SPEAK NO EVIL, DO NO HARM: A NEW LEGAL STANDARD FOR PROFESSIONAL SPEECH REGULATION

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INTRODUCTION

Few Supreme Court cases, with the possible exception of *Dred Scott v. Sandford*,[1] have attained more notoriety in the modern legal academy than *Lochner v. New York*.[2] In *Lochner*, the Supreme Court recognized an expansive right to economic liberty that trumped certain city regulations governing bakery management—an "economic liberty" that many modern critics associate with the skyrocketing wealth inequality of the American Gilded Age. And when President Donald J. Trump began to assemble his Cabinet—a Cabinet laden with prominent businesspersons promising regulatory cutbacks[3]—the specter of *Lochner* was again conjured forth, bringing with it fearful images of sweatshops, child labor, and the Triangle Shirtwaist Factory fire.

While *Lochner* is almost exclusively invoked today in pejorative contexts, its broad-based affirmation of economic liberty has not been forgotten, specifically with regard to the question of occupational licensing. Such licensing, while often taken as a given in certain professions like medicine or law, has given rise to numerous controversies surrounding government regulations.[4] Should the government require the owner of a one-woman business, dedicated to braiding hair in the traditionally expressive African style, to possess a cos-

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1. 60 U.S. 393 (1857).

2. 198 U.S. 45 (1905).

3. *See* Nick Timiraos & Andrew Tangel, *Donald Trump's Cabinet Selections Signal Deregulation Moves are Coming*, WALL ST. J. (Dec. 8, 2016), http://www.wsj.com/articles/donald-trump-cabinet-picks-signal-deregulation-moves-are-coming-1481243006.

4. *See, e.g.*, Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L.J. F. 304 (2016) (discussing these controversies).

metology license?[5] Can a municipality pass an ordinance barring any person—other than a professionally licensed guide—from giving tours within its boundaries?[6] In the face of regulatory hurdles like these, which too often seem engineered to protect entrenched interests against upstart competition, the libertarian promise of *Lochner* acquires a peculiar appeal.

Spurred on by widespread examples of apparently absurd state regulations, litigators have creatively wielded the First Amendment's guarantee of free speech against burdensome restrictions. And as free speech-based challenges to occupational licensing requirements proliferate, courts and scholars find themselves facing a challenging theoretical question: to what extent can free speech be differentiated from those types of "professional conduct" traditionally subject to regulation and licensing?

This Essay sketches and defends a theoretical framework by which courts can move beyond this dilemma—a pragmatic, functionalist standard for regulating professional speech based on *risk of permanent harm*. This standard, based on a principle already telegraphed by the Supreme Court, recognizes the concerns of *Lochner*'s many critics while simultaneously adopting a strong default position favoring professionals' right to speak unhindered.

OCCUPATIONAL LICENSING, PROTECTIONISM, AND THE REGULATORY STATE

Occupational licensing requirements date back to the early days of the American Republic,[7] but such laws did not gain widespread traction until the era of the Industrial Revolution.[8] Professionals' speech was largely free from outside constraints. And while a right to occupational freedom is not explicitly enumerated in the Constitution, the Supreme Court observed in 1889 that "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition."[9]

Occupational freedom, however, has been scaled back over time by a regime of ever-expanding professional licensing standards. This mandatory licensing, described in a recent White House report as "a form of regulation that

5. *See Washington Hair Braiding*, INST. FOR JUST., http://ij.org/case/washington-african-hair-braiding/ (last visited Apr. 14, 2018).

6. *See* Rachel Weiner & Wesley Robinson, *D.C. Tour Guides Win Court Battle With City*, WASH. POST (June 27, 2014), https://www.washingtonpost.com/local/crime/dc-tour-guides-win-challenge-of-licensing-test/2014/06/27/a5e7fd82-fe13-11e3-8176-f2c941cf35f1_story.html?utm_term=.b3e66ed89c3f.

7. Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 10467, 2004), http://www.nber.org/papers/w10467.pdf ("Prior to the late 1800s, only medicine, law and theology were considered 'learned professions' . . .").

8. *Id.* ("The late nineteenth and the early twentieth centuries witnessed the birth of modern day professions.").

9. Dent v. West Virginia, 129 U.S. 114, 121 (1889).

requires individuals who want to perform certain types of work to obtain the permission of the government,"[10] has proliferated: fully a quarter of today's jobs require, in at least one state, a license.[11] Mandatory occupational licenses can take a variety of forms and impose a broad range of obligations upon their holders, but they share one element in common: a worker performing certain types of work without a license will be subject to official penalties.

Critics of occupational licensing have frequently charged that such laws are protectionism by any other name—a tactic by which entrenched economic groups keep out new market entrants in order to thwart competition.[12] In such a protectionist system, occupational licenses work as the means by which established service providers ensure that they are the only vendors from which consumers can purchase services. This raises prices for consumers and creates "deadweight losses"—economic costs without accompanying gains.[13]

The argument that naked protectionism is inherently an improper goal of governmental action, however, has been met with varying reception in federal courts. For example, in *Sensational Smiles, LLC v. Mullen*, which dealt with a Connecticut state law mandating that only licensed dentists could perform teeth-whitening procedures, the Second Circuit Court of Appeals simply embraced critics' "protectionism" accusation:

> [E]ven if the only conceivable reason for the . . . restriction was to shield licensed dentists from competition, we would still be compelled by an unbroken line of precedent to approve the [state] Commission's action. The simple truth is that the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes. . . . Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense.[14]

While tooth whitening can be plausibly labeled a form of traditional "professional conduct," and thus would normally be subject to oversight by medical boards and professional organizations, constitutional questions lurk in the

10. WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

11. *Id.*

12. *See, e.g.*, Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 456 (2014) (discussing this phenomenon and advocating a discrete form of anti-protectionism scrutiny by courts).

13. *See* Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?*, 3 n.3 (W.E. Upjohn Inst. for Employment Research, Policy Paper No. 2011-009, 2011), http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=up_policypapers.

14. 793 F.3d 281, 286-87 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016). The Tenth Circuit has adopted a similar principle. *See* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.").

background, and such problems may become thorniest when a potential First Amendment interest comes into play. Existing First Amendment law does not clearly differentiate "professional conduct" (for example, performing heart surgery) from "professional speech" (for example, a stockbroker giving paid advice). This kind of "speech-as-conduct," a product of ongoing structural shifts toward a service-sector economy, exists in a kind of liminal constitutional space. A recently overturned regulation in Washington, D.C., for instance, "lev[ied] civil and criminal penalties for conducting a tour without first taking and passing a multiple-choice exam"[15] and subsequently receiving a license. The regulation covered individuals "who, in connection with any sightseeing trip or tour, describe[d], explain[ed], or lecture[d] concerning any place or point of interest in the District to any person."[16]

Here, a First Amendment interest—the right of individuals to speak freely, in a public place, about the characteristics of other public places—is plainly implicated.[17] At the same time, however, such speech is a type of professional activity—an activity of the sort commonly regulated by licensing boards or agencies.[18] This apparent bleed-over of free speech law into longstanding questions of economic regulation has sparked intense academic controversy.

CRITIQUES OF THE NEO-LOCHNERIAN IMPULSE

As discussed above, professional conduct has become increasingly bound up with questions of the individual right to free speech. A broad critique of this

15. Edwards v. District of Columbia, 755 F.3d 996, 999 (D.C. Cir. 2014)

16. *Id.*

17. The presence of a cognizable First Amendment interest differentiates the question of professional speech-as-conduct from the broader questions surrounding economic protectionism and occupational licensing and explains why this Essay's proposed framework adopts a strict scrutiny approach. For a proposed theory of how courts should apply intermediate scrutiny to lawsuits arising from mandatory occupational licensing, see Will Clark, Note, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 ST. LOUIS U. L.J. 345, 356–57 (2016).

18. These entities take center stage in Claudia Haupt's theory of professional speech. *See* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016). Haupt centers her analysis on how professional norms are formed and disseminated by way of "knowledge communities" (the American Bar Association and state bar associations spring to mind). *Id.* at 1241. Like Law and Kim, Haupt references the historic "learned professions" as exemplars of the "knowledge communities" she advocates.

Under Haupt's paradigm, however, free speech protections (that is, freedom from governmental regulation of speech) are generally restricted to a particularly narrow subset of "knowledge communities" with a longstanding capacity for promulgating professional norms. Not covered by Haupt's account are those information-disseminating professionals (*i.e.*, tour guides in D.C.) who do not belong to a discrete professional body, and who are not "learned professionals" as the term has traditionally been defined.

The functionalist theory espoused by this Essay's proposed harm-dependent standard for professional speech regulation recognizes the fluidity of contemporary "professions" and the degree to which information dissemination permeates the modern service-sector economy. Accordingly, while Haupt's theory constitutes a persuasive normative justification for the independence of the traditionally "learned professions," its account of the issues involved in "professional speech" is incomplete.

trend has been articulated by several progressive scholars, perhaps most cogently by Amanda Shanor in the *Wisconsin Law Review*.[19] Shanor incisively identifies the crux of jurisprudential concerns over invoking the First Amendment in a "professional speech" context:

> The approach of commercial speech advocates would subject innumerable laws to strict scrutiny—including those that require nutritional labels, disclosure of information related to securities, Truth in Lending Act disclosures, disclosures in prescription drug advertisements, warnings for pregnant women on alcoholic beverages, airplane safety information, and required exit signs.[20]

Shanor, and other scholars sharing her views, might well have no objection to jettisoning any protectionism-based theoretical grounds for occupational licensing: these scholars' concerns appear to hinge on the potential use of the First Amendment as a constitutional vehicle for cutting back health and safety regulations. Their opposition to blurring any professional conduct/free speech lines arises from a concern that the First Amendment will be "misused" as a deregulatory scythe to the detriment of individual citizens, and that the First Amendment will preclude *any* actions from being taken against marketplace miscreants. In their telling, regulations on communication-for-pay are necessary evils, required to prevent widespread marketplace anarchy.

Approaching this topic from an economic, rather than strictly legal, perspective, Marc Law and Sukkoo Kim have described this challenge as the *asymmetric information hypothesis*—the idea that as professions and service-oriented roles become have become more and more complex, many consumers will correspondingly lack the ability to make rational choices between professional service providers. Occupational licensing, Law and Kim contend, is a natural response to this asymmetry—a naturally emerging check on unqualified entrants into a marketplace that limits consumers' need to conduct extensive independent research.[21] The asymmetric information hypothesis raises important questions, and this Essay will return to it shortly.

The progressive *theoretical* critiques of this alleged neo-Lochnerian impulse,[22] however, contain a critical oversight. They assume that the specter of *Lochner* itself is creeping back into American jurisprudence, rather than that modern market dynamics have changed to the point that a reorientation of regulatory law is now required. Quite the contrary, today's professional speech/free speech controversy is not *jurisprudential* so much as it is *market-structural*: the

19. Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 151–52.

20. *Id.* at 194–95 (internal citations omitted).

21. Law & Kim, *supra* note 7, at 6 ("At least for the Progressive Era, we believe that the overall evidence on licensing gathered in this paper is more consistent with the asymmetric information hypothesis than the industry capture story.").

22. *But see* David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287, 297 (2016) ("[P]rogressives are increasingly expressing skepticism of occupational rules that have at best a tenuous connection to public welfare.").

American market economy has diverged significantly from the labor-and-capital patterns of the Industrial Revolution. In an economy increasingly populated by givers of expert advice, some behaviors constituting "professional conduct" have metamorphosed into domains of free speech that the First Amendment, as originally understood, likely protects.

This erroneous assumption rests at the heart of much progressive opposition to scaling back occupational licensing regimes. Shanor argues, for example, that "[t]he First Amendment's libertarian turn can be traced to the concerted organization of the business community to influence the law and hem in the growing regulatory state beginning in the early 1970s."[23] But independent of individual stakeholders' strategic motivations in pursuing First Amendment-based legal challenges to economic regulations, the broader transition to a service-sector economy can also mean simply that *more of the activities going on in the economy are now subject to traditional First Amendment protections*.[24] As service-sector professions—particularly *advice-giving* professions—proliferate, the range of economic activities that may be entitled to First Amendment protection will simply happen to expand. This expansion can occur *path-independently* of any parallel challenges to economic regulation that businesses might spearhead.

Accordingly, to call for reductions of the protective scope of the First Amendment, based on economic transitions that were *likely inevitable to begin with*, is to take a dangerously crabbed view of professionals' speech rights.[25] A far more sensible approach, which this Essay proposes, addresses Law and Kim's asymmetric information problem without carving back the jurisprudential protections guaranteed by free speech law.

A HARM-DEPENDENT STANDARD FOR PROFESSIONAL SPEECH REGULATION

As a general matter, the "rational basis review" default standard for judicial review of professional conduct regulation, seen in *Sensational Smiles* and elsewhere, has largely outlived its usefulness. Courts should abandon it in the majority of cases. Such a standard paints with so broad a brush that First Amendment interests—whether those of amateur tour guides or others—will inevitably be jeopardized, and courts ought to adopt a clearer, more tailored test.

23. Shanor, *supra* note 19, at 154.

24. *See* Francisco J. Buera & Joseph P. Kaboski, *The Rise of the Service Economy* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 14822, 2009), http://www.nber.org/papers/w14822.pdf (arguing that "the growth in services is driven by the movement of consumption into more skill-intensive output.").

25. *See* Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J. F. 314, 324 (2016) (arguing that "[t]he ambit of the Constitution's more stringent review is being pushed to expand more broadly into economic affairs."). As noted above, this claim begs an important question: being pushed *by what*? No need necessarily exists to problematize the brute fact that professional speech activities have developed *organically* to the point that they may possess First Amendment protection.

To help draw a distinction between "professional conduct" and "free speech," and with the overarching problem of occupational licensing creeping firmly in view, this Essay's proposed legal framework would operate as follows: regulation of categories of *"professional speech" with a substantial likelihood of irremediably affecting the bodily welfare or legal rights of a client* should be subject to rational basis review. Other speech made by professionals that does not meet this standard should be subject to strict scrutiny, and therefore treated like any other speech fully protected by the First Amendment.[26]

There are four major components to this composite standard:

Substantial Likelihood: The foreseen impact of a professional's speech-as-conduct must be plausible, not farfetched.

Irremediably Affect: The foreseen impact of a professional's speech-as-conduct must be sufficiently weighty, and not easily reversible, to warrant a lower standard of protection.

Bodily Welfare/Legal Rights: A professional's speech-as-conduct must implicate the significant personal interests of another party in order to warrant a lower standard of protection.[27]

Client: A professional's speech-as-conduct should be subject to closer scrutiny in the context of a relationship where a more stringent duty of care applies;[28] at the same time, a professional should not be disincentivized from speaking publicly and freely on topics of public concern.[29]

In practice, this standard calls for a two-step analysis. First, is the speech in question within the category of the standard? If so, the court proceeds with rational basis review; if not, the court proceeds with compelling interest review.

26. The Supreme Court has tentatively affirmed the pro-speech default principle that underlies this proposed theoretical framework. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.").

27. *See, e.g.*, Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1359 (2015) ("Strict First Amendment scrutiny is an appropriate response to the increasingly detailed regulation of professional-client interactions that touch on or concern constitutional rights.").

28. *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 961 (2000) ("Experts may attempt to persuade their clients by presenting corroborative evidence. Professionals . . . are . . . likely to rely on the authority of their professional status and encourage their clients to accept their professional judgment as a matter of faith. Research has corroborated this view."); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 872–73 (1999) (making similar claims from an institutionalist perspective).

29. *Cf.* Ann C. Hodges, *Matters of Public Concern Standard in Free Speech Cases*, *in* ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 982 (Paul Finkelman ed., 2006) (noting the presence of such a "matters of public concern" standard in other domains of First Amendment law).

As a practical matter, this new standard would readily mesh with existing First Amendment jurisprudence: the Supreme Court has already signaled its openness to a commercial speech rule primarily focused on risk of harm. In *Sorrell v. IMS Health Inc.*, a strong majority of the Court found that "the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'"[30] This Essay's proposed framework, then, fleshes out that existing principle in a way that furthers public and professional interests alike.

The immediate functional advantages of this Essay's new standard are obvious: courts' embrace of this standard would preclude the immediate invocation of protectionism-based rationales for occupational licensing (and would, by extension, limit state regulation of professional speech-as-conduct). In order for rational basis review to come into play, the harm-dependent threshold test would need to be met. In the immediate aftermath of adopting this new paradigm, a vast swath of occupational licensing laws—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. This standard would also leave in place the legal structures allowing for malpractice liability and lawsuits arising from false advertising,[31] thus sidestepping Shanor's critique of an expanded role for the First Amendment in the marketplace.[32] At bottom, this standard recognizes that not all forms of professional or occupational speech carry with them the same risk of harm: courts should echo this recognition.[33]

Importantly, this Essay's proposed standard is not without its own vulnerabilities. At bottom, this standard's effectiveness depends on courts' willingness to deal severely with regulations on professional speech-as-conduct, and not overexploit the standard's provisions that allow for limited regulation of professional speech. While this proposal sets a default presumption favoring strict scrutiny over rational basis review, the standard likely leaves some re-

30. *Sorrell*, 564 U.S. at 579 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993)).

31. One scholar has described malpractice, for example, as a form of nonexpressive conduct, which would sidestep any potential First Amendment concerns. *See* Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 193 (2015).

32. *Cf.* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 179 (2015) (expressing concern that an expanded commercial speech doctrine will block such legal claims).

33. This approach rejects a one-size-fits-all approach that makes no distinctions based on the stakes involved. *See, e.g.*, Patrick Bannon, Note and Comment, *Intermediate Scrutiny vs. the "Labeling Game" Approach:* King v. Governor of New Jersey *and the Benefits of Applying Heightened Scrutiny to Professional Speech* 23 J.L. & POL'Y, 649, 687–88 (2015) (proposing intermediate scrutiny as such a one-size-fits-all approach); Erika Schutzman, Note, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2052–55 (2015) (proposing intermediate scrutiny as such a one-size-fits-all approach).

straints on professional speech-as-conduct intact, based on the information asymmetry problem identified by Law and Kim.

Under current American social conditions, effectively abolishing *all* occupational licensing—in so doing, instituting a sort of turbocharged *caveat emptor* regime—would almost certainly be untenable. Establishing a system where consumers make decisions based on voluntary systems of credentialing and word-of-mouth would exact a heavy human toll: such a system would have to rely, at least originally, on widespread fatalities, failures, and instances of malfeasance in order to answer questions about *which credentials count* and *whose word-of-mouth matters*. A Yelp-style five-star review system might work well for Chinese restaurants; it works far more poorly where the costs of miscalculation are dramatically higher—a bad meal or two exacts a far less dramatic cost than a botched neurosurgery. *Some* degree of occupational licensing, then, makes both economic and moral sense, and this Essay's proposed standard would not eliminate all such licensing across-the-board.[34]

Finally, some might argue that this Essay's proposed standard is a form of content-based speech regulation under another name, since it takes into account certain professional speech's potential to do harm. If this were the case, allowing for rational basis review in such cases would upend existing constitutional protections.[35] However, this Essay's standard is based on *the risks implicated by the context within which professional speech is made*, not *the content of the speech itself*. The proposed framework is not content-based.

CONCLUSION

The need for a new framework for differentiating traditional "professional conduct" from First Amendment-protected "free speech" arises not because profit-seeking businesses have suddenly found a new avenue to attack governmental regulations, but because the economy has organically evolved to bring certain marketplace conduct under the preexisting protections of the First Amendment. This Essay's harm-based rationale for regulation of speech-as-conduct need entail no across-the-board revivification of *Lochner*, but is instead a pragmatic recognition by courts of evolving economic realities.

Resolving the dilemmas of occupational licensing, and the theoretical line-drawing questions surrounding professional conduct and professional

34. Libertarian academic David Bernstein concurs with this outline of the issue's general contours. "It is one thing to require a great deal of training and government certification for someone to work as a physician or attorney—occupations where the well-being of the public can reasonably be thought to be at stake. It is quite another for potential florists, African hair-braiders, or casket-sellers—all of whom have sued over occupational restrictions, and none of whom present risks to public well-being—to face expensive, time-consuming and broadly unreasonable barriers to entry." Bernstein, *supra* note 22, at 297–98; *see also* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (probing these questions in greater depth).

35. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

speech, will undoubtedly prove difficult. Yet, where possible, courts ought to recognize the essential need for robust First Amendment protections in the modern market economy, and consistently oppose attempts to curtail such safeguards. In seeking to reconcile the competing demands of public welfare and private liberty, a carefully tailored, harm-dependent standard for regulating professional speech-as-conduct offers an ideal path forward.