LAW

FREE SPEECH FOR YOU AND ME, BUT NOT FOR PROFESSIONALS

In this information age, the Supreme Court should make clear that censoring professionals is intolerable.

BY TIMOTHY SANDEFUR

Of all the rights the U.S. Constitution protects, courts are probably most vigilant about protecting free speech. Freedom of expression is not only a cornerstone of democratic government, but also central to the more ordinary choices citizens make in their daily lives. Thus courts have ruled that in addition to political speech or speech about public controversies, the First Amendment also protects the right to advertise goods and services, the right not to salute the flag, and the expressive freedoms of painters, poets, and even exotic dancers.

The Supreme Court has also made clear that one of the bedrock protections afforded by the First Amendment is its longstanding prohibition on "prior restraints": laws requiring government preapproval before a person may engage in communication. Courts presume that any law requiring such prior approval—whether it be a licensing requirement to publish a newspaper, or even a zoning permit to operate a strip club—is unconstitutional until proven otherwise. The government bears the burden of showing that any such restriction is truly necessary to serve the public good. This is the legal test called "strict scrutiny."

Yet one class of speech has been almost entirely ignored by the courts: speech by professionals engaged in their business. Although the courts have often discussed the protections afforded "commercial speech"—i.e., advertising—it has virtually never addressed the degree to which the Constitution protects the rights of doctors, lawyers, stock brokers, and others to speak as part of their jobs—even when their occupations consist *entirely* of speaking and writing. As a result, federal, state, and local governments today impose an array of limits on those professionals' freedom—limits that would never be tolerated if applied to any other kind of expression. Thanks to the lack of guidance from the Supreme Court, federal judges have struggled to fashion their own doctrine of "professional speech," and the result is a bizarre, often self-contradictory tangle of restrictions that often operate as prior restraints on speech.

The justices have now been asked to take the first step in fixing this confusion. Considering the growing importance of professional speech in an economy that is more service-oriented and reliant upon telecommunications than ever before, it should address this problem soon.

SPEECH AND CONDUCT

The case involves a Texas veterinarian named Ronald Hines, who offered advice to pet owners over the Internet and by telephone. Hines, now semi-retired, is an experienced and respected vet, and nobody complained that he had performed incompetently. But after learning of his online services, state officials issued Hines a cease-and-desist letter, warning him that state law forbids a vet from advising people about their animals without first examining the animal in person. Hines sued, arguing that the law was a prior restraint, limiting his right to speak. But the Fifth Circuit Court of Appeals threw out the case, holding that Hines's free speech rights only qualified as professional speech, which the state could restrict virtually without limit. It ruled that, unlike political speech, or religious speech, or even advertising, government limits on professional speech are subject not to "strict

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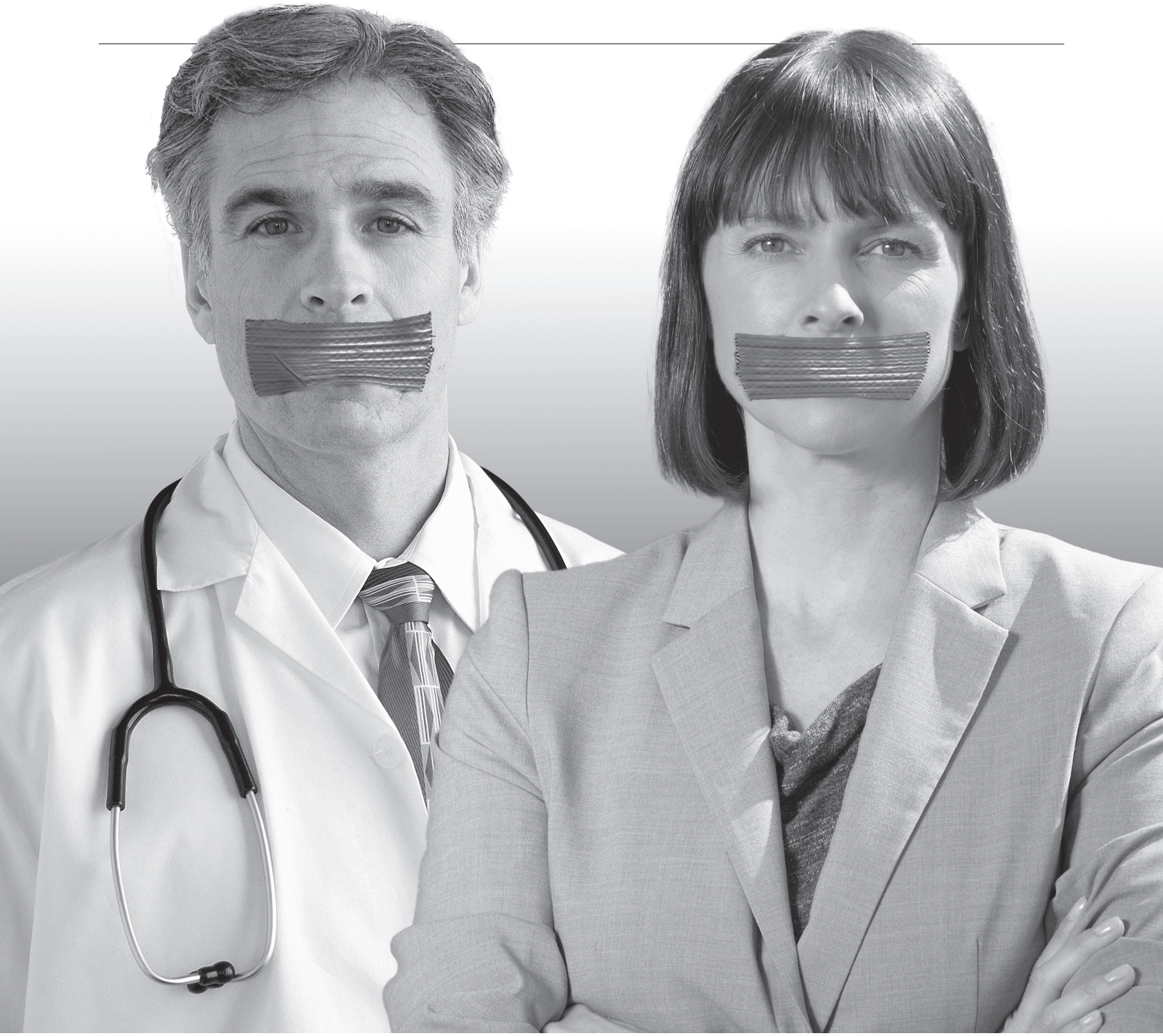

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scrutiny," but to the much more lenient "rational basis" test. This means that limits on the latter form of speech are upheld whenever the government might have thought they would serve some acceptable purpose. Laws are hardly ever struck down under the rational basis test.

That distinction is not found in the words of the First Amendment. Instead, it was first drawn in a 1945 opinion by Justice Robert Jackson in a case involving a Texas law that required union organizers to be licensed by the state. Roland Thomas, then vice president of the United Auto Workers, was arrested for giving a pro-union speech without a license. He argued that the requirement was a prior restraint that violated his free speech rights. The Supreme Court agreed, rejecting the state's argument that the law only restricted *conduct*, not *speech*. "Peaceable assembly for lawful discussion cannot be made a crime," the justices held, and allowing the state to call speech a kind of conduct was only a ruse that would allow the state to censor speech. "The right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen,

farmers, educators, political party members, or others," the Court declared.

In his short separate opinion, Justice Jackson acknowledged that conduct and speech might sometimes overlap. But, he wrote, "a rough distinction always exists.... A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak, urging persons to follow or reject any school of medical thought." Jackson urged courts not to allow government to restrict speech by categorizing it as conduct.

The Court did not address the subject again for 40 years, and when it did, it again failed to resolve the problem. *Lowe v. SEC* (1985) involved a stock market analyst named Christopher Lowe who published a newsletter about market trends and investment opportunities. Federal officials had stripped Lowe of his federal stockbroker license four years earlier, and when they learned of his newsletter venture, they charged him with offering investment advice without a license. Lowe argued that the prosecution violated his First Amendment rights, but while the Supreme Court ruled in his favor, it did so on much narrower grounds, concluding that his business did not actually fall within the law's prohibitions. Only three justices—Byron White, William Rehnquist, and Chief Justice Warren Burger—addressed the constitutional question. They thought the law did prohibit Lowe's newsletter, and that such censorship was unconstitutional. White and his colleagues took inspiration from Jackson's opinion in the *Thomas* case—but their opinion actually inverted Jackson's logic.

"At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment," wrote White. He suggested that the important distinction was between people who express themselves to a general audience and those who "take[] the affairs of a client personally in hand" and "exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." The latter should be "viewed as engaging in the practice of a profession," and limits on their freedom "cannot be said" to abridge First Amendment rights.

Thus while Jackson had warned that restrictions on economic activity should not be allowed to swamp free speech, White was declaring that the government could restrict speech almost with impunity, so long as it qualified as "professional." Jackson had urged courts not to view speech as conduct; White was redrawing the line between the two in a way that placed a whole species of expression within the "conduct" category—and beyond the protection of the First Amendment.

Such abstract disputes might have been considered relatively unimportant, given that both Jackson's and White's opinions were non-binding concurrences. But to this day, the two opinions remain virtually the only Supreme Court rulings ever to address the question of professional speech (a phrase neither opinion used). As a result, lower courts have been left to fashion their own theory, with no more guidance than White's and Jackson's separate—and mutually contradictory—opinions.

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Little wonder that the result is a mass of conflicting precedent that sometimes protects, sometimes surrenders, speech rights. Most courts today hold that while the government may not limit speech by ordinary citizens except in the rarest circumstances, it has virtually limitless power to censor professionals speaking in their field, without regard for the professionals' knowledge and training. While a state could not pass a law barring a layman from telling his friend to take an aspirin for his headache, it could, if it wished, impose a criminal punishment on a doctor who advises the same person to take the same pill.

One peculiarly clear example of the confusion involves fortune-telling. In 1998, the Eighth Circuit Court of Appeals struck down a law that prohibited fortune telling, rejecting the government's argument that such speech was "commercial" speech, entitled only to reduced constitutional protection. While it acknowledged that fortune telling is a business, the court refused to apply the commercial speech doctrine, which applies to advertising, because fortune telling does not advertise a transaction, "it *is* the transaction. The speech itself is what the 'client' is paying for." That meant that the First Amendment applied in its full strength. But the Fourth Circuit rejected that logic in 2013 when it followed Justice White's *Lowe* opinion and held that fortune telling is "professional" speech because fortune tellers "provid[e] personalized advice in a private setting to a paying client." This meant fortune tellers enjoyed even *less* protection than advertisers. Where the "commercial speech" doctrine provides at least some constitutional security, the government may

"license and regulate" *professional* speech "without running afoul of the First Amendment" at all.

TALKING PROFESSIONS

Under professional speech theory, even businesses that consist entirely of speech have been deemed "conduct" and stripped of constitutional protection. The most noteworthy example is psychology, a business that—unlike psychiatry—involves no medicines, but only speech and other forms of communicative therapies. Although no state licensed psychologists until the 1940s, every state today requires them to get some form of government certificate before practicing the profession. When a group of therapists challenged California's licensing law in 2000, the Ninth Circuit upheld it, citing Jackson's and White's opinions for the proposition that psychotherapy is conduct, "not speech." Thus, "although some speech interest may be implicated," California's licensing requirement was "a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment."

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Yet the effort to distinguish speech from conduct breaks down when one examines the legal definition of psychology. California defines psychology as the use of "psychological principles, methods, and procedures of understanding, predicting, and influencing behavior," which include the "prevention, treatment, and amelioration of psychological problems and emotional and mental disorders," as well as any effort to help a person "modify feelings, conditions, attitudes," or change "behavior[s] which are emotionally, intellectually, or socially ineffectual or maladjustive," or even just to "acquire greater human effectiveness." Whatever that last phrase might mean, it is clear that this is a list of different types of speech. If applied literally, the law would forbid an incalculable number of personal interactions: talking with a friend about her feelings, texting a classmate about how to get a date, taking one's sister to dinner to lessen her job-related stress, or even praying together about a moral dilemma. Sensing this problem, California lawmakers sought to exempt such acts by adding a list of exceptions: clergymen, hypnotists, social workers, and even dentists, optometrists, and lawyers—who receive no training in psychology whatsoever—need not get licenses. Also exempt is anyone who engages in psychology for free.

These exceptions are common sense, but they also contradict the case for requiring licensure. If, as the Ninth Circuit held, "the adverse effects of incompetent psychotherapy could include sexual activity between a client and therapist, deteriorating mental health, family, job, and relationships of the patient, and even suicide," there is no sense in excusing priests, dentists, or attorneys from the requirement, let alone exempting anyone who engages in psychology for free. Bad advice or a lack of sympathy from an acquaintance is just as likely to cause the same harms. Had the court regarded the psychologist licensing requirement as a restriction on speech, this extraordinarily broad and self-contradictory prohibition would have been ruled unconstitutional. But because psychologists offer personalized advice—or, in Justice White's words, take patients' affairs personally in hand—the court regarded it as a restriction on conduct, subject only to the lax "rational basis" test.

One consequence of regarding psychology as conduct instead of speech is that it allows lawmakers to forbid doctors from offering certain kinds of therapy. In 2013, California and New Jersey forbade psychologists from trying to help people change their sexual orientation. Several therapists sued, arguing that this was a form of censorship, and they lost on the grounds that psychology is only conduct, not speech. Indeed, the Ninth Circuit ruled that psychologists were entitled to no First Amendment protection at all, a position the Third Circuit criticized even while it upheld New Jersey's prohibition. Their East Coast colleagues considered the Ninth Circuit's "enterprise of labeling certain verbal or written communications 'speech' and others 'conduct,'" to be "unprincipled and susceptible to manipulation." Drawing the line, as the Ninth Circuit did, "between utterances that 'communicate information or a particular viewpoint,' and those that seek 'to apply methods, practices, and procedures,'" invited abuse:

> For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not "conduct" merely because it seeks to apply "principles" the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become "conduct" when the speaker is a licensed counselor.... To classify some communications as "speech" and others as "conduct" is to engage in nothing more than a "labeling game."

Yet while the Third Circuit ruled that psychology does qualify as speech, it also refused to apply the full "strict scrutiny" test that protects most types of speech against censorship. Citing the *Thomas* and *Lowe* concurrences, the judges concluded that "special

rules" apply when states try to restrict "speech that occurs pursuant to the practice of a licensed profession," and that the state could therefore ban speech by professionals if the ban "directly advance[s] the State's interest in protecting its citizens from harmful or ineffective professional practices."

MORE PROTECTION—OR LESS?

This ruling only adds another layer to the already weird doctrine of professional speech. Justice Jackson had warned in *Thomas* that the state's power to regulate medical practice should not be broadened to allow states to "make it a crime publicly or privately to speak, urging persons to follow or reject any school of medical thought," yet that is precisely what California and New Jersey were doing. The professional speech doctrine actually gives government more power to censor the speech of trained experts than that of ordinary laymen. Professionals are educated and trained in their subject area, and are expected to exercise considered judgment on behalf of their clients. But because courts classify professionals' speech as a type of conduct subject to broad legislative control, lawmakers—who typically lack that specialized knowledge, and who are often motivated by political considerations—can override the judgments of professionals who know the subject best. This paradox plagues professional speech cases. The Ninth Circuit declared in 2002 that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" Yet the Eleventh Circuit held 12 years later that First Amendment protections "approach a nadir" when a professional "exercis[es] his or her professional judgment."

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This confusion affected not only the psychotherapy decisions, but also recent cases involving laws that dictate what abortion providers may—or must—say to their patients. When the Texas legislature ordered physicians to display to patients the sonogram of a fetus, play the sound of its heartbeat, and explain fetal organ development in layman's terms, several doctors sued, arguing that this violated their right not to be forced to say things they do not believe. The Fifth Circuit ruled against them. The law, it said, was only a "regulation of medical practice," subject to "the antithesis of strict scrutiny."

The Fourth Circuit, by contrast, recently struck down a North Carolina law that forced doctors not only to display the sonogram and play the heartbeat, but also to describe the fetus in terms designed to pressure the patient into withdrawing from the procedure. Doctors were even required to keep speaking if the patient became upset, asked the doctor to stop, or covered her eyes and ears. Declaring that doctors do not "forfeit their First Amendment rights" by practicing medicine, the court found that the requirement "interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously ... interfering with the physician's professional judgment." Where the Fifth Circuit had found that a doctor's professional status stripped him of constitutional protections, the Fourth Circuit found that "the government's regulatory interest is less potent in the context of a self-regulating profession like medicine," and that courts should be skeptical when the government interferes with the "independent medical judgment that professional status implies."

LACK OF DEFINITION

Not only are courts divided as to whether professional status should come with less constitutional protection or more, they have also failed to fashion a working definition of "professional speech." Justice White described it as speech "incidental to the conduct of the profession," but judges have also applied this doctrine to professions—including fortune telling and psychotherapy—in which speech *is* the profession, not merely "incidental" to it. It is unclear whether the professional must be providing some service for money in addition to the speech before the doctrine applies, or whether the speech in question must be related to the service at all before the First Amendment shield is lowered.

This ambiguity played an important role in a recent case involving a Florida law that forbids doctors from asking patients whether they own guns. Some physicians' groups, including the American Academy of Pediatrics, recommend that their members ask such questions, along with questions about whether patients smoke, drink, own swimming pools, or have other risk factors in the home. Patients remain free to not answer, but that was not enough for state lawmakers, who passed a law barring doctors from asking the gun question at all. Doctors sued, arguing that the law interferes with their free speech.

The Eleventh Circuit upheld the law, declaring that, notwithstanding the fact that legislators are not physicians, they could "determin[e] that inquiry about firearm ownership ... falls outside the bounds of good medical care," and could impose that decision on doctors. That ruling directly conflicts with a 2002 Ninth Circuit case that struck down a White House effort to block doctors from recommending medical marijuana to patients in states that have legalized it. Citing "the core First Amendment values

of the doctor-patient relationship," the Ninth Circuit ruled that the government could not "punish physicians on the basis of the content of doctor-patient communications." It considered government efforts to "condemn[] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient," to be "troubling," and concluded that "being a member of a regulated profession" does not "result in a surrender of First Amendment rights."

Under the ordinary First Amendment rules, forbidding a doctor from speaking on a particular subject would obviously cross the line. In *Reed v. Gilbert* (2015), the Supreme Court emphasized that it is unconstitutional to restrict what people may say based either on who they are or what message they want to express, "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas.'" Yet the professional speech doctrine disregards those rules and—as the Eleventh Circuit admitted when upholding the Florida law banning doctors' questions about guns—lets states "discriminate on the basis of the speaker's identity" and "on the basis of the content of the speech."

THE GROWING IMPORTANCE OF PROFESSIONAL SPEECH

These confusions are not just puzzles for constitutional lawyers: they present a set of increasingly difficult problems for one of the fastest-growing sectors of the American economy: telecommunications-based businesses. Blogs and smart-phone apps often convey information for a fee, helping consumers get information and advice, and to buy and sell products or services. These activities consist entirely of communication, but government often classifies them as conduct, subject to restriction. Nowhere is this more obvious than in the growing field of "telemedicine."

Telemedicine—the use of communications technology to link patients with doctors or computer programs that can assess their conditions and prescribe treatment—holds great promise for patients who find it difficult to meet in person with a doctor or cannot afford frequent hospital visits. Some new smart phone apps enable patients to contact doctors across the country to ask questions by text message in real time. Other apps help diabetics track their glucose levels. Still others tell users when to apply more sunscreen. Telemedicine goes beyond merely providing information, like books or Google searches: patients can have their specific needs assessed and get personalized advice. This often runs afoul of state laws forbidding the unlicensed practice of medicine.

No state is more rigidly opposed to telemedical innovations than Texas, which according to the 2015 report of the American Telemedicine Association imposes the nation's most stringent limits on remote medical practice. Notwithstanding the fact that the state has a doctor shortage—27 of its counties have no primary-care physicians at all, and 16 counties have only one—Texas medical regulators imposed a rule in April that prohibits doctors from establishing a doctor-patient relationship by telephone, email, or text-message, meaning that a doctor must examine a patient in person before providing advice or prescriptions—thereby eliminating the great advantage of telemedicine.

Many of the state's doctors objected to the rule, echoing the words of retired U.S. senator (and doctor) Bill Frist, who asked in a March 2015 *Forbes* column why a doctor who has visited with a patient for 15 minutes is automatically considered qualified, while a doctor with a long-lasting telephonic relationship with a patient is not. "The idea of separating the visit and the exam from care is a fundamental reversal of what we learn," Frist wrote. "But we must remember that telemedicine is not the practice of medicine, but a tool for the delivery of care. And it's a tool with a proven track record and support in the medical community." But as is often the case with licensing regulations, the rules are often used, not to protect patients, but to protect doctors from having to compete economically.

Although Hines's case involves animal medicine rather than human, it is a typical example of the censorship that Texas's medical licensing restrictions impose. Lone Star State lawmakers defined the practice of veterinary medicine in such a way as to prohibit veterinarians from advising people about animal health without examining the animal in person—thus overriding Hines's own professional judgment. This means a layman may tell someone over the phone that, say, a certain brand of cat food will help a cat's digestive condition, but Hines can be criminally prosecuted for doing the same thing.

His service—offering pet owners a convenient alternative to in-person veterinarian visits—was an innovative and cost-effective solution for people who found visits to the vet expensive and time-consuming. But state officials shut it down. He's now waiting to see if the Supreme Court will consider his case.

Even aside from telemedicine, the First Amendment promises crucial protections for people whose business it is to speak—yet the Supreme Court has failed to make good on that promise. By leaving the question unaddressed, the justices have allowed lower courts to fashion a maze of contradictory standards that give government officials too much power to interfere with the judgments of the very people who are best trained to speak on the subject at hand—and to censor what they have to say. Given the American economy's trend toward an information and communication-based economy, it's time the Court made clear that censorship of any speech—including that by professionals—is intolerable. *R*

READINGS

- "Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions," by Daniel Halberstam. *University of Pennsylvania Law Review,* Vol. 147 (1999).
- "Occupational Speech and the First Amendment," by Paul Sherman. *Harvard Law Review Forum*, Vol. 128 (2015).
- "Telemedicine Is a Game-Changer for Patients, the System," by Bill Frist. *Forbes*, March 12, 2015.
- "The 'Watchman for Truth': Professional Licensing and the First Amendment," by Robert Kry. *Seattle University Law Review*, Vol. 23 (2000).
- "Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice," by Paula Berg. *Boston University Law Review*, Vol. 74 (1994).