DO YOU HAVE A LICENSE TO SAY THAT? OCCUPATIONAL LICENSING AND INTERNET SPEECH

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INTRODUCTION

Suppose that you eat a special kind of diet. This diet focuses primarily on eating meats and greens, and it has the benefit of countering diabetes. You decide to share this diet with the world via your blog to inform others who might be afflicted with this disease and to provide nutritional advice. Would you expect to need a license to provide this information and advice on this new diet? Would you expect a state licensing board to contact you about the content of your blog and inform you that you cannot provide such dietary advice without a license? Well, this is similar to the situation that Steve Cooksey, a proponent of the "cave man diet," found himself in.[1]

Mr. Cooksey's experience touches on an important area of constitutional law that Justice Byron R. White described as "a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment."[2] The collision is even more pressing during the Internet Age as individuals use the Internet as a medium to engage in the "marketplace of ideas."[3] In particular, blogging has become a popular method for individuals to express viewpoints and share information

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[1] Cooksey v. Futrell, No. 3:12CV336, 2012 WL 3257811, at *1 (W.D.N.C. Aug. 8, 2012); Adam Liptak, *Blogger Giving Advice Resists State's: Get a License*, N.Y. TIMES (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/us/nutrition-blogger-fights-north-carolina-licensing-rebuke.html. On October 5, 2012, the case was dismissed for a lack of standing. Cooksey v. Furtrell, No. 3:12CV336, 2012 WL 4756065, at *3 (W.D.N.C. Oct. 5, 2012), *vacated and remanded*, 721 F.3d 226, 234 (4th Cir. 2013) (concluding that Cooksey "ha[d] sufficiently shown that he suffered an injury-in-fact by First Amendment standards" to establish standing).

[2] Lowe v. SEC, 472 U.S. 181, 228 (1985) (White, J., concurring).

[3] *See generally* Todd G. Hartman, *The Marketplace vs. the Ideas: The First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 419, 434 (1999) (stating that Internet speech, because of its particular attributes, commands a heightened level of First Amendment protection under the marketplace theory).

in a seamless and efficient manner.[4] The structural characteristics of the Internet make information instantly accessible to all other users, and regulation of content is difficult, if not futile.[5]

The government's interest in licensing and regulating certain professions sets up a conundrum in relation to free speech. In certain professions, speech alone is the service being provided.[6] Thus, the government has to distinguish between speech that is provided as part of one's professional opinion and speech that is not.[7]

This Comment maintains that advice, opinions, and statements made on the Internet should not be subject to government licensing statutes because such statutes constitute content-based regulations. The governmental interest in licensing certain professions is not enough to overcome First Amendment protections for speech. Utilizing the "marketplace of ideas" doctrine, this Comment argues that both the content and medium of speech should push the Supreme Court to reject the licensing of speech by nonprofessionals.

Part I of this Comment presents the history of the state's power to issue occupational licenses and the economic and legal justifications for it. It goes on to examine First Amendment jurisprudence on economic issues, including the distinction between commercial and noncommercial speech. Part II analyzes how the government's right to regulate and license professional vocations clashes with the First Amendment. This conflict is important when determining how speech is classified and what level of judicial scrutiny a court will apply. Part III offers a normative analysis that stronger protections for First Amendment rights should trump the government's power to license certain professions. It then argues that Internet advice should not constitute commercial speech and that occupational licensing statutes would not pass strict scrutiny. Part III concludes with an argument in the alternative that occupational licensing would not survive intermediate scrutiny even if speech by nonprofessionals is classified as commercial speech.

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4 Charles B. Vincent, *Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006*, 31 DEL. J. CORP. L. 987, 990-91 (2006) ("[B]logs are the newest and most efficient means of disseminating decentralized information.").

5 Hartman, *supra* note 3, at 436-37.

6 Examples include psychology, consulting, and life coaches.

7 *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 893-94 (2000).

I. OCCUPATIONAL LICENSING, LEVELS OF JUDICIAL SCRUTINY, AND THE THREE SPEECH DOCTRINES

This Part presents the two lines of jurisprudence that are in conflict when the government attempts to regulate speech through occupational licensing. First, it addresses the economic and legal justifications for occupational licensing statutes. Next, it provides an overview of the two levels of judicial scrutiny the Supreme Court can apply to speech cases. It then presents the three areas of free speech doctrine: commercial speech, professional speech, and Internet speech. Finally, it introduces the "marketplace of ideas" theory of the First Amendment.

A. *Occupational Licensing*

Occupational licensing is a method of economic regulation whereby the government controls the entry and supply of participants in a given profession.[8] The intent is to protect the public health, morals, safety, and general welfare by preventing fraudulent and unethical professionals from entering a vocation.[9] Safety justifications are accomplished by imposing strict entrance requirements on new market participants such as licensing exams, education requirements, and residency requirements.[10]

In the United States, licensing laws first appeared as a regulation of the medical profession in Virginia in 1639.[11] Professional licensing became more prominent in the mid-nineteenth century,[12] and it expanded to many other professions by the 1920s.[13] This trend continued throughout the twentieth century.[14] Today, more than 1,100 occupations are subject to some form of licensing requirement.[15]

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8 *See* James A. Cathcart & Gil Graff, *Occupational Licensing: Factoring It Out*, 9 PAC. L.J. 147, 148 (1978).

9 *See* Daniel B. Hogan, *The Effectiveness of Licensing: History, Evidence, and Recommendations*, 7 L. & HUM. BEHAV. 117, 117 (1983) ("Licensing attempts to . . . eliminat[e] quacks, charlatans, incompetents, and unethical practitioners from the field."); Evgeny S. Vorotnikov, *License to Profit: An Analysis of Entry Regulations in the Legal and Real Estate Professions*, U. ST. THOMAS J.L. & PUB. POL'Y, Spring 2011, at 52, 52.

10 *See* Morris M. Kleiner, *Occupational Licensing*, J. ECON. PERSP., Fall 2000, at 189, 192.

11 Hogan, *supra* note 9, at 118.

12 *See id.* at 120.

13 Professions included accountants, architects, and nurses. *See* Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723, 731 (2005).

14 Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 678-79 (2010).

15 *Id.* at 677; *see also* Alan B. Krueger, *Do You Need a License to Earn a Living? You Might Be Surprised at the Answer*, N.Y. TIMES (Mar. 2, 2006), http://www.nytimes.com/2006/03/02/

1. Economic Justifications

Justifications for occupational licensing laws are based on the economic principles of market failure and asymmetric information.[16] Consumers of goods and services face information costs and knowledge gaps when engaging in market transactions with providers.[17] Providers are more knowledgeable on the quality and value of the goods or services offered.[18] The gap in knowledge can lead to warped incentives for sellers to take advantage of consumers.[19] This information asymmetry makes it difficult for consumers to know if prices truly reflect the quality of what is being purchased.[20]

Regulation is aimed at partially solving the information problem by ensuring a minimum level of quality to the market.[21] Licensing provides a level of certainty and dependability to consumers when they interact with providers in the marketplace.[22] Theoretically, it has the ancillary effect of increasing the compensation for professionals, since the improvement in the quality of service increases consumer expectations.[23] The ideal goal is a well-functioning market where buyers can trust that sellers are offering quality services without worrying about whether the seller is a legitimate professional.

Despite the theory and history, arguments in support of occupational licensing have come under increasing criticism by contemporary economists.[24] The basic counterargument to occupational licensing regimes is that

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business/yourmoney/02scene.html?_r=0 (stating that conservative estimates find that 20 percent of occupations in 2000 had a state licensing requirement, up from 5 percent in the 1950s)

16 *See* Cathcart & Graff, *supra* note 8, at 147; CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, BUREAU OF ECON., ECONOMIC ISSUES: THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 4-5 (1990).

17 *See* Law & Kim, *supra* note 13, at 724-25.

18 *See id.*

19 *See, e.g.*, George A. Akerlof, *The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-91 (1970). The "lemons" model is used to describe a situation where sellers are incentivized to put low-quality products on the market because buyers, prior to making their purchase, cannot tell the difference in quality and it is not reflected in price. *Id.* Eventually, quality products are driven out of the market by low-quality products because sellers refuse to sell at a price below their subjective valuation. *Id.* This causes a collapse in the market because buyers and sellers lack trust in each other. *Id.*

20 *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 148 (40th Anniversary ed. 2002) (1962) (describing the paternalistic argument that individuals "are incapable of choosing their own servants adequately"); Roger M. Swagler & David A. Harris, *An Economic Analysis of Licensure and Public Policy: Evidence from the Social Work Case*, J. CONSUMER AFF., Summer 1977, at 90, 91 (noting that consumers gain relevant information only after purchase).

21 *See* COX & FOSTER, *supra* note 16, at 5-6.

22 Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93, 104 (1961).

23 *See* Law & Kim, *supra* note 13, at 725.

24 *See* FRIEDMAN, *supra* note 20, at 148; Hogan, *supra* note 9, at 121; Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399, 399 (1974).

they encourage rent-seeking behavior and allow special interests to obtain a monopoly advantage in a competitive market.[25] Also, evidence suggests that they fail to have the desired effects of higher quality.[26] Despite the depth of criticism, occupational licensing remains popular in state legislatures and is growing to cover more professions.[27]

2. Legal Justifications

The judiciary has long accepted the government's ability to regulate professions through licensing schemes.[28] The courts deem the regulations a valid exercise of the police power.[29] The legal justification for occupational licensing relies partly on some of the economic justifications.[30] Essentially, it is founded on the idea that the state has both the power and obligation to provide for the general welfare.[31] Licensing is a method to protect citizens from fraud and ignorance in the market.[32]

Occupational licensing laws are subject to the Due Process Clause and Equal Protection Clause of the U.S. Constitution.[33] The Supreme Court scrutinizes challenges to government licensing schemes under the rational basis test.[34] The Supreme Court has held that occupational licensing laws are constitutional so long as the qualifications "have a rational connection with the applicant's fitness or capacity to practice" his profession.[35] The

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25 *See* FRIEDMAN, *supra* note 20, at 148; Law & Kim, *supra* note 13, at 724.

26 *See* Kleiner, *supra* note 10, at 198.

27 *See* Kleiner & Krueger, *supra* note 14, at 677; *see also* Krueger, *supra* note 15.

28 *See* Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 233 (1957) (licensing of lawyers); Graves v. Minnesota, 272 U.S. 425, 428-29 (1926) (licensing of dentistry); Dent v. West Virginia, 129 U.S. 114, 122 (1889) (licensing of medicine); Kry, *supra* note 7, at 889 n.22; *see also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("Legislative bodies have broad scope to experiment with economic problems . . . .").

29 Watson v. Maryland, 218 U.S. 173, 176 (1910); Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 322 (1905); *Dent*, 129 U.S. at 122; Cathcart & Graff, *supra* note 8, at 149.

30 *See* Douglas v. Noble, 261 U.S. 165, 169-70 (1923) (holding that a legislature may delegate authority to a licensing board to determine minimum qualifications for the practice of dentistry); *Dent*, 129 U.S. at 122 (stating that the state can provide for the general welfare).

31 *Dent*, 129 U.S. at 122.

32 *Id.* ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance or incapacity as well as of deception and fraud.").

33 *See Schware*, 353 U.S. at 238-39 ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.").

34 *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1024 (2006).

35 *Schware*, 353 U.S. at 239.

Constitution bars economic regulations that are arbitrary or that discriminate against a constitutionally protected class.[36]

The rational basis test is the lowest form of judicial scrutiny in cases regarding the Due Process Clause or Equal Protection Clause.[37] Generally, the rational basis test applies to economic legislation.[38] It is a deferential standard[39] where "the governmental action need only be *rationally related* to a *legitimate* state interest . . . [and] the methods chosen by the government must be rational means to achieve that purpose."[40] The rational basis test is not a difficult standard to satisfy, making successful challenges to economic regulations unlikely.[41] In fact, the government is not even required to produce evidence in support of their rationalizations.[42] Government laws are presumed to be rational unless they are classified as arbitrary.[43]

B. *Speech and the Levels of Judicial Scrutiny*

The Supreme Court's jurisprudence on speech shows that two levels of judicial scrutiny have emerged.[44] On the one hand is strict scrutiny, which requires a "compelling" governmental interest.[45] On the other hand is intermediate scrutiny, which requires a substantial connection to an important governmental interest.[46] Distinguishing between a compelling government

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36 *Id*.

37 Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 805-06 (2006).

38 Mark G. Parenti, Recent Development, *A New Direction in Maryland's Rational Basis Review of Economic Regulation*, 54 MD. L. REV. 703, 705 (1995).

39 *See* Heller v. Doe, 509 U.S. 312, 320 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (alteration in original) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (internal quotation marks omitted)); Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 185 (2003) ("The rational basis test is, to put it mildly, a very easy standard for legislatures to meet.").

40 Wadhwani, *supra* note 37, at 806.

41 *See Beach Commc'ns*, 508 U.S. at 313 (stating that a challenged law will withstand rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis" for the challenged law); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 899-900 (2005); Simpson, *supra* note 39, at 185; Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006). *But see* Romer v. Evans, 517 U.S. 620, 632 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

42 *See Heller*, 509 U.S. at 320; Neily, *supra* note 41, at 900.

43 *See Beach Commc'ns*, 508 U.S. at 313-15.

44 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994).

45 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

46 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

interest and a substantial one requires an examination of the origins of each doctrine.

1. Strict Scrutiny

Strict scrutiny has its origins in First Amendment jurisprudence in the case *Sweezy v. New Hampshire*.[47] There, the Supreme Court used the "compelling state interest" test to overturn the conviction of a man who was questioned in connection with the state attorney general's attempt to investigate "subversive activities."[48] The convicted man was an avowed socialist, a guest lecturer at the University of New Hampshire, and a member of the Progressive Party.[49] The attorney general thought his associations might connect him to subversive organizations and attempted to question him.[50] The Court held that such inquiries were unconstitutional because they interfered with the free exercise of the professor's liberties.[51] The Court reasoned that minority political views are an important aspect of a democratic society and cannot be infringed upon by a legislature whose interest is to investigate subversive organizations.[52] In his concurrence, Justice Felix Frankfurter emphasized the importance of academic freedom and stated that in order for that right to be infringed "the subordinating interest of the State must be compelling."[53]

Justice Frankfurter's conception of the "compelling state interest" test became Supreme Court doctrine in *NAACP v. Button*.[54] The commonwealth of Virginia attempted to strengthen its regulation of the legal profession by prohibiting certain organizations from soliciting legal business.[55] This prohibition affected the NAACP, which regularly participated in civil litigation.[56] As it would later reiterate in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[57] the Court stated its contention that the First Amendment protects a "free trade in ideas."[58] Even though Virginia argued that its intention was to ensure high professional standards

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47 354 U.S. 234 (1957) (plurality opinion); *see* Stephen A Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 364-67 (2006).

48 *See Sweezy*, 354 U.S. at 235-44, 251-52 (plurality opinion).

49 *Id.* at 243-44.

50 *See id.* at 236-38.

51 *Id.* at 250.

52 *Id.* at 251.

53 *Id.* at 262-63 (Frankfurter, J., concurring in the result).

54 371 U.S. 415 (1963).

55 *Id.* at 423-24.

56 *Id.* at 419-26.

57 425 U.S. 748 (1976).

58 *Button*, 371 U.S. at 437 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)) (internal quotation marks omitted).

and not to curtail expression, the Court explained, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[59] Virginia's interest in regulating the legal profession was not compelling enough to justify the limitation of First Amendment freedoms.[60]

Whereas *Sweezy* and *Button* set the conceptual foundation for the application of strict scrutiny to First Amendment issues, the modern test appears to be more formulaic.[61] The modern test hinges on the government having a "compelling state interest" when infringing on free speech.[62] The test also requires any government restriction on speech to be "narrowly-tailored," or only what is necessary to achieve the compelling interest.[63] The Supreme Court has "never set forth a general test to determine what constitutes a compelling state interest."[64] However, a "compelling" governmental interest can be discerned through the few instances where a law was upheld despite strict scrutiny.[65]

2. Intermediate Scrutiny

The compelling interest test seen in strict scrutiny is contrasted with the substantial interest test, as used in intermediate scrutiny.[66] Similar to the compelling interest test, the Supreme Court has not articulated a clear standard to determine what is substantially related to an important government interest.[67] Ostensibly, neither test is amenable to bright-line rules or standards, but each is a rather flexible, fact-specific standard that courts analyze based on the context of the restriction proposed and the fundamental right being infringed.[68] After a court deems the government's interest to

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59 *Id.* at 439.

60 *Id.* at 438-39.

61 Formulaic in description, not necessarily in application. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (finding that strict scrutiny was "'strict' in theory and fatal in fact").

62 *See Button*, 371 U.S. at 438.

63 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

64 *See* Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion).

65 *See generally Sable Commc'ns*, 492 U.S. at 130-31 (stating that the government had a compelling interest in preventing minors from being exposed to indecent telephone messages, but that the particular law was not narrowly tailored); Korematsu v. United States, 323 U.S. 214, 223-24 (1944) (holding that it was constitutional for the federal government to impose a race-based curfew during wartime despite rigid scrutiny).

66 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

67 *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987).

68 *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 318 n.128 (1998) (citing important governmental objectives).

be substantial, the restriction must "directly advance the state interest" and be the most reasonable attempt to limit the expression.[69]

Intermediate scrutiny is similar to strict scrutiny in many respects.[70] The level of review depends on categorical distinctions between the type of speech and the classification of the government regulation at issue.[71] In the speech context, intermediate scrutiny applies to commercial speech,[72] certain types of expressive conduct,[73] political contributions,[74] mass media,[75] and indecent or obscene speech.[76] Even within the general category of intermediate scrutiny cases, the Supreme Court's application of intermediate scrutiny is uneven at times.[77]

The Supreme Court applies intermediate scrutiny to government regulation that is content-neutral, and applies strict scrutiny to content-based regulation.[78] Content-based restrictions burden a particular viewpoint based on its content, while content-neutral restrictions burden speech regardless of content.[79] In fact, this may be the most important distinction in whether speech will be examined under strict or intermediate scrutiny.[80] The Supreme Court has acknowledged that distinguishing content-based and content-neutral regulations is a difficult task.[81] The practical difference can also depend on the efficacy and intention of the government regulation in question.[82] Despite the Supreme Court's extensive history of dealing with the distinction, the application of judicial scrutiny to certain types of speech remains relatively uncertain.[83]

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69 *See Cent. Hudson*, 447 U.S. at 564.

70 *Compare id.* at 566 (applying a four-part test), *with Sable Commc'ns*, 492 U.S. at 126 (applying a strict scrutiny test).

71 *See generally* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-43 (1994).

72 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553-55 (2001); *Cent. Hudson*, 447 U.S. at 566.

73 *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

74 *See* Buckley v. Valeo, 424 U.S. 1, 64-65 (1976) (per curiam).

75 *See Turner Broad. Sys.*, 512 U.S. at 641.

76 *See* Roth v. United States, 354 U.S. 476, 488-89 (1957).

77 *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 800-02 (contrasting the Supreme Court's treatment of different types of speech under intermediate scrutiny).

78 *See Turner Broad. Sys.*, 512 U.S. at 642.

79 *See id.* at 643.

80 *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000) ("[V]irtually every free speech case turns on the application of the distinction between content-based and content-neutral laws.").

81 *See Turner Broad. Sys.*, 512 U.S. at 642 ("Deciding whether a particular regulation is content based or content neutral is not always a simple task.").

82 *See* Chemerinsky, *supra* note 80, at 59-61.

83 *See* Stone, *supra* note 67, at 117-18.

C. *Regulation and the Three Speech Doctrines*

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."[84] In order to determine whether the government can use occupational licensing laws to regulate speech by nonprofessionals over the Internet, it is important to explore three unique areas of speech doctrine: commercial speech, professional speech, and Internet speech. These doctrines exemplify unique modes of analysis for how the Supreme Court justifies or strikes down government laws infringing on free speech. If speech by nonprofessionals over the Internet can be classified as commercial speech rather than noncommercial speech, then it affects the level of scrutiny the Court will apply.[85]

First, this Part explores commercial speech doctrine. Commercial speech doctrine is a complex area of First Amendment jurisprudence. Commercial speech is distinguished from noncommercial speech for the purposes of government regulation and restrictions.[86] Also, commercial speech receives a different level of scrutiny than noncommercial speech.[87] Next, this Part analyzes professional speech, which is similar to commercial speech in many respects. Finally, this Part describes the emerging area of Internet speech and concludes with a presentation of the marketplace of ideas doctrine, a concept the Internet epitomizes.

1. Commercial Speech Doctrine

Commercial speech is broadly defined as "expression related solely to the economic interests of the speaker and its audience."[88] Primarily, commercial speech deals with advertising.[89] However, commercial speech doctrine is not as clear as it appears.[90] What constitutes "commercial speech"

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84 U.S. CONST. amend. I.

85 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553-56 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-66 (1980).

86 *See Cent. Hudson*, 447 U.S. at 561-66.

87 *Id.* at 562-63.

88 *Id.* at 561; *see also* United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (stating that commercial speech is "usually defined as speech that does no more than propose a commercial transaction"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000) ("We can define [commercial speech] as the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse.").

89 *See Cent. Hudson*, 447 U.S. at 563.

90 *See, e.g.*, Post, *supra* note 88, at 5 ("[S]ometimes advertising is deemed to be public discourse rather than commercial speech, and sometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech." (footnote omitted)).

can depend on either the content of the speech or the characteristics of the speaker.[91] The Supreme Court has utilized loose tests to differentiate commercial from noncommercial speech.[92]

The Supreme Court has determined that the First Amendment protects commercial speech.[93] The Court rejected the "highly paternalistic" view that the government can protect citizens from their own ignorance.[94] The government lacks the complete power to suppress and regulate commercial speech.[95] However, in certain circumstances, government restrictions of commercial information are justified.[96] Commercial speech is afforded less protection under the Constitution than other types of expression.[97] Two main cases that inform modern day jurisprudence on commercial speech doctrine are *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[98]

In *Virginia Pharmacy*, the Supreme Court held that a Virginia statute forbidding licensed pharmacists from advertising the prices of prescription drugs was unconstitutional on First Amendment grounds.[99] The Court recognized that commercial speech, though different from noncommercial speech, still received First Amendment protection.[100] The government could not regulate it despite the economic nature of the advertisement.[101] The Court concluded that, while false or misleading speech is not protected,[102] the government cannot restrict truthful information about lawful activity absent a significant governmental interest.[103]

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91 *See generally id.* at 5-15.

92 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983). The three factors that the Court considered when determining if pamphlets were commercial speech were: (1) they were conceded to be advertisements; (2) they referred to a specific product; and (3) there was an economic motive. *Id.* at 66-67. Whereas each factor in isolation is not enough to compel the Court to call the pamphlets commercial speech, the combination of all the factors provides strong support that they are properly characterized as commercial speech. *Id.*; *see also* Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 143-44 (2007).

93 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (*Va. Pharmacy*), 425 U.S. 748, 761-62 (1976).

94 *See id.* at 769-70.

95 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980); *Va. Pharmacy*, 425 U.S. at 762.

96 *See* Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 722 (1982).

97 *Cent. Hudson*, 447 U.S. at 562-63.

98 447 U.S. 557 (1980).

99 *Va. Pharmacy*, 425 U.S. at 749-50, 773.

100 *Id.* at 761-62.

101 *Id.* at 771-72.

102 *Id.*

103 *Id.* at 771-73.

However, the Court based its reasoning on more than just legal distinctions. The free flow of information into the marketplace is one of the prevailing themes of the opinion.[104] Society has an interest in the free flow of information, even if that information is commercial and for the purpose of profit.[105] The Court thought that the free flow of information was so important that it contributed to the goal of "enlighten[ed] public decision-making in a democracy."[106] The Court also recognized that access to more information does not harm consumers.[107] Any harm that could occur would be due to professional dereliction on the part of the pharmacist.[108] Making intelligent and well-informed economic decisions is part of the free enterprise system and contributes to a better economy.[109] For these reasons, the First Amendment protects commercial speech.[110]

The Supreme Court decided *Central Hudson* only a few years after *Virginia Pharmacy*.[111] In *Central Hudson*, New York law prohibited an electrical utility company from advertising the use of electricity.[112] While exploring the commercial speech doctrine, the Court acknowledged its previous holdings that the government lacks the "highly paternalistic" and "complete power to suppress" and regulate commercial speech.[113] However, the Court ruled that the government could restrict commercial speech, even if it is not false or misleading, when a substantial government interest is involved.[114] The Court professed that the Constitution affords lesser protection to commercial speech than to other constitutionally guaranteed speech.[115]

In *Central Hudson*, the Court acknowledged the importance of providing information to consumers so they can make informed decisions.[116] Nevertheless, the Court deemphasized the dicta of *Virginia Pharmacy* by instituting a four-part test for determining if the First Amendment protects commercial speech.[117] In addition to the preexisting prong that commercial speech concern truthful and legal activity, the Court imposed the require-

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104 *See generally id.* at 753-65.

105 *Va. Pharmacy*, 425 U.S. at 763-65.

106 *Id.* at 765.

107 *Id.* at 769-70.

108 *Id.*

109 *Id.* at 765.

110 *Id.* at 761-62.

111 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). *Va. Pharmacy* was decided in 1976. *Va Pharmacy*, 425 U.S. at 748.

112 *Cent. Hudson*, 447 U.S. at 558-59.

113 *Id.* at 561-62 (quoting *Va. Pharmacy*, 425 U.S. at 770) (internal quotation marks omitted).

114 *Id.* at 563-64.

115 *Id.* at 563.

116 *Id.* at 567 ("Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.").

117 *Id.* at 565-66.

ments that the regulation involve substantial government interests, advance the government interest, and be narrowly tailored.[118] Ultimately, the Court in *Central Hudson* found that the state's regulation failed to meet this test.[119]

Content-based regulation of free speech receives strict scrutiny, the highest level of judicial scrutiny.[120] The *Central Hudson* test, however, applies a lower level of judicial scrutiny called intermediate scrutiny.[121] The distinction between the levels of scrutiny rests on whether a court believes a government restriction infringes on fundamental rights[122] and whether that infringement is important or compelling.[123] In a speech context, the first step a court considers is whether the speech is content-based or content-neutral.[124] Content-neutral laws that restrict speech are subject to a more deferential standard of review.[125] This classification of speech usually involves conduct that contains both "speech" and "nonspeech" elements.[126] The government can regulate the nonspeech element and thereby limit the speech element if there is a sufficiently important governmental interest.[127]

2. Noncommercial Professional Speech

The professional speech doctrine is related to commercial speech. Professional speech is simply speech that a professional renders to a client or patient.[128] It applies to professions where speech is incidental to conduct.[129] In other words, it "is a course of conduct that merely involves speech ele-

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118 *Cent. Hudson*, 447 U.S. at 566.

119 *Id.* at 570-71.

120 United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

121 *Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., concurring in the judgment).

122 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) ("[A] government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."); *see also infra* Part II.C.

123 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007).

124 *See* City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring).

125 *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

126 *See id.* at 376 (internal quotation marks omitted).

127 *See id.*

128 Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 650 (2012).

129 Kry, *supra* note 7, at 891-93.

ments."[130] This classification of speech applies to lawyers,[131] physicians,[132] financial advisors,[133] and other professions that render advice to clients.[134]

Professional speech differs from commercial speech in that it does not propose an economic transaction or advertise goods and services.[135] Also, whereas commercial speech is usually regulated through some form of statutory restriction, professional speech is regulated primarily through licensing.[136] Governmental attempts to regulate professionals who interact with their clients in the course of their duties implicate First Amendment issues similar to commercial speech.[137] The two types of speech often overlap.[138] However, there are subtle differences in how the Supreme Court has viewed government restrictions of speech.[139]

The Court confronted the question of "where the individual's freedom ends and the State's power begins"[140] in *Thomas v. Collins*.[141] A Texas law prohibited anyone from soliciting workers without obtaining an organizer's card.[142] A union president, who had planned to address a group of laborers, learned of the law but decided to give his speech anyway.[143] The union president gave his speech without making any solicitations, but police arrested him shortly after.[144] The Supreme Court granted his habeas corpus petition because the state law violated the First Amendment.[145] In its reasoning, the Court noted that the government has some latitude in regulating speech in the context of business or economic activity.[146] However, the

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130 *Id.* at 891; *see also* Lowe v. SEC, 472 U.S. 181, 228 (1985) (White, J., concurring in the result) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.").

131 *See* NAACP v. Button, 371 U.S. 415, 417-18, 428-29 (1963).

132 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion).

133 *See Lowe*, 472 U.S. at 208-11.

134 Kry, *supra* note 7, at 893.

135 *Compare* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980), *with Lowe*, 472 U.S. at 189, 234 (1985) (neither the majority or the concurrence answered the question of whether professional speech was commercial or noncommercial speech); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 819 (1999) (stating that it is unlikely professional speech would be viewed as similar to an economic transaction).

136 *See* Kry, *supra* note 7, at 886-89.

137 *See id.* at 889 (stating that because "professional practice involves a speech-related activity . . . government regulation might raise at least a colorable First Amendment issue").

138 *See* Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 48 (1985).

139 *See* Halberstam, *supra* note 135, at 839-44, 851-57.

140 Thomas v. Collins, 323 U.S. 516, 529 (1945).

141 323 U.S. 516 (1945).

142 *Id.* at 518.

143 *Id.* at 520, 522.

144 *Id.* at 522-23.

145 *Id.* at 540.

146 *Id.* at 531.

Court found actions that restrict speech can only be justified by a clear public interest or clear and present danger.[147] Accordingly, the Court found that the union president's speech to laborers concerning the advantages and disadvantages of joining a union was protected speech.[148]

The Court's analysis into the constitutionality of the statute reveals a deeper reasoning of the conflict between legitimate government action and protected speech. The restriction on "soliciting" workers is problematic because there is no standard to determine when speech goes from admiration to advocacy and solicitation.[149] The government could infer whatever intent or meaning it wants, which would undermine the very purpose of free expression.[150] Drawing on Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*,[151] the Court held that the First Amendment provides for a "free trade in ideas" which allows a speaker to encourage action.[152] A registration requirement contravenes this principle because it imposes a mandatory condition on a speaker before engaging in what is nothing more than an exercise of free speech.[153] It is only when the speaker engages in conduct incidental to speech that a requirement may be imposed upon him.[154]

Justice Robert H. Jackson's concurrence went even further than the Court in advocating a strong First Amendment protection.[155] Speaking on the licensing of professional speech, Justice Jackson stated that, while the state can prohibit someone from practicing a profession without a license, it cannot prohibit an unlicensed man from practicing speech advocating one aspect of that profession over another.[156] So, while the state can regulate conduct and activities that are part of one's profession, it cannot regulate the exercise of speech by a professional outside of his vocation.[157] Justice Jackson ultimately argued that the state's interest in protecting the public

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147 *Thomas*, 323 U.S. at 530.

148 *Id.* at 532.

149 *See id.* at 534-35.

150 *See id.* at 535.

151 250 U.S. 616 (1919).

152 *Thomas*, 323 U.S. at 537 (quoting *Abrams*, 250 U.S. at 630) (internal quotation marks omitted).

153 *See id.* at 540 ("If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order.").

154 *Id.*

155 *Id.* at 544-48 (Jackson, J., concurring).

156 *Id.* at 544 ("[T]he 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.").

157 *Id.* at 544-45.

through licensing is subordinate to the principle protecting speech that advocates a certain position.[158]

The Supreme Court further explained the boundaries of government power to restrict professional speech in the case of *Lowe v. SEC*.[159] The Securities and Exchange Commission ("SEC") accused an individual, who was not registered as an investment advisor, of violating a federal statute by publishing and distributing investment advice and commentary in newsletters.[160] Based on legislative history, the Court determined that the speech in question fell under the "bona fide newspaper" exclusion and outside the regulations of the Investment Advisers Act of 1940.[161] The Court decided that the Act's regulations of professional speech only applied when the advice rendered was personalized to a particular client and subsequently created a fiduciary relationship.[162] Speech rendered by nonregistered individuals was not subject to the Act's restrictions absent that relationship.[163] The Court found that professional advice that is circulated in a public forum receives First Amendment protection.[164] This holding prevented the Court from addressing the constitutional question of whether the Act violated the First Amendment.[165]

The influential concurrence Justice Byron White authored sometimes overshadows the majority decision in *Lowe*.[166] The concurring Justices disagreed with the Court that the investment newsletters were outside the restrictions of the Act.[167] Rather, they would have found the Act's restrictions unconstitutional on First Amendment grounds.[168] Justice White conceded that the government has the power to regulate professions that involve speech,[169] but he stated that the Court has never extended licensing schemes to include the licensing of speech per se.[170] Statutes reach a point where they are no longer regulating a profession but are regulating speech.[171] Borrowing from Justice Jackson's concurring opinion in *Thomas v. Collins*,[172]

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158 *See Thomas*, 323 U.S. at 545 (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

159 472 U.S. 181 (1985).

160 *Id.* at 183-84.

161 *Id.* at 204-10.

162 *Id.* at 207-10.

163 *Id.* at 210-11.

164 *Id.* at 208.

165 Carol E. Garver, Note, Lowe v. SEC*: The First Amendment Status of Investment Advice Newsletters*, 35 AM. U. L. REV. 1253, 1257 (1986).

166 *Lowe*, 472 U.S. at 211-36 (White, J., concurring in the result).

167 *Id.* at 227.

168 *Id.* at 233, 235.

169 *Id.* at 228.

170 *Id.* at 229-30.

171 *Id.* at 230.

172 323 U.S. 516, 544-48 (1945) (Jackson, J., concurring).

Justice White thought that the distinguishing characteristic between regulation of a profession and regulation of speech was whether the speaker provided particularized advice to a client.[173] Absent a "professional nexus" between professional and client, a regulation restricting speech violates the First Amendment.[174]

3. Internet Speech Doctrine

A third doctrine that needs to be explored is the regulation of Internet speech. Technology has changed the way society communicates and expresses information. The Internet has become an important medium for mass communication and expression.[175] The ease with which individuals can share information or express viewpoints has made it an essential component of people's everyday lives.[176] For all of the reasons the Internet has become so integral to the fabric of society, it has become a battleground for First Amendment issues.[177] The simplicity of access and distribution of information means that speech can pass unregulated.[178] The same speech may face sanction outside of the Internet sphere.[179] This ambiguity has led to government attempts to regulate the Internet, and by extension free speech.[180]

Both federal and state legislatures have attempted to regulate Internet speech based on indecency, pornography, and the need to protect children.[181] In virtually all cases, civil rights groups challenged the regulations

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173 *Lowe*, 472 U.S. at 232 (White, J., concurring in the result) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

174 *Id.* at 232 ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such . . . .").

175 *See* Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187, 187 (2003).

176 *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1120 (2005).

177 *See* Tanessa Cabe, Note, *Regulation of Speech on the Internet: Fourth Time's the Charm?*, 11 MEDIA L. & POL'Y 50, 50-51 (2002) (describing congressional attempts to regulate the Internet being struck down).

178 *See* Reno v. ACLU, 521 U.S. 844, 852-53 (1997).

179 *See id.* at 868-69 (distinguishing regulation of broadcast media from regulation of the Internet).

180 *See* Cabe, *supra* note 177, at 50.

181 *See* Ashcroft v. ACLU, 542 U.S. 656, 659-63 (2004); Ashcroft v. ACLU, 535 U.S. 564, 566-71 (2002); Ashcroft v. Free Speech Coal., 535 U.S. 234, 239-40 (2002); *Reno*, 521 U.S. at 849, 857-61.

on free speech grounds.[182] This development has forced courts to adapt First Amendment jurisprudence to the new realities that the Internet provides.[183] Courts must balance the governmental interest of protecting people from harmful types of speech with the universal interest of maintaining a free and open forum for expression.

a. *Courts on Internet Regulation*

The Supreme Court first considered the issue of First Amendment rights and the Internet in *Reno v. ACLU*.[184] The American Civil Liberties Union ("ACLU") challenged a congressional act aimed at protecting minors from harmful material on the Internet.[185] The Court struck down the act for vagueness and overbroad regulation of speech.[186] It determined that the regulation would affect speech outside of the category the government intended to restrict.[187] This overbroad reach usually will prove fatal to legislation restricting speech.[188]

Perhaps most importantly, the Court decided that regulation of the Internet constituted content-based regulation of speech.[189] Therefore, laws restricting speech on the Internet received strict scrutiny analysis rather than intermediate scrutiny.[190] This development proved significant in limiting the government's reach in instituting speech restrictions.[191]

What is less clear is how the Supreme Court views speech that is both commercial and on the Internet.[192] In *Reno*, the Court compared the Internet to broadcast media and determined that it should not receive the same level of First Amendment protection.[193] Although the Court clarified that the Internet is not analogous to broadcast,[194] the question of what to compare it to remains. Perhaps the Internet is just not comparable to traditional types of

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182 *See* Ashcroft v. ACLU, 542 U.S. at 660, 663; Ashcroft v. ACLU, 535 U.S. at 566, 571-72; *Free Speech Coal.*, 535 U.S. at 239, 242-43; *Reno*, 521 U.S. at 849, 861-62.

183 *See Reno*, 521 U.S. at 868-70.

184 521 U.S. 844 (1997).

185 *Id.* at 849.

186 *Id.* at 875-79.

187 *Id.* at 874.

188 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 256-58 (2002).

189 *Reno*, 521 U.S. at 867-68; *see* Cabe, *supra* note 177, at 55.

190 *Reno*, 521 U.S. at 868-70; Cabe, *supra* note 177, at 54-55.

191 *See, e.g.*, *Free Speech Coal.*, 535 U.S. at 252-58.

192 *See* Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 278-79 (1998).

193 *See Reno*, 521 U.S. at 866-70.

194 *Id.* at 867.

media. The Court has labeled it "a unique and wholly new medium of worldwide human communication."[195]

b. *Marketplace of Ideas Theory*

First Amendment jurisprudence has evolved through a number of theories about its function in a liberal democracy.[196] One of the dominant theories that emanates from free speech cases is the "marketplace of ideas" doctrine ("marketplace theory").[197] The Court first introduced the doctrine in *Abrams v. United States*, a case concerning five men convicted of conspiracy under the Espionage Act for publishing and disseminating anti-war leaflets.[198] In his dissent, Justice Holmes iterated that the government should only restrict speech in the narrowest circumstances.[199] It is through a "free trade in ideas"[200] that speech may compete without government interference and be accepted or rejected on its merits.[201]

Under marketplace theory, the free exchange of ideas, even those that the majority of citizens despise, leads to the betterment of the welfare of society.[202] The government, as the protector of individual rights, is charged with fostering and promoting the public exchange of ideas.[203] Increasing the variety of ideas and opinions encourages the democratic ideals of a free and liberal society.[204] This contributes to a more informed populace and better governance.[205] The Court views restrictions on speech particularly harshly because anything that encourages a more active exchange of opinions and ideas will support society's search for truth.[206] If the government is able to

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195 *Id.* at 850 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)) (internal quotation marks omitted).

196 *See* Hartman, *supra* note 3, at 420-21 (discussing the development of First Amendment jurisprudence).

197 *Id.* at 427 (internal quotation marks omitted).

198 250 U.S. 616, 616-17 (1919).

199 *Id.* at 630 (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law . . . .").

200 *Id.*

201 *See* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Hartman, *supra* note 3, at 427.

202 *See* Hartman, *supra* note 3, at 427.

203 *See id.* at 429 (stating that government should facilitate the exchange of ideas rather than restrict it).

204 *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4.

205 *See id.* at 3-4.

206 *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Hartman, *supra* note 3, at 427-28.

engage in content discrimination, it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[207]

The theory is characterized as an "idealistic" view of the First Amendment.[208] Aspects of the marketplace theory are found in many Supreme Court opinions involving speech.[209] The concept survives because it has strong foundations in the history of the U.S. Constitution,[210] and it also acts as a formidable counterargument to government attempts to restrict speech.[211] However, the Court has not accepted the free exchange of ideas as the prevailing doctrine when evaluating speech cases.[212] A balancing approach, which weighs countervailing interests, has also been prominent.[213] The Court employs the balancing approach in its treatment of commercial speech,[214] obscene speech,[215] sexually explicit speech,[216] and other types of speech.[217]

The Internet offers a new medium through which the Court can apply its speech doctrines. Its unique characteristics make it unlike any form of media that has come before it.[218] The Internet exemplifies marketplace theory because it fits the theory's structural, functional, and cultural characteristics.[219] It epitomizes the principle of "free exchange of ideas" because of the ease of access for users, the lack of a centralized control, and the free flow

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207 *See* R. A. V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)) (internal quotation marks omitted).

208 Hartman, *supra* note 3, at 429.

209 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (discussing the importance of "robust political debate"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976) ("[S]ociety also may have a strong interest in the free flow of commercial information."); NAACP v. Button, 371 U.S. 415, 437 (1963) ("Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts." (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)) (internal quotation marks omitted)); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829 (2008) (discussing the importance of the "'marketplace of ideas' metaphor," as first discussed in Justice Holmes's dissent in *Abrams*).

210 U.S. CONST. amend. I.

211 *See* Hartman, *supra* note 3, at 428.

212 *See* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 821-23 (1998); Hartman, *supra* note 3, at 429-30.

213 *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987); Barron, *supra* note 212, at 821-25; Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 383-87 (2009).

214 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

215 *See* FCC v. Pacifica Found., 438 U.S. 726, 744-45 (1978) (plurality opinion).

216 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 732, 740-41 (1996) (plurality opinion).

217 *See* R. A. V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (fighting words); Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964) (libel).

218 *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

219 Hartman, *supra* note 3, at 435-41.

of (mostly) unfiltered content.[220] Also, the Internet largely has been unregulated for over a decade as it came into the mainstream consciousness.[221] This fact lends support to the marketplace theory because it shows the stability and functionality of the Internet despite the lack of centralized control.

For these reasons, the Internet receives a heightened level of First Amendment protection.[222] The Court partially adopted marketplace theory rhetoric in its decision in *Reno v. ACLU*.[223] It even labeled the Internet as the "new marketplace of ideas."[224] Skeptical of government regulation of Internet speech,[225] the Court appealed to the interest in encouraging and promoting free expression in a democratic society.[226]

II. CONFLICT BETWEEN LICENSING AND SPEECH

This Part examines how the jurisprudence of occupational licensing conflicts with the First Amendment. First, it addresses the conflicting issues that occupational licensing and free speech attempt to resolve. Next, it addresses the issue of whether Internet speech needs to be designated "commercial speech" before it can be subject to regulation. It then examines the different levels of judicial scrutiny the Supreme Court could apply to government regulation of speech.

A. *Fundamental Differences Between Licensing and Speech*

All speech is not created equal.[227] Classifying speech into one of the categories established by the Court is the first step in determining the extent to which the government can restrict it.[228] Even when speech is properly classified, the Court's treatment of speech can be unpredictable.[229] The introduction of the Internet further complicates the problem. As individuals

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220 *Id.* at 435.

221 *See Reno*, 521 U.S. at 853.

222 *Id.* at 869-70.

223 *Id.* at 885.

224 *Id.*

225 *Id.* ("As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

226 *Id.*

227 *See, e.g.*, Dennis v. United States, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring in affirmance) ("Not every type of speech occupies the same position on the scale of values.").

228 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

229 *See* Cecil C. Kuhne, III, *Testing the Outer Limits of Commercial Speech: Its First Amendment Implications*, 23 REV. LITIG. 607, 613-17 (2004) ("If only the problem were as simple as defining the speech at issue as either commercial . . . or noncommercial.").

increasingly turn to blogging and social media to express their views, the analysis that was appropriate for traditional media no longer applies. As technology changes the way society functions, the law and the courts have to follow suit.

Blogging is one of the most popular ways for Internet users to share information.[230] Different entities utilize blogs in several ways: businesses market products, political campaigns address constituents, and citizens relay personal musings. Along with the spreading of factual information, there is also the sharing of advice. Sometimes the advice can mirror the speech-related activity of certain professions. When people offer their experiences or recommendations about a wide range of activities, their subjective speech can influence readers into taking certain action.

This influence is one of the issues that occupational licensing statutes aim to address.[231] The intention is to prevent fraudulent or deceitful individuals from providing poor advice that will adversely impact the recipients of that advice.[232] Recipients then act on that advice to their own detriment. In certain areas, such as medicine or finance, acting upon poor advice could lead to medical problems or steep losses in investment.

The question is whether sharing advice through a blog or social media is of such a nature that it mirrors the activity of professionals whose expertise is advising clients or patients.[233] Then the question becomes whether the government's interest in protecting the public from that speech is greater than the First Amendment rights of the speaker.[234] Should recommendations on a certain medical treatment be restricted because the speaker is not a medical professional? Should advice on a financial transaction be blocked because the speaker is not an investment advisor? Finally, should dietary recommendations be prohibited if the author is not a licensed nutritionist? The arguments risk devolving to the point of reductio ad absurdum, so that it appears obvious the sharing of certain experiences cannot be regulated. However, it is difficult to determine where the harmless sharing of advice crosses the boundary into speech that must be licensed.

The fundamental goals of occupational licensing and free speech conflict because the government is designated the protector of individual rights as well as the health, safety, and welfare of the public. Depending on the classification of the speech, the level of judicial scrutiny, and the status of the speaker, the outcome of a case regarding speech can vary.

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230 *See* Sprague, *supra* note 92, at 128-30.

231 *See* Moore, *supra* note 22, at 104.

232 *See* Hogan, *supra* note 9, at 117 ("Licensing attempts to . . . eliminat[e] quacks, charlatans, incompetents, and unethical practitioners from the field."); Vorotnikov, *supra* note 9, at 52.

233 *See* Lowe v. SEC, 472 U.S. 181, 204 (1985) (inquiring whether the speech at issue sufficiently mirrored the conduct of the professional speech targeted by a licensing law to determine whether the licensing requirement applied).

234 *See id.* at 205, 210 (comparing the importance of First Amendment rights to the legitimate interests the licensing law at issue served).

B. *Classifications of Speech*

The Supreme Court has not provided an adequate definition as to what constitutes "commercial speech" in an online setting.[235] The complexity of commercial speech doctrine is due to the fact that it usually contains both commercial and noncommercial elements.[236] While courts are usually willing to allow regulation of economic activity, they have been more skeptical of content-based restrictions on speech.[237] The distinction between commercial and noncommercial speech is important to determine the degree of protection the First Amendment provides.[238]

Deciphering how the Court will treat Internet speech first requires putting it through tests the Court has used to distinguish commercial speech from noncommercial speech. The Court in *Bolger v. Youngs Drug Products*[239] looked at three main characteristics when determining that an informational pamphlet was commercial speech.[240] First, the Court acknowledged that the pamphlets in question were advertisements.[241] However, this finding did not mean they automatically qualified as commercial speech.[242] The second factor the Court considered was whether the pamphlet referenced a specific product.[243] As with the first factor, references to a product are not enough to make speech commercial.[244] Finally, the Court looked at the economic motivation of the speaker.[245]

The test in *Bolger* is instructive on how the Court views commercial speech versus noncommercial speech, but it is only a preliminary inquiry into whether the government can regulate the speech.[246] The *Bolger* test focused on the intentions and actions of the speaker rather than the relationship between the speaker and his audience.[247] In *Lowe*, the Court did not

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235 This is particularly true as businesses utilize social media such as blogs. *See e.g.*, Sprague, *supra* note 92, at 148-51.

236 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 81 (1983) (Stevens, J., concurring in the judgment); Sprague, *supra* note 92, at 149.

237 *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814 (2000); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

238 *See Bolger*, 463 U.S. at 67-68.

239 463 U.S. 60 (1983).

240 *See id.* at 66-68.

241 *Id.* at 66.

242 *Id.*

243 *Id.*

244 *Id.*

245 *Bolger*, 463 U.S. at 67.

246 *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995); City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring); *Bolger*, 463 U.S. at 65.

247 *Bolger*, 463 U.S. at 66-67.

rule on the distinction between commercial and noncommercial speech.[248] Rather, it emphasized the relationship of the speaker with his audience as determinative in whether professional speech could be regulated.[249] The publishing and dissemination of a newsletter containing investment advice was not subject to licensure under the Act because there was no "fiduciary, person-to-person relationship[]."[250] The newsletter did not contain any individualized advice but was distributed to the public in an open forum.[251]

Finally, the question is whether the Court's classification of speech depends on the content or on the status of the speaker.[252] Individuals who do not hold themselves out to be professionals may still engage in speech that mirrors the advice that professionals provide to clients.[253] Whether occupational licensing statutes target the speech or the speaker can affect how the speech is classified.[254]

C. *Conflict Between Levels of Judicial Scrutiny*

The level of judicial scrutiny afforded to occupational licensing statutes is the most pressing issue for determining the extent of the government's power to regulate speech.[255] Economic regulations such as occupational licensing usually receive rational basis review.[256] However, laws that aim at restricting speech can receive either intermediate or strict scrutiny.[257] Under varying scenarios, courts could apply strict scrutiny, intermediate scrutiny, or even rational basis review. The basis of inquiry is which level of scrutiny the Court should apply in the case of an economic regulation that restricts speech.

Of the three possibilities, the Court is least likely to apply rational basis review. Speech will not be subject to rational basis review except in the

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248 *See* Lowe v. SEC, 472 U.S. 181, 234 (1985) (White, J., concurring in the result).

249 *See id.* at 210 (majority opinion).

250 *Id.*

251 *Id.* at 208.

252 *See Bolger*, 463 U.S. at 66-67 (considering both the content of the speech and the status of the speaker when determining whether speech is commercial without clarifying which element, if either, is more determinative).

253 *See Lowe*, 472 U.S. at 208.

254 *Bolger*, 463 U.S. at 66-67 (considering various factors in determining whether speech is commercial).

255 *See* Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 358 (2011) (noting that intermediate scrutiny is "more lenient" than strict scrutiny); Sandefur, *supra* note 34, at 1024 (stating that the rational basis test is "so lenient that virtually no law can fail it").

256 Parenti, *supra* note 38, at 705; Winkler, *supra* note 41, at 799.

257 *Compare* Reno v. ACLU, 521 U.S. 844, 870, 878 n.45 (1997) (applying strict scrutiny review), *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (applying intermediate scrutiny review).

narrowest of circumstances.[258] This assertion is based on the Court's distinction between "fundamental" and "non-fundamental" rights.[259] Fundamental rights are usually designated as those rights expressly provided for in the Constitution, such as free speech and equal protection.[260] However, even then it is not a perfect correlation.[261] Non-fundamental rights encompass almost everything else.[262]

Occupational licensing statutes are economic regulations aimed at protecting the health, safety, and welfare of the public.[263] Even though this intention is a legitimate governmental interest under normal circumstances, the law will receive heightened scrutiny when it infringes upon a fundamental right such as free speech.[264] The Supreme Court has indicated in the past that when a governmental interest and an individual right are in conflict, the level of scrutiny placed on the governmental act depends on the right in question, not the governmental interest.[265] It is only after the individual right is established that a court will proceed with the inquiry of whether the governmental interest is sufficient enough to restrict it.[266] Free speech, being the bedrock of the First Amendment and a "fundamental" right, demands heightened protection.[267]

The most likely form of judicial review for First Amendment cases is either strict scrutiny or intermediate scrutiny. The standard depends partly

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258 Tonnis H. Venhuizen, United States v. American Library Association*: The Supreme Court Fails to Make the* South Dakota v. Dole *Standard a Meaningful Limitation on the Congressional Spending Powers*, 52 S.D. L. REV. 565, 571 (2007) ("[A] regulation can be subject to rational basis review when it only regulates speech on government property, when that property is not a traditional public forum, and when the regulation is not designed to suppress a particular viewpoint.").

259 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) ("[A] government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.").

260 *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 125 n.17 (1989).

261 *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227-28 (2006).

262 *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1504 (2002).

263 *See* Hogan, *supra* note 9, at 117; Vorotnikov, *supra* note 9, at 52.

264 *See* Lowe v. SEC, 472 U.S. 181, 230 (1985) (White, J., concurring in the result) ("Congress' characterization of its legislation cannot be decisive of the question of its constitutionality where individual rights are at issue.").

265 *See id.* at 230-31; NAACP v. Button, 371 U.S. 415, 438-39 (1963); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("[I]t is the character of the right, not of the limitation, which determines what standard governs . . . .").

266 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

267 *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 147-48 (1992) (internal quotation marks omitted).

on whether the court classifies the speech as commercial.[268] It can also depend on whether the court classifies the regulation of speech as content-based or content-neutral.[269] This classification is important because practically no content-based regulation of speech survives judicial scrutiny.[270] Content-neutral regulations restrict speech, but not on the basis of content.[271] The Supreme Court's classification of Internet advice and the burden that occupational licensing places on that speech will determine whether government can restrict nonprofessional speech.

III. INTERNET ADVICE IS NONCOMMERCIAL SPEECH AND SHOULD RECEIVE STRICT SCRUTINY

This Part argues that Internet speech providing advice through a blog should not constitute commercial speech. It further argues that regulations of advice and opinions on the Internet should receive strict scrutiny because they amount to content-based regulation of speech. This Part asserts that occupational licensing of speech would not pass strict scrutiny. Finally, this Part argues that even if the Court considers occupational licensing of speech to be commercial speech, the licensing would not pass intermediate scrutiny.

A. *Internet Advice Is Not Commercial Speech*

Occupational licensing statutes are regulations aimed at affecting economic and commercial activity.[272] For certain professions, the conduct that requires a license is speech-related activity. However, just because the government requires a license for the professional practice of a vocation does not mean that speech incidental to that conduct is necessarily commercial speech. Whether the speech being targeted needs to be commercial before it can be regulated through occupational licensing is still an issue. For instance, in *Lowe*, the Court did not even address the issue of whether a newsletter containing investment advice was commercial speech.[273]

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268 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

269 Wexler, *supra* note 68, at 317.

270 *See* Bunker et al., *supra* note 255, at 357-60; Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 B.Y.U. L. REV. 1595, 1598.

271 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.").

272 *See supra* Part I.A.1.

273 *See supra* Part I.A.1.

Regardless, determining whether certain Internet speech is commercial is useful in determining whether occupational licensing of speech is valid. The Supreme Court has not provided a clear definition of commercial speech.[274] While it usually involves advertising or proposing a commercial transaction, it does not pertain to all speech regarding economic activity.[275] The Court has attempted to employ a "commonsense" distinction between commercial speech and public discourse,[276] but this does not ameliorate the confusion.

The test that the Court developed in *Bolger* is slightly more illustrative of what types of speech are commercial.[277] The Court has classified speech as commercial when it is an advertisement, it references a product, and the speaker has an economic motivation.[278] It does not guarantee classification as commercial speech but only lends "strong support."[279] The *Bolger* test focused on both the content of the speech and the motivations of the speaker.[280] Other definitions are content-oriented.[281] Still others focus on the relationship between the speaker and the audience.[282] Combining these varying definitions, commercial speech can be described as a commercial communication between an economically motivated speaker aimed at inducing an audience to purchase a good or service, where the audience reasonably understands the speech is directed at them as potential customers. This definition will not solve all of the dilemmas that pertain to applying commercial speech doctrine to speech, but it sufficiently combines the three aspects of commercial speech that distinguish it from noncommercial speech.[283]

Applying this definition to Internet speech, it is unlikely that the sharing of advice or opinions about products or services would constitute commercial speech. In blogging, individuals who are sharing information such as nutritional advice or medical experiences might "advertise" certain products or regimens, but they do not necessarily have a financial interest in the outcome of a reader's decision to follow their advice. Therefore, the Court cannot consider advice "advertising" in the normal sense of the word. Ra-

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274 *See* Halberstam, *supra* note 135, at 852-53 (describing the problem with defining commercial speech); Post, *supra* note 88, at 7.

275 *See* Thomas v. Collins, 323 U.S. 516, 531 (1945) ("The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity.").

276 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)) (internal quotation marks omitted).

277 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983).

278 *Id.*

279 *Id.* at 67.

280 *See id.* at 66-68.

281 *Cent. Hudson*, 447 U.S. at 561-62.

282 *See* Halberstam, *supra* note 135, at 853 (discussing a definition of commercial speech that would put emphasis on relations between the speaker and the audience similar to professional speech).

283 The three aspects are the content of the speech, the motivations of the speaker, and the relationship between the speaker and the audience. *See supra* notes 280-282.

ther, bloggers are merely sharing their experiences and recommendations with like-minded individuals. For these reasons, online speech that purports to offer advice or opinions on products or activities does not constitute commercial speech under the *Bolger* test.

It is true that businesses have increasingly turned to blogs to increase awareness of their goods or services,[284] but many other blogs have no affiliation with companies that produce products. The first part of the commercial speech definition relates to content.[285] Commercial speech doctrine recognizes that posting accurate information about a good or service differs from the sale of those goods.[286] This distinction is why commercial speech receives constitutional protection under the First Amendment in the first place. Therefore, it is unlikely that the sharing of information or advice about a product is sufficient to become licensable commercial speech.

First, discussing or advocating a certain good or service is not akin to "proposing a commercial transaction."[287] A transaction may eventually occur as a result of the information or recommendation, but that would be between the listener and a third-party seller. The Court cannot deem bloggers who have no personal affiliation with a business to be speaking on behalf of a business when discussing it in an online forum. The same is true of situations where the blogger's speech is similar to advice rendered by a professional.

Second, if a blogger does not have any affiliation with a business or does not have a profitable interest in the outcome of a person's decision, then the blogger lacks an economic motive and the Court could not say that the speech is commercial. The Court supports this assertion by acknowledging that economic motivation alone is insufficient to turn materials into commercial speech.[288] If economic motivation is not enough to classify speech as commercial, then surely the lack of an economic motivation provides even more weight to the conclusion that the speech is not commercial.

Finally, the Internet as a medium of communication severs the personalized link between a speaker's advice and the listener's reasonable expectations. It is certainly possible for a professional to communicate with a client over the Internet and for that speech to be subject to government regulation. However, individuals who provide advice or opinions through their blog to a widespread audience lack the particularized relationship that distinguishes public discourse from commercial speech.[289] In this context, a blog post would be no different from protected speech in traditional media,

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284 *See* Sprague, *supra* note 92, at 128-30.

285 *See Bolger*, 463 U.S. at 65.

286 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996) (plurality opinion).

287 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)) (internal quotation marks omitted).

288 *Bolger*, 463 U.S. at 67.

289 *See* Lowe v. SEC, 472 U.S. 181, 210 (1985).

such as handing out pamphlets, writing a newspaper article, or talking to people on the streets. Similar to the holding in *Lowe*, the lack of a fiduciary, person-to-person relationship prevents occupational licensing statutes from affecting nonprofessional speech.[290]

The openness of the Internet affects the relationship in two ways. First, the Internet is not "invasive" in the same manner as radio or television.[291] The content on the Internet is only accessible by people who search for it. People who search for dietary, financial, or medical advice know what they are looking for. Second, Internet users have no reasonable expectation that they may rely on the advice of bloggers or anyone else absent a representation that a licensed professional is rendering the advice. The anarchic system of the Internet represents perhaps the last medium where caveat emptor applies.[292] As such, the Court cannot consider the relationship between blogger and audience to be personal, and therefore cannot consider the speech to be commercial. For these reasons, regulation of Internet speech by bloggers who render advice but do not purport to be a professional constitutes content-based regulation of speech.

B. *Regulation of Internet Speech Would Not Survive Strict Scrutiny Under Marketplace Theory*

Speech that provides advice, opinions, or information through blogs or social media should receive the highest level of constitutional protection. The Court should consider regulation and restriction of such speech content-based and review it under strict scrutiny.[293] This conclusion holds even when the governmental interest in question is the protection of the health, safety, and welfare of the public through occupational licensing. Supreme Court case law and the theoretical foundations for free speech reveal a deeply held belief that protection of First Amendment freedoms occurs in all but the narrowest of circumstances.[294]

The first issue that needs to be discussed is whether occupational licensing of professional speech is content-based or content-neutral.[295] Only

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290 *See id.* While the holding pertained specifically to application under the Investment Advisors Act of 1940, the issue of whether the speech in question was licensable is comparable to the issue in this Comment.

291 *See* Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

292 "Let the buyer beware."

293 *See Reno*, 521 U.S. at 878-79 & n.45.

294 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (stating that First Amendment protections are "subject only to narrow and well-understood exceptions").

295 *See* City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.").

then can a court determine the appropriate level of review.[296] Based on prior precedents, the evidence suggests that when there is economic regulation of speech related to legitimate professional activity, burdens imposed on that speech constitute content-based regulation.[297] This outcome is even more significant in situations where the speaker does not purport to be a professional. If the state targets individuals for sharing information that is similar to advice rendered by professionals, then logically that regulation is targeting the content of the speech.

It is unlikely that occupational licensing statutes would receive deferential review under the rational basis test due to the existence of a First Amendment issue. It is also unlikely the Court would classify advice by nonprofessionals on the Internet as commercial speech and review it with intermediate scrutiny. Under strict scrutiny review, the government must demonstrate that a regulation is narrowly tailored to advance a compelling governmental interest.[298] Although the Court does not apply the standard strictly in speech cases, the characteristics of Internet speech make it similar to situations where the Court has afforded heightened review in the past.[299]

The Court applied strict scrutiny in cases where the medium of communication is the same,[300] as well as where the object of the restriction is the same.[301] In *Reno*, the Court asked whether a government regulation of indecent speech on the Internet satisfied both prongs of strict scrutiny review.[302] It held that the government's regulation failed both prongs due to being vague and overbroad.[303] A substantial aspect of the Court's analysis was recognition of the Internet as a new medium that had no history of prior regulation.[304] The expansive and decentralized aspects of the Internet contributed to the finding that the government's regulation would unnecessarily suppress speech.[305]

In *NAACP v. Button*, the issue revolved around the government's regulation of speech related to the legal profession.[306] The Court applied strict

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296 *See id.*

297 *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723-24 (2010) (holding that a statute is a content-based restriction of speech when it "depends on what they say"); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); Lowe v. SEC, 472 U.S. 181, 206-09 (1985); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976); NAACP v. Button, 371 U.S. 415, 438-39 (1963); Thomas v. Collins, 323 U.S. 516, 531-32 (1945).

298 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

299 *See generally* Reno v. ACLU, 521 U.S. 844, 879 (1997) (applying the strict scrutiny test).

300 *See id.*

301 *See Button*, 371 U.S. at 453-54; *Thomas*, 323 U.S. at 532-34.

302 *Reno*, 521 U.S. at 870-79.

303 *Id.*

304 *Id.* at 868-70.

305 *See id.* at 873-75.

306 *Button*, 371 U.S. at 419.

scrutiny to the prohibition of soliciting legal services and found the government lacked a compelling interest that justified curtailing speech.[307] It explained, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[308] So while the Court recognized that the state had a legitimate interest in regulating professional activity,[309] the state could not infringe on free speech to do it.[310] In employing strict scrutiny, the Court also relied partially on the notion that the First Amendment upholds a "[f]ree trade in ideas."[311]

The notion that the First Amendment promotes a "free trade in ideas" and that it results in heightened protection for speech provides further support as to why occupational licensing statutes would not pass strict scrutiny. Although the purpose of occupational licensing is to protect the health, safety, and welfare of the public, one of the consequences of those laws is to restrict the exchange of ideas, opinions, and information. Thus, the state has to argue that occupational licensing is both narrowly tailored and achieves a compelling governmental interest.[312]

The first prong of strict scrutiny review is whether occupational licensing serves as a compelling government interest that overcomes content-based regulation.[313] This prong means the government needs to establish that there is an actual problem in need of solving.[314] The compelling interest the government could argue in support of occupational licensing is both protection of the public from fraudulent or unqualified practitioners and the maintenance of a quality standard of professional conduct. The argument would point to past cases where the Court has upheld the government's legitimate interest in passing economic regulations and establishing licensing regimes.[315] The state would also argue that setting reasonable standards for professional conduct was a valid use of its police power.[316]

Both of these arguments will prove unpersuasive because the cases cited in support deal with the government regulating a profession which is

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307 *See id.* at 438-39.

308 *Id.* at 439.

309 *See id.* at 439-41.

310 *Id.* at 438-39.

311 *Id.* at 437 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)) (internal quotation marks omitted).

312 *See* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

313 *See* Fallon, *supra* note 123, at 1321-25.

314 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822-23 (2000).

315 *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); Graves v. Minnesota, 272 U.S. 425, 427-29 (1926); Douglas v. Noble, 261 U.S. 165, 169-70 (1923); Watson v. Maryland, 218 U.S. 173, 176-80 (1910); Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318-19 (1905); Dent v West Virginia, 129 U.S. 114, 122-24 (1889).

316 *See Graves*, 272 U.S. at 427-29 (stating that licensing statutes are a valid exercise of the police power unless they are arbitrary).

considered a non-fundamental right.[317] As previously noted, when dealing with fundamental rights such as free speech, the constitutionality of a statute rests on whether the right is being unjustly infringed.[318] In the case of occupational licensing and Internet speech, the state's interest in restricting a nonprofessional is not compelling because it only serves to restrict ideas and information from being communicated.[319] While there are economic arguments for why occupational licensing does not ultimately achieve the government's interest,[320] the legal argument rests on the Court's consistent principle that the free flow of information and viewpoints is vital to a liberal and plural democracy.[321]

The second prong of strict scrutiny review looks at whether occupational licensing statutes are narrowly tailored to achieve the compelling government interest.[322] It also means that occupational licensing must be the least restrictive means to achieve the state's ultimate goal.[323] Marketplace theory provides the most prominent counter to licensing statutes being narrowly tailored. The Court has applied it in numerous cases to display its reluctance to limit the amount of opinions or ideas in the market.[324] The Internet epitomizes the marketplace theory of the First Amendment.[325] Due to all of the characteristics that make the Internet a revolutionary medium for communication, the government's attempt to restrict speech that occurs through the Internet is highly unlikely to be narrowly tailored. Restrictions of speech are likely to be vague and overbroad, as was the case in *Reno*.[326]

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317 *See id.* at 428-29; *Noble*, 261 U.S. at 169-70.

318 *See* Lowe v. SEC, 472 U.S. 181, 230-31 (1985) (White, J., concurring in the result) ("Congress' characterization of its legislation cannot be decisive of the question of its constitutionality where individual rights are at issue."); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *supra* Part II.C.

319 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 582 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("Applied to adults, an interest in manipulating market choices by keeping people ignorant would not be legitimate, let alone compelling.").

320 *See* FRIEDMAN, *supra* note 20, at 148; Hogan, *supra* note 9, at 121; Kleiner, *supra* note 10, at 192-93; Maurizi, *supra* note 24, at 399-403.

321 *See* Reno v. ACLU, 521 U.S. 844, 885 (1997); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (*Va. Pharmacy*), 425 U.S. 748, 765 (1976); NAACP v. Button, 371 U.S. 415, 437-38 (1963); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

322 *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

323 *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); *Playboy Entm't Grp.*, 529 U.S. at 815; *Sable Commc'ns*, 492 U.S. at 126; Fallon, *supra* note 123, at 1274.

324 *See, e.g.*, *Va. Pharmacy*, 425 U.S. at 770.

325 *See* Hartman, *supra* note 3, at 433-35; *supra* Part I.C.3.b.

326 *See Reno*, 521 U.S. at 884-85.

While the *Lowe* ruling applied specifically to violation of the Investment Advisers Act of 1940,[327] the Court's reasoning is informative when applied to Internet speech. The focus on interpersonal relationships and the distribution of advice is applicable to the attributes of an online blog.[328] Blogs allow authors to express their views to a wide audience without the existence of personal relationships.[329] The existence of a blog does not presuppose readers or followers. Internet users usually seek out blogs on their own based upon common interests or for educational reasons.[330] Interaction between authors and readers does occur,[331] but it does so in an open forum analogous to a "vast library."[332]

An occupational licensing statute that restricts speech related to professional conduct is bound to ensnare individuals outside of a given profession if the restriction is based on content rather than the representations of the speaker. Bloggers who utilize the Internet to share advice, opinions, and information should not be subject to the same regulations and restrictions as licensed professionals who are rendering advice to paying customers and clients. Absent a "personal nexus" between the speaker and audience, regulation of a blogger's Internet advice no longer functions as "legitimate regulation of professional practice with only an incidental impact on speech."[333]

As the Internet continues to allow for the proliferation and dissemination of more content, there is the possibility of more misleading or harmful information for users to consume. However, this development does not justify statutes that purport to limit the amount of information available. The First Amendment protects the right of the public to receive information.[334] It also prevents the state from choosing what content the public is allowed to receive.[335] For these reasons, occupational licensing statutes would not survive strict scrutiny review.

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327 Lowe v. SEC, 472 U.S. 181, 210-11 (1985).

328 Hartman, *supra* note 3, at 435-36 (explaining how blogs operate like interpersonal communication, without the centralized control options that would be available with corporate speech, for example).

329 *See* Sprague, *supra* note 92, at 128-30.

330 *See id.* at 129 n.8 (explaining that most Internet users do not know what a blog is, which suggests that most blogs are not written with an expectation of a higher readership and that actual readers sought out those blogs).

331 *See id.* at 129 (noting that blogs often allow readers to post comments to entries).

332 *See* Reno v. ACLU, 521 U.S. 844, 852-53 (1997).

333 Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

334 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986).

335 *See* R. A. V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed." (citations omitted)); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

C. *Regulation of Online Advice Would Not Survive Intermediate Scrutiny*

If the Court does consider a blogger's online speech to be commercial speech due to its content, then the online speech receives intermediate scrutiny rather than strict scrutiny.[336] Assuming that a blogger's online advice is commercial speech, the Court still must apply the *Central Hudson* test.[337] Accordingly, the speech restriction must promote a substantial government interest and be narrowly tailored to achieve that goal.[338] Even under this standard, regulation of a blogger's advice about a diet, lifestyle, or course of action would not survive intermediate scrutiny.

Although intermediate scrutiny is not as stringent as strict scrutiny, the Court rarely upholds government regulations aimed at restricting commercial speech.[339] The Court has not sustained a commercial speech restriction since 1995.[340] The Court seldom upholds commercial speech regulations under intermediate scrutiny for many of the same reasons the regulations fail strict scrutiny: they constitute content-based regulation of speech.[341] The only difference is the Supreme Court is distinguishing between content-based restrictions that are permissible because they have an economic nature and content-based restrictions that fall into traditional categories of protected speech. The categorical distinction exists so governments have some discretion to regulate harmful speech, but courts are reluctant to accept a paternalistic approach.[342]

The first question for determining whether occupational licensing statutes will survive intermediate scrutiny is if they are substantially related to an important governmental interest.[343] The degree of difference between intermediate scrutiny's "substantial governmental interest" test and strict scrutiny's "compelling interest" test remains unclear. Ostensibly, the government has a "substantial" interest in a number of areas. The second ques-

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336 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

337 *Id.*

338 *See id.* (outlining a four-step test to apply to First Amendment challenges related to commercial speech).

339 *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 360, 373-74 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550, 554 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489, 501 (1996) (plurality opinion); *Cent. Hudson*, 447 U.S. at 561, 566 (applying a four-part test to commercial speech restrictions for qualifying First Amendment speech); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391-92, 414 (2012).

340 *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620-22 (1995); Pomeranz, *supra* note 339, at 391.

341 *See Cent. Hudson*, 447 U.S. at 561, 566.

342 *See id.* at 561-62; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (*Va. Pharmacy*), 425 U.S. 748, 770 (1976); Post, *supra* note 88, at 50-53.

343 *See Cent. Hudson*, 447 U.S. at 564.

tion is whether the regulation is a reasonable attempt to address that interest.[344]

Supreme Court precedent reveals that occupational licensing statutes that affect Internet advice would not constitute a substantial government interest or be a reasonable attempt to address speech.[345] Without an underlying substantial government interest for the restriction, Internet advice cannot substantially relate to that important government interest, failing the Court's first prong for determining whether an occupational licensing statute survives intermediate scrutiny. As discussed earlier, courts do not believe the government should protect individuals from their own poor decisions in commercial transactions.[346] Using occupational licensing statutes to regulate Internet advice would cross the boundary into paternalistic activity. When the choice is between the suppression of information and the potential dangers of that information being misused, the courts must opt for the latter instead of the former absent a substantial interest.[347]

The Supreme Court has found a substantial governmental interest in a number of the commercial speech cases it analyzed under intermediate scrutiny.[348] However, the government lacks that substantial interest when the restriction pertains to Internet advice. The marketplace theory applies to commercial speech just as it does in other content-based restrictions of speech.[349] The Supreme Court has acknowledged that the free exchange of ideas is an important aspect of commercial speech doctrine.[350] Therefore, individuals who provide content through blogs or social media would receive First Amendment protection even if the Court classified the content as commercial speech.[351] Using blogs to advocate a certain viewpoint could cross the line of promotion and advertisement in certain contexts. Many times blogs that contain noncommercial content also contain commercial advertising somewhere on the site from an unrelated source.[352] What distin-

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344 *See id.*

345 Assuming, as this Section does, that a blogger's online speech is commercial speech, see *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). *See also Cent. Hudson*, 447 U.S. at 569-70; *Va. Pharmacy*, 425 U.S. at 770, 773.

346 *See Va. Pharmacy*, 425 U.S. at 770; Bhagwat, *supra* note 77, at 795.

347 *See Va. Pharmacy*, 425 U.S. at 770.

348 *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623-25 (1995) (holding that the government has a substantial interest in regulating the legal profession); *Rubin*, 514 U.S. at 482, 485 (applying the *Central Hudson* test and stating that the government's interest in the labeling of alcohol content is substantial); *Cent. Hudson*, 447 U.S. at 566, 569 (outlining the intermediate scrutiny test applied to commercial speech and finding that there is "a direct link" between the government's interest in energy conservation and the advertising of an energy utility).

349 *See* Stone, *supra* note 67, at 58 ("[T]he greater the interference in the marketplace of ideas, the greater the burden on the government to justify the restriction.").

350 *See Va. Pharmacy*, 425 U.S. at 760; Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

351 *See Va. Pharmacy*, 425 U.S. at 761.

352 *See* Hartman, *supra* note 3, at 423 n.25.

guishes ordinary commercial speech cases from the case of Internet advice is that occupational licensing is supposed to target professionals and not any member of the public whose content happens to contain a commercial aspect.

The overbreadth of occupational licensing statutes as applied to Internet speech is the death knell in intermediate scrutiny cases. Applying occupational licensing statutes to nonprofessionals providing advice on the Internet would create an even greater sense of confusion about what is commercial speech and subject to regulation. Whether it is offering nutritional advice, critiquing restaurants, or sharing information about real estate, the boundary between which types of commercial speech are subject to regulation and which are not is unclear. Occupational licensing statutes will not survive intermediate scrutiny as applied to Internet speech due to the confusion regarding when commercial speech would fall under the regulatory umbrella, as well as the increased likelihood that nonprofessionals will become the target of licensing regimes.

CONCLUSION

As the Internet becomes intertwined with the fabric of society, laws and court doctrines need to reflect the changes that technology brings to the way individuals communicate. The ease with which individuals can share family photos, relay daily experiences, or express their political opinions challenges the traditional notions of speech doctrine. First Amendment jurisprudence has evolved in such a way as to create distinct categories of speech that are subject to different levels of review and different levels of government restriction. The lines between these distinctions are often blurred and prevent the Court from establishing clear-cut rules.

With the immense increase in communication that the Internet affords, bloggers and users of social media are more willing and able to share advice, opinions, and information with each other. The proliferation of a true "marketplace of ideas" has occurred through decentralization. While this dispersal of ideas produces a multitude of benefits, it also entails the proliferation of certain types of speech that were usually the subject of stringent government control.

Occupational licensing of professions that have speech-related activity is one form of regulation governments use to protect the health, safety, and welfare of the public. The intentions, while noble, have the potential to engulf nonprofessionals into adhering to restrictions of their constitutionally protected speech. When individuals do not purport to be professionals and are merely sharing their personal experiences or educated opinion, they are not engaging in professional speech. Advice that pertains to nutrition, the law, finance, real estate, and a host of other areas are bound to be part of mainstream communication. Absent a profit motive, a representation of professionalism, or a fiduciary relationship with the audience, speech that

occurs online should receive the highest form of First Amendment protection.