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## PRIVATE ORDERING IN THE MARKET FOR PROFESSIONAL SERVICES

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*Freedom of contract is significantly restricted in the market for professional services. Under the so-called “corporate practice doctrine,” professionals such as doctors and lawyers are prohibited from practicing within corporate entities, and laypeople are likewise prohibited from investing in professional service firms. Defenders of this prohibition argue that it can be justified as a means of protecting professional independence and thereby increasing the quality of care. In fact, however, the available evidence suggests that investment restrictions are counterproductive to their stated goal. In practice, these restrictions raise costs and reduce access without measurably improving the quality of service at all.*

*This Article examines why, in spite of significant criticism, the doctrine remains alive in the twenty-first century in both medicine and law, preventing the professions from reaping the benefits of outside investment. Legislative*

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*solutions have largely failed; U.S. jurisdictions universally prohibit corporate practice in the legal field, and a significant (and resurging) minority of states continues to apply corporate practice restrictions in medicine. In both fields, the possibility of reaching a political solution is hindered by protectionist impulses.*

*This Article therefore proposes a challenge to the doctrine on constitutional grounds. The constitutional case in favor of private ordering is not an easy one to make: current constitutional doctrine defers heavily to state choices in the economic sphere, even when those choices lack any empirical evidence of rationality. Nevertheless, there has been an effort in recent years to move toward a more evidence-based version of rational basis review in economic cases. In addition, the Supreme Court's recent jurisprudence on commercial speech buttresses the case for permitting external investment. In a pair of recent decisions, the Court has demonstrated an increased focus on the public's interest in obtaining free and unfettered information. The corporate practice doctrine therefore presents an excellent test case for a more robust review of professional regulation, whether under a rational basis standard or under a more heightened level of scrutiny.*

#### INTRODUCTION

The corporate practice doctrine prohibits outside investment in professional services.<sup>1</sup> It prevents nonlawyers from investing in the provision of legal services and likewise prevents nondoctors from investing in the provision of medical care.<sup>2</sup> Prohibiting such investment protects the licensed professionals against outside competition. But does the prohibition also protect the clients and patients of those licensed professionals by raising the quality of professional advice?

The quality argument rests on two fundamental assumptions: first, that outside investment reduces independence and therefore lowers the quality of professional advice; and second, that getting bad professional advice is worse than getting no professional advice at all. If either one of these assumptions proves false, then the quality-based rationale for banning outside investment crumbles, leaving only a protectionist rationale. Both assumptions have been heavily criticized by scholars, policymakers, and others,<sup>3</sup> and few onlookers

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<sup>1</sup> Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 205 (2000).

<sup>2</sup> *Id.* at 204-05; George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 800 (2001) ("By denying to non-lawyers the opportunity to buy and resell the services of lawyers, granting to lawyers the exclusive right to earn a profit from investment in the legal services industry, and denying to non-lawyers the opportunity to compete for management positions in for-profit law firms, the ownership restriction serves to 'keep the law business all in the family.'").

<sup>3</sup> *See, e.g.*, Giesel, *supra* note 1, at 205 ("The *Model Rules* protect more directly against

have attempted to defend the corporate practice doctrine on either normative or pragmatic grounds.<sup>4</sup>

This Article examines why, in spite of such criticism, the doctrine still remains alive in the twenty-first century, preventing the professions from benefiting from outside investment, and why it is now more important than ever to allow private ordering in the market for professional services.<sup>5</sup> In particular, this Article argues that current trends in technology, information availability, and globalization counter the existence of even a hypothetical benefit from the doctrine.<sup>6</sup> This Article then turns to the question of how to eradicate the doctrine – an issue not easily solved, as the doctrine is embedded in competing statutory and common law sources, as well as in the ethical rules governing the legal profession.<sup>7</sup> Economic protectionism, misguided

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the evils feared if corporations can practice law via attorneys than does the ‘hocus pocus’ of the corporate practice of law doctrine.”); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, INT’L REV. L. & ECON. (forthcoming 2014) (manuscript at 2), available at <http://ssrn.com/abstract=2333990> (“[A]s a matter of economic policy, it is essential that the legal profession abandon the prohibition on the corporate practice of law.”); Harris & Foran, *supra* note 2, at 800; Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 HEALTH MATRIX 243, 244 (2004) (“The corporate practice of medicine doctrine is a relic; a physician-centric guild doctrine that is at best misplaced, and at worst obstructive, in the present incarnation of the American health care system.”); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6 (2012) (arguing that bar regulators disregard the potential benefit of corporate legal practice in the interests of lawyer independence, reputation, and client security, while also ignoring the other mechanisms that provide protection for those concerns).

<sup>4</sup> Two articles have defended corporate practice restrictions in law. See Paul R. Koppel, *Under Siege from Within and Without: Why Model Rule 5.4 Is Vital to the Continued Existence of the American Legal Profession*, 14 GEO. J. LEGAL ETHICS 687, 698 (2001) (“At heart, Model Rule 5.4 serves to protect clients from individuals not qualified or licensed to practice law. The practice of law is an extremely specialized vocation requiring particularized skills, professional ethics, and an independence of judgment. All these prerequisites are needed to ensure that clients receive the best legal representation possible.”); L. Harold Levinson, *Independent Law Firms That Practice Law Only: Society’s Need, the Legal Profession’s Responsibility*, 51 OHIO ST. L.J. 229, 262 (1990) (“We should be seriously concerned about the pending proposals by some lawyers and accountants in this country, and by the advocates of multidisciplinary practices in Europe, to dilute or even abandon professional independence.”). Another article recommends strengthening the restrictions in medicine as a means of reducing conflicts of interest between insurers and medical professionals. Andre Hampton, *Resurrection of the Prohibition on the Corporate Practice of Medicine: Teaching Old Dogma New Tricks*, 66 U. CIN. L. REV. 489, 492 (1998) (arguing for the resurrection of the corporate practice doctrine in medicine).

<sup>5</sup> See *infra* Parts I & II.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See *infra* Part IV.

paternalism, and bureaucratic inertia all combine to resist easily abandoning the corporate practice doctrine.

This Article therefore recommends cutting off the prohibition on outside investment at the root by launching a constitutional challenge founded on due process and freedom of contract.<sup>8</sup> The constitutional case in favor of private ordering is not an easy one to make.<sup>9</sup> Current constitutional doctrine defers heavily to state choices in the economic sphere, even when those choices lack any empirical evidence of rationality.<sup>10</sup> Nonetheless, the pendulum may now be swinging back from its outer limit; commenters have urged courts to apply “a somewhat more vigorous version of rationality review in economic cases,” and there are signs that some are willing to do so, though such efforts remain controversial.<sup>11</sup> Furthermore, the Supreme Court’s recent jurisprudence on commercial speech may buttress the challenge to the prohibition on outside investment. In recent years, the Court has been increasingly willing to recognize the public’s interest in free and unfettered information.<sup>12</sup> The corporate practice doctrine therefore presents an excellent test case for a more robust review, whether under a rational basis standard or under a more heightened level of scrutiny, that defers to legitimate economic choices but

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<sup>8</sup> See *infra* Part IV.

<sup>9</sup> Judge Stephen Williams has persuasively argued that the structure of the Constitution “express[es] a preference for minimizing state interferences in private ordering,” and that a preference for private ordering can usefully play a “tie-breaker role” in statutory interpretation. Stephen F. Williams, *Background Norms in the Regulatory State*, 58 U. CHI. L. REV. 419, 433-34 (1991) (reviewing CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990)).

<sup>10</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (providing that deference to state legislative choice is appropriate whenever “there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”); see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 2* (2011) (“The Supreme Court withdrew constitutional protection for liberty of contract in the 1930s. Since then, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court’s liberty of contract decisions.”).

<sup>11</sup> Ernest A. Young, *Sorrell v. IMS Health and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903, 928-29 (2012) (describing how others that have pressed for the more vigorous review, but expressing personal nervousness about reviving *Lochner*); see also BERNSTEIN, *supra* note 10, at 125 (“The Progressive outlook on constitutional law and related matters—a combination of support for the growth of an administrative state dominated by experts insulated from both politics and the market, opposition to serious judicial review of the constitutionality of legislation, and indifference or hostility to ‘individualistic’ civil liberties and the rights of minorities—is now anachronistic and finds no comfortable ideological home in modern American politics.”); Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday’s Rationality Review Isn’t Enough*, 24 N. ILL. U. L. REV. 457, 458 (2004).

<sup>12</sup> See *infra* Part IV.B.

does not blindly give way to policies designed to “protect[] insiders against competition.”<sup>13</sup>

#### I. DEVELOPMENT OF THE CORPORATE PRACTICE DOCTRINE

The corporate practice doctrine is a pure restriction on the right to contract: it prohibits professionals from contracting for employment with entities organized to serve third parties, and prohibits nonprofessionals from contracting to provide capital in professional service firms.<sup>14</sup> The doctrine took root in the early part of the twentieth century, at a time when both the legal and medical professions were struggling to distinguish themselves from the “spirit of trade,”<sup>15</sup> and desired to reduce competition among members of the profession.<sup>16</sup> Occupational licensing became widespread between 1890 and 1910.<sup>17</sup> With a licensing scheme firmly in place, states then applied the corporate practice doctrine primarily in medicine and law: doctors, dentists, veterinarians, and lawyers have all been subject to the doctrine, and therefore forbidden to practice in corporations with outside ownership or with partners who were not also members of the same profession.<sup>18</sup>

The corporate practice doctrine rests on two primary grounds. The first is pure economic protectionism: avoiding competition and keeping economic returns for professionals alone.<sup>19</sup> The second ground is oriented, at least in

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<sup>13</sup> Sandefur, *supra* note 11, at 487.

<sup>14</sup> Hadfield, *supra* note 3 (manuscript at 45) (“The doctrine . . . prohibits lawyers from being employed by entities that provide legal services to others: this is a restriction on the form of contract that a lawyer can enter into with others.”).

<sup>15</sup> Am. Med. Ass’n, 94 F.T.C. 701, 898 (1979) (quoting an unnamed 1890 report to the AMA House of Delegates); *see also* Jeffrey F. Chase-Lubitz, Note, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 VAND. L. REV. 445, 461 (1987) (“In 1934 the House of Delegates added another ethical provision bearing on contract practice. Entitled ‘Direct Profits to Lay Groups,’ the provision condemned arrangements in which a lay entity directly profited from compensation received by a physician for providing medical services.”).

<sup>16</sup> *See* Chase-Lubitz, *supra* note 15, at 455 (“A substantial segment of the medical profession harbored hostility toward forms of organizing medical practices and methods of paying for medical services that increased competition among independent physicians.”); Heather A. Miller, Note, *Don’t Just Check “Yes” or “No”: The Need for Broader Consideration of Outside Investment in the Law*, 2010 U. ILL. L. REV. 311, 312 (2010).

<sup>17</sup> Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 489 (1965) (“Laws to license doctors, plumbers, barbers, funeral directors, nurses, electricians, horseshoers, dentists, and the practitioners of many other occupations were debated, propounded and very often passed.”).

<sup>18</sup> *See, e.g.*, *Isles Wellness, Inc. v. Progressive N. Ins.*, 703 N.W.2d 513, 522 (Minn. 2005) (“[H]istorically the prohibition on corporate practice applies to the ‘learned professions’ and is not limited to medicine.”).

<sup>19</sup> Opposition to corporate practice arose in part because doctors “wanted to prevent the emergence of any intermediary or third party that might keep for itself the profits potentially

theory, toward client protection: defending professionals' independent judgment from outside pressure, and thereby protecting clients and patients from the risk of harmful legal or medical advice.<sup>20</sup> This Part explores how those competing goals gave rise to the doctrine and how the doctrine subsequently evolved over time in medicine and law.

#### A. *Medicine*

The corporate practice doctrine is in some ways a historical anachronism in the medical field – but it is nonetheless surprisingly resilient.<sup>21</sup> The doctrine arose in the states as part of a broader attempt to regulate professional services.<sup>22</sup> In 1934 the American Medical Association (AMA) added an ethical rule declaring it “unprofessional” for doctors to contract for salaried employment.<sup>23</sup> The AMA declared that such practice “is beneath the dignity of professional practice, is unfair competition with the profession at large, is harmful alike to the profession of medicine and the welfare of the people, and is against sound public policy.”<sup>24</sup>

The corporate practice doctrine gained legitimacy after it survived a constitutional challenge in the 1930s. The case challenging the doctrine arose when a dentist's license was revoked by the State of Colorado for accepting employment with a corporate dental practice.<sup>25</sup> The dentist appealed the

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available in the practice of medicine. . . . [T]he full return on physicians' labor had to go to physicians.” PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 215-16 (1982)); *see also* Chase-Lubitz, *supra* note 15, at 455 (describing the medical profession's hostility towards not only corporate practice, but also contract practice, clinics, and group practice).

<sup>20</sup> *E.g.*, *Cal. Med. Ass'n, Inc. v. Regents of Univ. of Cal.*, 94 Cal. Rptr. 2d 194, 199 (Cal. Ct. App. 2000) (stating that the doctrine was “adopted to protect the professional independence of physicians and to avoid the divided loyalty inherent in the relationship of a physician employee to a lay employer”).

<sup>21</sup> Andrew Fichter, *Owning a Piece of the Doc: State Law Restraints on Lay Ownership of Healthcare Enterprises*, 39 *J. HEALTH L.* 1, 7 (2006) (“[T]he corporate practice doctrine and related impediments to lay ownership have proven remarkably resilient.”).

<sup>22</sup> *See* Friedman, *supra* note 17, at 489 (stating that professional regulation became widespread between 1890 and 1910).

<sup>23</sup> *Am. Med. Ass'n.*, 94 F.T.C. 701, 899 (1979) (“It is unprofessional for a physician to dispose of his professional attainments or services to any lay body, organization, group or individual, by whatever name called, or however organized, under terms or conditions which permit a direct profit from the fees, salary or compensation received to accrue to the lay body or individual employing him.” (internal quotation marks omitted) (quoting *Medical Ethics and New Methods of Practice*, 103 *JAMA* 263, 263-64 (1934))).

<sup>24</sup> *Id.*

<sup>25</sup> *State Bd. of Dental Exam'rs v. Miller*, 8 P.2d 699, 703-04 (Colo. 1932), *appeal denied*, *Miller v. State Bd. of Dental Exam'rs of Colo.*, 287 U.S. 563 (1932) (holding that revoking a dentist's license for accepting employment in a corporate practice was not an abuse of discretion and was supported by the evidence).

revocation on due process grounds, but the Supreme Court disagreed that the doctrine raised a constitutional issue and therefore denied the appeal.<sup>26</sup> Three years later, the Court stated explicitly that states could reasonably prohibit professionals from accepting employment in corporate practices.<sup>27</sup> Perhaps not coincidentally, the Court's decision to uphold the corporate practice doctrine went along with upholding prohibitions on advertising for professional services,<sup>28</sup> and it occurred just as the Court was more generally abandoning the liberty of contract doctrine.<sup>29</sup>

Over the next eight decades, the corporate practice doctrine weakened in the medical field. In 1979, the Federal Trade Commission (FTC) launched an antitrust challenge to the AMA's ethical rule against corporate practice.<sup>30</sup> The FTC ordered the association "to cease and desist from promulgating, implementing and enforcing restraints on advertising, solicitation and contract practices by physicians and on the contractual arrangements between physicians and non-physicians," though it made an exception to allow the restraint of "false or deceptive" activities.<sup>31</sup> The order was appealed; ultimately, the United States Court of Appeals for the Second Circuit agreed that the provision was an unlawful restraint of trade, and it upheld a modified version of the order, requiring the Association to refrain from "interfering with the consideration offered or provided to any physician in any contract with any entity that offers physicians' services to the public."<sup>32</sup> The Second Circuit's judgment was affirmed by an equally divided Supreme Court in 1982.<sup>33</sup>

The elimination of the AMA's previous restriction did not mean the end of the corporate practice doctrine in medicine, though it may have looked that way in the early 1980s.<sup>34</sup> Nevertheless, a number of states still independently prohibited physicians from contracting for employment with for-profit

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<sup>26</sup> *Miller v. State Bd. of Dental Exam'rs of Colo.*, 287 U.S. 563 (1932) (denying appeal for want of a federal question).

<sup>27</sup> *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) ("We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals . . .") (citing *Miller v. State Bd. of Dental Exam'rs*, 8 P.2d 699, *appeal denied*, *Miller v. State Bd. of Dental Exam'rs of Colo.*, 287 U.S. 563).

<sup>28</sup> *Semler*, 294 U.S. at 611-12 ("We do not doubt the authority of the State to estimate the baleful effects of such [advertising] methods and to put a stop to them.").

<sup>29</sup> BERNSTEIN, *supra* note 10, at 108 ("[T]he Court's abandonment of the liberty of contract doctrine began in the mid-1930s.").

<sup>30</sup> *Am. Med. Ass'n v. FTC*, 638 F.2d 443, 447 (2d Cir. 1980), *aff'd*, 455 U.S. 676 (1982).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 453 (excepting from the provision "professional peer review of fee practices of physicians").

<sup>33</sup> *Am. Med. Ass'n v. FTC*, 455 U.S. 676 (1982).

<sup>34</sup> Arnold J. Rosoff, *The Corporate Practice of Medicine Doctrine: Has Its Time Passed?*, 12 HEALTH L. DIG. 1, 3-4 (Supp. Dec. 1984) (calling corporate practice restrictions "'legal landmines,' remnants of an old and nearly forgotten war, half-buried on a field fast being built up with new forms of health care organizations").

corporations.<sup>35</sup> Because these rules were adopted by state legislatures, they were exempt from antitrust challenges under the state action doctrine.<sup>36</sup> Some state laws were preempted by federal legislation authorizing health management organizations (HMOs).<sup>37</sup> Other state laws remained on the books, though largely ignored and unenforced for a number of years.<sup>38</sup> Nevertheless, a significant minority of states continued actively enforcing corporate practice restrictions,<sup>39</sup> and, in recent years, some states have begun dusting off long-ignored common law restrictions on corporate practice.<sup>40</sup> In addition, the

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<sup>35</sup> *Isles Wellness, Inc. v. Progressive N. Ins.*, 703 N.W.2d 513, 522 (Minn. 2005); D. Cameron Dobbins, *Survey of State Laws Relating to the Corporate Practice of Medicine*, 9 HEALTH LAW. 18, 18 (1996).

<sup>36</sup> *Cal. Ass'n of Dispensing Opticians v. Pearle Vision Ctr., Inc.*, 191 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983) (rejecting Pearle Vision Center's antitrust challenge to California's corporate practice restriction, as the regulations "are activities required by the state acting in its sovereign capacity," and therefore "beyond the reach of the Sherman Anti-Trust Laws").

<sup>37</sup> Sabra K. Engelbrecht, Comment, *The Importance of Clarifying North Carolina's Corporate Practice of Medicine Doctrine*, 33 WAKE FOREST L. REV. 1093, 1102-03 (1998) ("Although the 1973 legislation did not explicitly preempt state corporate practice of medicine prohibitions, 1988 amendments to the HMO Act preempted all state laws that impose requirements that inhibit the formation of HMOs. . . . Accordingly, almost all of the states have exempted HMOs from the prohibition against the corporate practice of medicine." (footnotes omitted)).

<sup>38</sup> Edward B. Hirshfeld & Gail H. Thomason, *Medical Necessity Determinations: The Need for a New Legal Structure*, 6 HEALTH MATRIX 3, 47 (1996) ("While the majority of states retain a bar on the corporate practice of medicine, corporate interests have managed to either find a way around, through, or ignored the intent behind the corporate bar." (footnote omitted)); Maxwell J. Mehlman, *Professional Power and the Standard of Care in Medicine*, 44 ARIZ. ST. L.J. 1165, 1166 n.2 (2012) ("By the end of the century, most states were ignoring the laws, had repealed them, or had enacted laws enabling managed care plans to structure themselves as corporations. The advent of large private and governmental health insurance programs and their attempts to rein in costs ultimately defeated efforts by organized medicine to resist external controls over physician behavior." (citations omitted)).

<sup>39</sup> One recent study found that ten states actively enforced a prohibition on doctors from accepting direct employment with for-profit hospitals as of 2012; four of those ten states also restricted employment by nonprofit hospitals. Eric Lammers, *The Effect of Hospital-Physician Integration on Health Information Technology Adoption*, 22 HEALTH ECON. 1215, 1218 (2013) (showing that Arkansas, California, Michigan, Nevada, North Carolina, Ohio, South Carolina, Texas, Washington, and West Virginia are the states that limit employment with hospitals in some manner).

<sup>40</sup> *Isles Wellness*, 703 N.W.2d at 524 (reaffirming a 1933 case, *Granger v. Adson*, 250 N.W. 722 (Minn. 1933), adopting a common law prohibition on the corporate practice of medicine); Huberfeld, *supra* note 3, at 253 ("While the doctrine may seem too outdated to be enforced, the statutes and regulations that form the doctrine remain in current statutory compilations and, like a sleeping dragon, need only a slight stimulus to be set into action.").

passage of the Patient Protection and Affordable Care Act reignited the discussion of corporate practice restrictions.<sup>41</sup>

B. *Law*

The corporate practice doctrine has remained much more robust in law than in medicine. The legal profession originally followed a similar path as the medical profession, by first introducing licensing rules and then by restricting licensed professionals' ability to contract for employment with corporate entities. The American Bar Association (ABA), like the AMA, was instrumental in adding corporate practice restrictions to the ethics rules: the ABA adopted supplemental ethical rules against nonlawyer investment in law firms in 1928,<sup>42</sup> very close to the time that the AMA adopted its parallel rules for doctors.<sup>43</sup> These supplemental ethics canons provided that the "professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer" and further specified that a lawyer who works in-house with a business or organization "should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."<sup>44</sup> The supplemental canons even prohibited attorneys from serving as advice columnists for newspapers, specifically stating that while a "lawyer may with propriety write articles for publications in which he gives information upon the law," that attorney "should not accept employment from such publications to advise inquirers in respect to their individual rights."<sup>45</sup>

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<sup>41</sup> See Craig A. Conway, *Accountable Care Organizations Versus Texas' Corporate Practice of Medicine Doctrine*, HEALTH L. PERSP. 3-5 (Oct. 19, 2010), <http://www.law.uh.edu/healthlaw/perspectives/2010/%28CC%29%20ACO.pdf> (observing that the Act's establishment of "Accountable Care Organizations" would likely conflict with Texas's statutory prohibition on the corporate practice of medicine, and suggesting that the state statute be amended to accommodate the new practice form (but cautioning that physicians may be unwilling to accept the lower billing rates and heightened control offered by such organizations)).

<sup>42</sup> Report, *Special Committee on Supplements to the Canons of Professional Ethics*, 51 ANN. REP. A.B.A. 495, 497 (1928) ("The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."); *Striking and Successful Celebration of Association's Semi-Centennial*, 14 A.B.A. J. 447, 479-80 (1928) (observing that the proposals were officially adopted in at the ABA annual meeting in 1928); Bernard Sharfman, Note, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 GEO. J. LEGAL ETHICS 477, 480 (2000).

<sup>43</sup> *Medical Ethics and New Methods of Practice*, 103 JAMA 263, 263-64 (1934).

<sup>44</sup> Report, *supra* note 42, at 497 ("The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer.").

<sup>45</sup> *Id.*

These restrictions on attorney employment paralleled the restrictions on physician employment.<sup>46</sup> Unlike the AMA, however, the ABA did not regulate lawyers' conduct directly; instead, the highest court of each state was charged with adopting ethical rules to govern the practice of law, though in actual practice those rules tended to largely mirror the ABA's model.<sup>47</sup> The difference in adoption procedures meant that the state action exception to antitrust liability played a more robust role. The FTC did challenge certain ABA restrictions, including an overbroad definition of the "practice of law."<sup>48</sup> Such challenges were ultimately left to the individual states, however, and there was no effective analog in the legal profession to the FTC's challenge to the AMA rule – although the FTC did urge states to drop the corporate practice restrictions, it had no power to compel that action.<sup>49</sup> As a result, while the AMA dropped its ethical restriction on corporate practice after losing the FTC's 1979 lawsuit, the ABA did not drop its rule; in fact, its restriction on nonlawyer investment remains part of the current ABA Model Rules of Professional Conduct.<sup>50</sup>

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<sup>46</sup> See *supra* Part I.A.

<sup>47</sup> Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 620-21 (1989) ("The state action exemption has been held to shelter lawyer rules of professional conduct when they have been adopted by a state supreme court. Thus, state court action adopting Rule 5.4, or its predecessors under the older Code, would be immune from prosecution or private action under the antitrust laws." (footnote omitted)); James Wilber, *Ready or Not, Here They Come*, LEGAL MGMT., Sept./Oct. 1999, at 16, 16 ("Most states now have rules of professional conduct that closely mirror the ABA's model rules . . .").

<sup>48</sup> Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1707-08 (2008) ("After being told by the FTC, the Department of Justice, and its own section on Antitrust Law that the definition was too broad, the task force recommended and the ABA adopted a resolution that allowed an arguably broader definition but left the matter to the profession in each state." (footnote omitted)).

<sup>49</sup> Andrews, *supra* note 47, at 620 ("[W]hile the existing rules governing the relations between lawyers and nonlawyers are incompatible with federal antitrust policy, they have escaped enforcement because of the state action defense."); Harris & Foran, *supra* note 2, at 800 (observing that the FTC urged the Supreme Court of Kentucky not to adopt a rule against outside investment, as it would "prevent the use of potentially efficient business formats" and otherwise "limit potentially procompetitive professional ventures" (citing Letter from Jeffrey I. Zuckerman, Dir., FTC Bureau of Competition, to Robert F. Stephen, Chief Justice, Supreme Court of Ky. 5-6 (June 8, 1987))).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2010) (forbidding a lawyer from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit," if, among other things, "a nonlawyer owns any interest therein"); *id.* cmt. 2 (stating that the rule "expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another").

The states have likewise been reluctant to abandon the corporate practice doctrine for legal services. In 1981, an ABA commission (chaired by attorney Robert Kutak, and formed for the purpose of recommending revisions to the Model Rules) returned a recommendation in favor of allowing nonlawyer investment in legal services, as long as other requisites of independence and confidentiality were maintained.<sup>51</sup> The proposal died after opponents pointed out that “the proposed rule would open up the legal profession to ownership by large retail institutions such as Sears or the large accounting firms, creating competition with traditional law firms”; afterward, these objections to nonlawyer investment became known as the “Fear of Sears,” and were influential in defeating the proposal.<sup>52</sup>

Although states need not follow the ABA Model Rules, there have been few state initiatives to change the rules on nonlawyer investment. The District of Columbia has the most generous investment provision of any U.S. jurisdiction; it allows “an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients” to become a partner in a firm that “has as its sole purpose providing legal services to clients” as long as the nonlawyer participant(s) “undertake to abide by these Rules of Professional Conduct.”<sup>53</sup> This limited exception would allow an accountant to become a partner at a tax law firm; it would not, however, allow Sears or WalMart to hire attorneys to provide legal services to store customers, and it would not allow the passive contribution of capital from outside investors.<sup>54</sup> In 2011, both the ABA and the State of New York examined proposals to adopt limited rules similar to the D.C. rule,<sup>55</sup> due to opposition from the bar, however, both proposals went down in defeat.<sup>56</sup>

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<sup>51</sup> Sharfman, *supra* note 42, at 481 (“The Commission’s 1981 draft of *Model Rule 5.4* recommended that investment by nonlawyers be permitted so long as there was no interference with the lawyer’s professional independent judgment and attorney-client relationship, the rule on confidentiality of information was retained, the rules on solicitation were not violated, and the fees charged were reasonable.”).

<sup>52</sup> *Id.* at 481; see also Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 4 (1998) (“For nearly seventy years, the profession’s Fear of Sears has doomed any proposal that would have allowed a nonlawyer even a passive investment in a law firm.”).

<sup>53</sup> D.C. RULES OF PROF’L CONDUCT R. 5.4(b) (2007).

<sup>54</sup> *Id.* cmt. 8.

<sup>55</sup> Tyler Cobb, Note, *Have Your Cake and Eat It Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 787 (2012).

<sup>56</sup> N.Y. STATE BAR ASS’N, REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP 50-54 (2012); Hadfield, *supra* note 3 (manuscript at 2) (observing that the ABA 20/20 proposal “was killed by the Commission four months after the circulation of a discussion draft, never making it to the floor of the House of Delegates,” and the New York State Bar “released a report explaining their opposition to the proposal”); Press Release, ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), <http://www.americanbar.org>.

In spite of the fact that the ABA and the states have been reluctant to change the investment rules, they may well find change foisted upon them. Other countries – most notably Australia and England – have liberalized their investment rules and allowed outside investment.<sup>57</sup> As discussed more in Part III, U.S. jurisdictions are facing significant competitive pressure on the international front from jurisdictions that have already liberalized restrictions on professional practice.<sup>58</sup>

In addition to pressure from these international sources, domestic legal service providers (though still a minority of the practicing bar)<sup>59</sup> are also pressing for change, and new lawsuits are challenging the investment restrictions. An earlier constitutional challenge to the rules against outside investment was rejected by the Seventh Circuit in 1992.<sup>60</sup> Now, however, the challenges are revitalized. The law firm of Jacoby and Meyers, LLP has been at the vanguard of the new challenges to the corporate practice doctrine within the United States; it has sued in New York, New Jersey, and Connecticut, arguing that the ban on investment violates the firm's constitutional rights.<sup>61</sup> These suits are still in their infancy, with the underlying substantive legal arguments yet to be fleshed out.<sup>62</sup> Nevertheless, the suits may well have traction; after a federal district court in New York originally dismissed the

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org/content/dam/aba/administrative/ethics\_2020/20120416\_news\_release\_re\_nonlawyer\_ownership\_law\_firms.authcheckdam.pdf.

<sup>57</sup> See *infra* Part III.B.

<sup>58</sup> Daniel Vázquez Albert, *Competition Law and Professional Practice*, 11 ILSA J. INT'L & COMP. L. 555, 617-18 (2005) ("This circumstance has turned the countries with flexible regulations into exporters of professional services and those with rigorous regulations into importers of such services."); Justin D. Petzold, Comment, *Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?*, 2009 WIS. L. REV. 67, 101 ("Motivation for reform via competitive pressure in the United States must emerge via an international front.").

<sup>59</sup> Hadfield, *supra* note 3 (manuscript at 3-4) (commenting that state bars overwhelmingly supported maintaining corporate practice restrictions).

<sup>60</sup> *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1385 (7th Cir. 1992) (concluding that the rule against outside investment satisfied rational basis review because it is "designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach").

<sup>61</sup> Amended Complaint for Declaratory and Injunctive Relief at 5, *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments, Appellate Division of the Supreme Court of the State of New York*, No. CV-11-3387 (S.D.N.Y. 2011), 2011 WL 7102185 ("Rule 5.4 substantially burdens the fundamental right of legal service providers to associate with others and to represent clients for purposes of accessing the courts and asserting legal entitlements. There are no compelling or rational grounds for preventing lawyers from raising capital in the same manner as any other business; and there are alternative regulatory means to achieve any putative legitimate state purposes that Rule 5.4 otherwise seeks to advance."); Hadfield, *supra* note 3 (manuscript at 18).

<sup>62</sup> Hadfield, *supra* note 3 (manuscript at 18) (stating that the New Jersey and Connecticut courts have yet to rule on the merits).

New York case for lack of standing, the Second Circuit reinstated the case and remanded for consideration on the merits.<sup>63</sup>

C. *The Continuing Challenge of Corporate Practice Restrictions in Medicine and Law*

As discussed previously, the corporate practice doctrine has eroded more quickly in medicine than in law. In some states, corporate practice restrictions have been eliminated from the medical field entirely – a situation still unheard of in the legal field.<sup>64</sup> And even in states that continue to restrict the corporate practice of medicine, significant loopholes to the doctrine allow greater participation by organizations – in many states, for example, hospitals and their affiliates are allowed to employ physicians.<sup>65</sup> Other states will allow a broader range of business entities to employ physicians, as long as “the company does not exercise control over the physician’s independent medical judgment.”<sup>66</sup> Nevertheless, it would be incorrect to say that the doctrine is necessarily on the way out in medicine; while some states have continued to loosen restrictions, others have reaffirmed or tightened existing restrictions.<sup>67</sup>

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<sup>63</sup> *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments*, Appellate Division of the Supreme Court of the State of New York, 488 F. App’x 526, 527 (2d Cir. 2012) (remanding to allow *Jacoby & Meyers, LLP* to amend its complaint to challenge additional New York state laws so that the District Court could adequately address the constitutionality of those laws and Rule 5.4).

<sup>64</sup> Lofft et al., *Is a Hybrid Just What the Doctor Ordered? Evaluating the Potential Use of Alternative Company Structures by Healthcare Enterprises*, HEALTH LAW., Apr. 2013, at 9, 13 (“Some states have not historically prohibited CPOM, and a few have not provided meaningful guidance as to whether CPOM is prohibited (and whether any exceptions apply).” (footnote omitted)); *see also* 1992 Va. Op. Att’y Gen. 147, 150 (1992) (“[T]here is no court decision or statute in Virginia adopting the ‘corporate practice of medicine’ doctrine.”); *Health Care Alert: State Medical Board of Ohio Declares that Ohio Law Does Not Prohibit the Corporate Practice of Medicine*, VORYS, SATER, SEYMOUR & PEASE LLP (Apr. 4, 2012), [www.vorys.com/publications-589.html](http://www.vorys.com/publications-589.html) (“Ohio law does not prohibit an Ohio licensed physician from rendering medical services as an employee of a corporation or any other form of business entity.”).

<sup>65</sup> Lofft et al., *supra* note 64, at 13.

<sup>66</sup> *Id.* at 13 n.20 (citing 2001 Ala. Op. Att’y Gen. 89; Iowa Op. Att’y Gen. 91-7-1 (1991)).

<sup>67</sup> *Id.* at 13 (“A small number of states have in recent years reaffirmed their commitment to the CPOM doctrine.”); *see also* *Estate of Harper ex rel. Al-Hamim v. Denver Health & Hosp. Auth.*, 140 P.3d 273, 276 (Colo. App. 2006) (acknowledging that the Colorado legislature took action “to reinstate the corporate practice of medicine doctrine to the extent [a 2002 court decision] had created an exception to it”); *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 524 (Minn. 2005) (reaffirming restrictions on the corporate practice of medicine).

Thus, although state laws vary significantly, industry advisors point to four areas in which the corporate practice doctrine continues to exert influence over the medical profession:

1. Some states prohibit business entities from employing physicians to provide medical care.
2. Certain states require entities that provide medical services be owned and operated by licensed medical doctors.
3. Some states prohibit professional fee splitting between licensed medical professionals and non-licensed individuals or business entities.
4. The management fees stated within management services agreements must be set at fair market value.<sup>68</sup>

By and large, these restrictions are the same as the prohibitions on lawyers' practice found in the ABA Model Rules of Professional Conduct.<sup>69</sup> The first three restrictions are explicitly forbidden,<sup>70</sup> and the fourth is normally inapplicable only because law firms, unlike medical providers, rarely hire outside administrators – though parallel restrictions on marking up fees for nonlegal services would almost certainly require firms to limit such fees to fair market value if they did hire such administrators.<sup>71</sup>

Thus, the types of restrictions imposed by the corporate practice doctrine are strikingly similar in both law and medicine. The main difference is that these restrictions are more universal in law than in medicine. States have enacted a patchwork of exceptions and loopholes in the corporate practice of medicine, so that while each of these restrictions continues to carry force in some states, the doctrine does not operate consistently – in the field of medicine, different states impose different restrictions to different degrees. In law, however, the states are nearly uniform, with only the District of Columbia having allowed minor inroads into outside investment.<sup>72</sup> Nevertheless, because the doctrine operates similarly across the two professions, it is useful to consider the

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<sup>68</sup> Jennifer Brunkow, *3 Steps to Navigate Through the Corporate Practice of Medicine*, BECKER'S HOSP. REV. (Mar. 26, 2012), <http://www.beckershospitalreview.com/legal-regulatory-issues/3-steps-to-navigate-through-the-corporate-practice-of-medicine.html>.

<sup>69</sup> See *supra* Part I.B.

<sup>70</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

<sup>71</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (finding that attorneys are limited to charging "reasonable fees" for administrative services and that unless the client has agreed otherwise, "it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves"); Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts to Manage Legal Care*, 28 U. MEM. L. REV. 57, 68 (1997) ("As a general rule, attorneys should bear overhead costs rather than shifting them to their clients.").

<sup>72</sup> See *supra* notes 53-56.

professions together when examining the role of corporate practice restrictions in the modern era.

## II. THE CORPORATE PRACTICE DOCTRINE'S REGULATORY DISTORTION

Regulation is intended to counteract market failure.<sup>73</sup> Thus, economic regulation may be aimed at removing monopoly rents when competition is absent from the marketplace.<sup>74</sup> Regulation of professional services, by contrast, is intended – at least in theory<sup>75</sup> – to compensate for market failure arising from consumers' inability to monitor professional quality: if laypeople cannot competently evaluate the quality of professional service providers they hire,<sup>76</sup> then regulation may protect the public from suffering harm they could not have reasonably avoided.<sup>77</sup>

But while regulation at its best can correct for market failure, at its worst it can also induce the very market failure that it was intended to counteract.<sup>78</sup> Such regulatory distortion can occur when individuals capture the regulatory system and introduce anticompetitive rules for their own benefit.<sup>79</sup> Regulatory

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<sup>73</sup> Sidney A. Shapiro, *Keeping the Baby and Throwing out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L. REV. AM. U. 721, 725 (1995) (“According to economic theory, the purpose of regulation is to address market failures and thereby increase the efficiency of markets.” (citing STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982))).

<sup>74</sup> See James Alleman & Paul Rapport, *Optimal Pricing with Sunk Cost and Uncertainty*, in *THE ECONOMICS OF ONLINE MARKETS AND ICT NETWORKS* 143, 146 (Russel Cooper et al. eds., 2006).

<sup>75</sup> In practice, licensing laws have often served to extract monopoly rents. David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90 (1994); Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93, 93 (1961).

<sup>76</sup> Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1329 (1979) (“It is difficult, for example, for a patient to ascertain the exact quality of a physician's services or for a housewife (or househusband) to verify the radiation leakage of a microwave oven.”); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 806 (commenting that licensing schemes “assume a need to screen unqualified lawyers in order to prevent the development of a ‘lemons’ market in which consumers do not know whom to trust and therefore distrust lawyers generally”).

<sup>77</sup> *Crowe v. Tull*, 126 P.3d 196, 207 (Colo. 2006) (“The primary purpose of lawyer regulation proceedings is to protect the public, not to punish an offending lawyer.”); *Bird v. Mo. Bd. of Architects, Prof'l Eng'rs, Prof'l Land Surveyors & Landscape Architects*, 259 S.W.3d 516, 523 (Mo. 2008) (“While some financial protection of licensees may be an effect of professional regulation, the public's protection—not the licensees'—is the purpose of professional regulation.”).

<sup>78</sup> BREYER, *supra* note 73, at 194-95 (commenting that “classical regulation can cause various sorts of anticompetitive harm,” including raising barriers to entry, raising prices, and protecting inefficient firms).

<sup>79</sup> Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167,

distortion can also occur even with the best of intentions if regulators misunderstand the relevant facts and circumstances underlying the regulated system.<sup>80</sup> In such cases, regulators may misdiagnose the market failure they seek to correct, or they may correctly diagnose the problem but apply the wrong set of tools to fix the problem.<sup>81</sup>

The corporate practice doctrine creates all three types of regulatory distortion. On the legal side, there is no question that attorney self-regulation gives rise to some amount of self-interested rulemaking – and that, in particular, one of the motivations for preserving corporate practice restrictions was to protect against competition.<sup>82</sup> Likewise, physicians have rallied in favor of the corporate practice doctrine in medicine.<sup>83</sup> But the larger regulatory distortions are the ones that are unintentional: Even if the doctrine were adopted with the best of intentions for public protection, it would still reduce access to medical and legal services without correspondingly increasing the quality of professional care.

There is significant evidence that corporate practice restrictions reduce access to professional services.<sup>84</sup> This reduction is not surprising; prohibiting outside investment in professional services denies professional service providers the resources they need in order to find and serve their clientele.<sup>85</sup> This effect is especially pronounced at the lower end of the market, where outside investment could create economies of scale that would bring the cost of professional services down to a level where more people could afford to enter the market.<sup>86</sup>

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1180 (2003) (“In general, small, concentrated groups with a lot at stake per capita regularly triumph over diffuse, large groups with little individual stake, even though the aggregate cost to the large group is considerable and often greater than the gain to the small group.”).

<sup>80</sup> F.A. Hayek, *The Use of Knowledge in Society*, 4-35 AM. ECON. REV. 519, 530 (1945) (discussing the economist’s error “to assume all the knowledge to be given to a single mind in the same manner in which we assume it to be given to us as the explaining economist”).

<sup>81</sup> BREYER, *supra* note 73, at 194 (discussing the importance of identifying “areas where the wrong regulatory tools are likely being used”).

<sup>82</sup> See Hadfield, *supra* note 3 (manuscript at 3) (explaining how a New York proposal to allow nonlawyer ownership of law firms failed after a survey of state lawyers encountered seventy-eight percent opposition).

<sup>83</sup> ALLEGRA KIM, CAL. RESEARCH BUREAU, *THE CORPORATE PRACTICE OF MEDICINE DOCTRINE 1* (2007) (“With the aid of state legislatures and the courts, physicians seeking to promote and protect their profession and autonomy succeeded in prohibiting the CPM.”).

<sup>84</sup> See Hadfield, *supra* note 3 (manuscript at 1-2); Harris & Foran, *supra* note 2, at 800 (“The legal services regulatory scheme and its various prohibitions thus play a prominent role in ensuring that the price of participation in the legal services market remains too high for most Americans.”).

<sup>85</sup> Hadfield, *supra* note 48, at 1723 (“Professional regulation of legal markets significantly restricts the capacity for scaling up new legal ideas by limiting the potential to exploit economies of scale and scope.”).

<sup>86</sup> *Id.*; Hadfield, *supra* note 3 (manuscript at 5) (“The problem is not financing options

The corporate form itself is valuable precisely for its ability to offer a choice of raising capital either through debt financing or by offering ownership shares.<sup>87</sup> Like other entrepreneurs and innovators, professional service providers need sufficient capital to be able to reach potential clients in need of their services. And in fact, professional service providers may need more capital than traditional businesses. There is no reason to believe that attorneys and physicians are usually good – or even mediocre – businesspeople; these are very different skill sets, and, as others have pointed out, “an inventive mind is rarely accompanied by the skill necessary to transform a novel thought into the tangible invention and produce it for the market.”<sup>88</sup> Lawyers and doctors have dedicated years of education to develop a very specialized expertise. Only in rare instances, however, does their expertise encompass either marketing skill or administrative ability. Capital – including economic, intellectual, and social capital – is needed to bridge the gap between these professional service providers and their markets.<sup>89</sup>

The inefficiencies created by the corporate practice doctrine can be easily seen in the current market for legal services. The market currently contains large numbers of unemployed attorneys willing to work for low pay<sup>90</sup> coexisting with a large population of individuals who need, but cannot afford, legal services.<sup>91</sup> In an efficient market, the attorneys looking for work would be hired by those who have unmet legal needs. Differences in price requirements (what the client would be willing to pay, and what the attorney would be willing to accept) are not the primary driver of inefficiency; in spite of the fact that attorneys have been applying in droves for unpaid internships and low-paying positions,<sup>92</sup> a typical client cannot find an attorney willing to

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available to existing law firms, which do indeed seem to be surviving just fine without equity participation by nonlawyers.”).

<sup>87</sup> Andrew Beckerman-Rodau, *Selecting a Business Entity for a Small Business: Non-Tax Considerations*, 93 DICK. L. REV. 519, 539 (1989).

<sup>88</sup> *Jones v. Ulrich*, 95 N.E.2d 113, 118 (Ill. App. Ct. 1950).

<sup>89</sup> Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 149 (2011) (describing four forms of capital – economic, intellectual, social, and symbolic – and observing that intellectual capital includes “specialized knowledge and competence in the field,” and social capital includes “access to stakeholders and decisionmakers”).

<sup>90</sup> For example, a Boston firm offering \$10,000 a year for a full-time attorney received thirty-two applications for the job. Martha Neil, *Boston Law Firm Got 32 Applicants for Attorney Job Paying \$10,000 a Year, Partner Says*, A.B.A. J. (May 31, 2012, 4:35 PM), [http://www.abajournal.com/news/article/boston\\_law\\_firm\\_got\\_32\\_applicants\\_for\\_attorney\\_job\\_paying\\_10000\\_a\\_year\\_part](http://www.abajournal.com/news/article/boston_law_firm_got_32_applicants_for_attorney_job_paying_10000_a_year_part).

<sup>91</sup> Hadfield, *supra* note 3 (manuscript at 10) (“Conventional legal services are simply beyond the means of most Americans.”); Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 84 (2012).

<sup>92</sup> Alana Semuels, *Unpaid Internships Gain Popularity Among the Jobless*, L.A. TIMES

accept less than \$150 an hour – a rate that is flatly unaffordable even for most middle class individuals.<sup>93</sup>

Instead, the mismatch appears to arise from difficulties in maintaining overhead, finding and reaching the potential client base, and adopting an economy of scale sufficient to sustain the legal work – all things that are made more difficult under the current regulatory regime.<sup>94</sup> Thus, a single attorney who “hangs a shingle” may have a difficult time making a living.<sup>95</sup> The attorney may not know how to market his or her services or how best to reach those who might have unmet legal needs. Even if the attorney finds a paying client or two, it is unlikely that the attorney has sufficient cash reserves to cover the downtime between clients. The attorney, like any other entrepreneur, needs sufficient capital to be able to reach potential clients in need of legal services. Having sufficient capital also provides benefits to the clients – thus, for example, many solo practitioners cannot afford malpractice insurance and are largely judgment proof as individuals, creating a risk for clients.<sup>96</sup> Allowing corporate entities to provide legal services largely eliminates that risk, as such entities would have sufficient capital either to purchase insurance or to self-insure.<sup>97</sup>

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(Mar. 14, 2011), <http://articles.latimes.com/2011/mar/14/business/la-fi-old-interns-20110315>; Liza Dee & Cory Weinberg, *In Dim Job Market, Law School Pays More Graduates to Work*, GW HATCHET (Feb. 7, 2013), <http://www.gwhatchet.com/2013/02/07/in-dim-job-market-law-school-pays-more-graduates-to-work>.

<sup>93</sup> Robertson, *supra* note 91, at 79 (explaining that most parties without legal representation in civil actions do not qualify for legal aid and “often cannot afford the cost of an attorney, which would likely run \$150 per hour or more”); Debra Cassens Weiss, *Middle-Class Dilemma: Can’t Afford Lawyers, Can’t Qualify for Legal Aid*, A.B.A. J. (July 22, 2010, 8:36 AM), [http://www.abajournal.com/news/article/middle-class\\_dilemma\\_cant\\_afford\\_lawyers\\_cant\\_qualify\\_for\\_legal\\_aid](http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid).

<sup>94</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 154 (2010) (“[T]he extreme approach to unauthorized practice of law in the United States drastically curtails the potential for ordinary folks to obtain assistance with their law-related needs and problems.”).

<sup>95</sup> See, e.g., Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 *MICH. ST. L. REV.* 415, 482-83 (acknowledging that “solo and small firm lawyers” who lack the capital to adjust to the changing legal market may be harmed by competition from corporate competitors, but that “nonlawyer-corporate ownership will bring needed capital and incentives to develop alternative and creative business models for delivering legal services at prices much more in line with the financial realities of middle- and lower-income clients”).

<sup>96</sup> Steven K. Berenson, *A Cloak for the Bare: In Support of Allowing Prospective Malpractice Liability Waivers in Certain Pro Bono Cases*, 29 *J. LEGAL PROF.* 1, 26 (2005) (“[I]t seems probable that small firm and solo practitioners are more likely to ‘go bare,’ that is, practice without malpractice insurance coverage, than their colleagues in larger firms.”).

<sup>97</sup> *Id.* (“Medium- and large-size firms are more likely to have the resources necessary to

Eliminating the corporate practice restrictions could help connect willing buyers and willing sellers.<sup>98</sup> An existing corporation might hire attorneys to provide affordable legal services to individual clients; some have speculated that WalMart could integrate legal services into store locations that already offer banking and optometry services in many areas, or that Google could expand its technological empire into computer-assisted legal services.<sup>99</sup> In medicine, where there has been a greater move away from corporate practice restrictions, it has been easier to measure the doctrine's effect on access to care; experience has shown that allowing physicians to practice in "efficient and economical" business forms improves access to medical care for individuals, especially in rural or remote areas where the fixed costs of practice may not allow a single doctor's practice to scale to an efficient level.<sup>100</sup>

With regard to legal services in particular, some have questioned whether there is truly an untapped market of people willing and able to pay for legal services.<sup>101</sup> It is certainly true that for the most destitute, lower prices may matter less than access to publicly funded services (though there is still unmet need even in the population currently eligible for subsidized services).<sup>102</sup> For

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obtain malpractice insurance coverage. On the other hand, a greater percentage of small-firm and solo practitioners may lack the resources necessary to obtain adequate coverage.").

<sup>98</sup> Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 268 (1985) ("Salaried lawyers, often younger ones, constitute another group who lose by virtue of rules like 5.4. Because only other lawyers may hire them to provide legal services to third persons for a profit, the number of these jobs will be limited by the number of lawyers willing to create them. If the ban on lay participation were lifted, the number of these jobs likely would expand. Legal time can be a remunerative product bought wholesale and sold retail.").

<sup>99</sup> Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6 (2012) ("Corporations like Google and Wal-Mart know a great deal about the delivery of services, goods, and information to the mass public. These corporations and many others have the capacity to make significant financial outlays into innovative mechanisms for providing legal services and await a delayed return on that investment.").

<sup>100</sup> Michele Gustavson & Nick Taylor, *At Death's Door – Idaho's Corporate Practice of Medicine Doctrine*, 47 IDAHO L. REV. 479, 518 (2011) ("Physicians especially have a disincentive to practice in rural or remote areas, which inherently pose significant economic risks due to their size and disadvantaged status. Corporations are more qualified to shoulder the economic risks by hiring physicians full-time."); Conway, *supra* note 41, at 3 (summarizing arguments "that the doctrine acts as a barrier to address the growing shortage of physicians in rural areas of the state").

<sup>101</sup> Paul Campos, *Law and Economics*, LAW. GUNS & MONEY (Jan. 31, 2013), <http://www.lawyersgunsmoneyblog.com/2013/01/law-and-economics> ("The reason ordinary folk don't pay for legal services even when in theory they could benefit from them is exactly the same reason they don't pay for a lot of things they could in theory benefit from: because they don't have any money for those things after paying for more pressing needs . . .").

<sup>102</sup> Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 FORDHAM URB. L.J. 157, 213 (2010) ("[T]he Medicaid budget provides over

the middle class, however, affordability is essential to access<sup>103</sup> – and at the current time, the middle class is largely priced out of the traditional market.<sup>104</sup> Additionally, the rapid growth and expansion of low-cost technological alternatives like LegalZoom and LawPivot suggests that if the price of legal services were lowered, demand would indeed increase.<sup>105</sup> Thus, while lower prices would not solve the access-to-justice problem alone, they would nevertheless mitigate the problem, particularly for the middle class.<sup>106</sup>

### III. THE CHANGING PROFESSIONAL LANDSCAPE

As the previous Section argues, the corporate practice doctrine significantly limits access to professional advice by restricting the business forms in which professionals may practice. Given the negative effect on access, any client-oriented defense of the doctrine must therefore rely on two premises: first, that restricting access increases the quality of service rendered to those who remain in the market for professional care, and second, that those who are priced out of the market are better off with no access to professional service than they would be with access to the lower-quality services they might receive in an unrestricted professional marketplace.

Evidence from the states that have loosened restrictions on the corporate practice of medicine suggests that the first premise is false.<sup>107</sup> At least for routine services, the evidence suggests that allowing doctors to contract for employment with corporate entities increases access to care without diminishing the quality of that care.<sup>108</sup> A study of ophthalmologists found that there was no difference in quality between corporate practices and physician-owned practices, but that restricting corporate practice raised prices by five to thirteen percent.<sup>109</sup> Another study of dentists found that corporate practices actually provided higher levels of care for the most common services, though the study concluded that these corporate practices were not as good at

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\$4,500 per eligible patient, while civil legal aid only has \$20 per eligible client.”).

<sup>103</sup> The Supreme Court made this point when it struck down attorney advertising restrictions. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370 (1977) (“Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.”).

<sup>104</sup> Robertson, *supra* note 91, at 78-80 (discussing how less than half of middle-class families with legal needs can afford to go to court and hire legal representation); Hadfield, *supra* note 3 (manuscript at 10) (“Conventional legal services are simply beyond the means of most Americans.”).

<sup>105</sup> See Hadfield, *supra* note 3 (manuscript at 22-23).

<sup>106</sup> See Robertson, *supra* note 91, at 79.

<sup>107</sup> KIM, *supra* note 83, at 22-23 (describing studies that reveal “no statistically significant relationship between commercial practice restrictions and higher quality” medical treatment).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 22.

providing complex services such as dental surgery.<sup>110</sup> Thus, both cost and quality are likely to be best served by eliminating restrictions on corporate practice.<sup>111</sup> Even if the benefits are limited to routine care, the overall effect remains. Allowing outside investment would not eliminate traditional entities, but would merely allow the creation of alternatives – so high-end boutique care with professional ownership would still be available.<sup>112</sup> In addition, new businesses with a focus on expanded access and a possible emphasis on routine care would be allowed to supplement the high-end care offered by the boutique firms, thus increasing overall access to care.

The failure of the first premise – that corporate practice restrictions improve the quality of service – should be enough by itself to support ending such restrictions. After all, if allowing corporate practice reduces cost without reducing quality, then there is no legitimate policy reason to keep the corporate practice restrictions in place. Nevertheless, in case some are not convinced by the available data on quality of service, it is worth examining the second premise: Assuming that corporate practice restrictions did increase the quality of service, what is the fate of those priced out of the market for professional services – are they insulated from harmful or misleading guidance in the medical or legal arena?

The answer to this question has changed over time, with both positive and negative effects. In the past, regulators might have reasonably believed that the public was better off with no care than with substandard care. Eighty years ago, when these restrictions were first implemented, there was no evidence contradicting that the view that information in the wrong hands could present a danger to the public; and, without the ability to hire a professional, laypeople were largely excluded from knowledge about legal and medical matters.<sup>113</sup> In

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<sup>110</sup> *Id.* at 22-23 (“An unpublished FTC study found commercial dentistry practices (i.e., practices that employ at least one non-owner dentist, have at least three offices, and advertise) provided higher quality for most common services but lower quality for complex services, such as surgery.”).

<sup>111</sup> *See id.*

<sup>112</sup> Jurisdictions that have permitted outside investment have seen some, but not all, firms choose to restructure. *See* Chris Johnson, *Continental Breakfast: Three U.K. Firms Ink External Investment Deals as Legal Services Shakeup Starts*, AM. LAW. (Feb. 10, 2012, 12:05 AM), <http://amlawdaily.typepad.com/amlawdaily/2012/02/ukexternalinvestmentdeals.html> (stating that in England, “[a] select group of U.K. top 100 firms have publicly announced plans to convert to the new structure,” but that “major international and elite corporate law firms are less likely to turn to external capital – at least in the near future”).

<sup>113</sup> *Silver v. Lansburgh & Bro.*, 111 F.2d 518, 519 (D.C. Cir. 1940) (observing that previous cases had distinguished professions that were prohibited from engaging in corporate practice from trades that did not require such protection “mainly upon the difference in the required degree of learning and training,” but concluding that the private nature and confidential communications required for medical and legal advice offered an even sounder rationale for the prohibition, as “[t]hese necessary disclosures create the personal relationship which cannot exist between patient or client and a profit-seeking

the modern era, that belief is no longer reasonable. The growth of technology and the globalization of everyday life mean that individuals have greater access than ever before to information that was previously the exclusive domain of licensed professionals.<sup>114</sup> To the extent that modern communication technology enables the public to provide adequate self-care even if priced out of the market for professional services, this is a net positive benefit to society. To the extent that such technology exposes individuals to harmful or misleading advice, the effect may be negative. In both cases, however, the development of this communications technology diminishes the argument in favor of restricting professional services: in the modern era, any attempt to insulate laypeople from specialized knowledge is doomed to failure.

A. *The Internet and Social Media*

In the past, a person who could not afford to seek legal or medical advice was faced with few resources. Self-study (in medicine) or self-representation (in law) offered one option; seeking advice from friends or family members offered another. Neither of these options, however, operated as a reasonable substitute for professional advice; after all, doctors and lawyers have years of specialized education and training, as well as a great deal of specialized knowledge that would not be easy to replicate elsewhere. Thus, individuals might well have sought help from nonprofessional sources, and might have gotten good advice or bad advice from doing so. Nevertheless, the alternative sources of information did not generally present a strong alternative to professional care, and regulatory action combatting the unauthorized practice of law and medicine ensured that these outsider sources of information remained limited.<sup>115</sup>

The internet, however, is a game changer. The sheer quantity of information available to an individual can come much closer to replicating the role of professional advice; as a result, there is no doubt that modern technology disrupts the current regulatory regime.<sup>116</sup> Instead of seeking advice from a

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corporation”).

<sup>114</sup> Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 1021-22 (2012) (“What is not wise is intransigence when the gap between socially beneficial conduct and the rules that constrict the conduct grows large. We have entered such a period for the rules governing the legal marketplace, and it is in large part a product of changing technology and the cross-border activity of lawyers and clients.”).

<sup>115</sup> See, e.g., Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 453 n.80 (1988) (noting that courts have sustained “unauthorized practice of medicine” challenges in areas as diverse as faith healing, nutritional advice, and tattooing).

<sup>116</sup> Kristin Madison, *Regulating Health Care Quality in an Information Age*, 40 U.C. DAVIS L. REV. 1577, 1651 (2007) (“The health care regulatory framework will and should survive the health information revolution, but in altered form. . . . [I]t should prompt a shift

single individual, the internet allows an individual to seek advice from the “wisdom of the crowd.”<sup>117</sup> In the aggregate, the collective knowledge even of laypeople can be a reasonable substitute for the more specialized knowledge possessed by an individual professional.<sup>118</sup>

In the medical realm, for example, a recent case study of parents who searched “Doctor Google” for clues to their children’s illnesses found that the parents were able to use the information gained from the internet to lead their doctors to a correct diagnosis of their children’s rare disorders.<sup>119</sup> The parents were not medical specialists and were of merely “average education,” but by searching their children’s symptoms, they were able to obtain an accurate diagnosis.<sup>120</sup> Internet search engines have also made it easier for people to self-diagnose their own disorders correctly, especially in the case of minor illnesses.<sup>121</sup> If medical diagnosis presents a puzzle, the internet may allow individuals to access enough disparate bits of information – symptoms, similar cases histories, and related information – to allow even a layperson to put the pieces together.<sup>122</sup>

Tapping into social connections through social media allows an individual to combine data from professional and nonprofessional sources of information.<sup>123</sup> Thus, for example, a person going through a difficult divorce

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away from market-displacing approaches toward the market-channeling and market-facilitating regulatory approaches that can more easily accommodate variations in patient preferences for the quality of care.”)

<sup>117</sup> JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 57 (2004).

<sup>118</sup> *Id.* (explaining the value of collective wisdom and commenting that “[c]ollective decisions are most likely to be good ones when they’re made by people with diverse opinions reaching independent conclusions, relying primarily on their private information”).

<sup>119</sup> Machtelt G. Bouwman et al., ‘Doctor Google’ Ending the Diagnostic Odyssey in Lysosomal Storage Disorders: Parents Using Internet Search Engines as an Efficient Diagnostic Strategy in Rare Diseases, 95 *ARCHIVES DISEASE CHILDHOOD* 642, 643 (2010).

<sup>120</sup> *Id.*

<sup>121</sup> J. Escarrabill et al., *Good Morning, Doctor Google*, 17 *REVISTA PORTUGUESA DE PNEUMOLOGIA* 177, 179 (2011) (“Google is useful for patients to diagnose their own complaints and, in some instances, they use it in a quicker and more effective manner than the doctors, especially in cases of minor illnesses.”).

<sup>122</sup> Databases of electronic health records can play a similar role in aggregating disparate information, even substituting for clinical trials in some instances. See, e.g., Sharona Hoffman & Andy Podgurski, *Balancing Privacy, Autonomy, and Scientific Needs in Electronic Health Records Research*, 65 *SMU L. REV.* 85, 101 (2012) (“[O]bservational studies have several advantages over clinical trials. EHR databases could allow researchers to access vast amounts of information about patients with diverse demographics collected over a much longer period of time than that encompassed by clinical trials, which typically last only a few years.”).

<sup>123</sup> Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 *DUKE L.J.* 147, 151 (1999) (“In cyberspace, the much-decried unmet legal needs of middle-income people are available for the world to see, with just a few clicks of a mouse. The Internet abounds with tales of legal woe, presented through a number of

who suspects that his lawyers are not diligently pursuing his interests in the litigation might reach out to tap into the collective wisdom of his online social network.<sup>124</sup> Some of his Facebook friends may be lawyers, though perhaps in different practice areas; other friends may have gone through acrimonious divorces themselves, and may have experience with the legal process from the client side. Those with experience in either realm “can give him a second opinion on whether his concerns are warranted; they may post reassurances, suggestions for other attorneys to hire, or even information about how to report the attorneys for bar discipline.”<sup>125</sup> Through this process, the individual can tap into the aggregated collective wisdom of his social connections in a way that would be difficult or even impossible to replicate in person, where he would have to wade through numerous individual conversations in an effort to determine who in his social circle could have relevant information.<sup>126</sup>

Other websites aggregate more specialized professional information, but do so outside the traditional professional-layperson relationship. Two companies in the legal services field, LawPivot<sup>127</sup> and LegalZoom,<sup>128</sup> maintain websites where attorneys answer questions posed by persons without legal representation. In contrast to traditional models of the attorney-client relationship, the advice offered by such attorneys is not provided confidentially to a single client; instead, it is archived on a public website, and intended to provide assistance to future searchers with similar questions in addition to helping the original poster who sought the advice.<sup>129</sup> Similar websites allow doctors to post medical advice on sites that serve both to offer individualized advice and to archive that advice for future searches.<sup>130</sup>

Other websites may offer a forum for crowdsourced wisdom that does not intentionally seek to enter the realm of professional advice, but finds instead that medical and legal issues are not easily severable from the more general issues that arise in everyday life. One of the best known sources of crowdsourced wisdom is Ask Metafilter – the tagline for which is “querying the hive mind” – a general advice site and offshoot of a popular community

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different vehicles.”).

<sup>124</sup> Robertson, *supra* note 91, at 84.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> LAWPIVOT, <https://www.lawpivot.com> (last visited Nov. 20, 2013).

<sup>128</sup> LEGALZOOM, <http://www.legalzoom.com> (last visited Nov. 20, 2013); *see also* *LegalZoom-Free Joe!*, FACEBOOK, [http://www.facebook.com/LegalZoom?sk=app\\_10531514314](http://www.facebook.com/LegalZoom?sk=app_10531514314) (last visited Nov. 20, 2013) (providing a service on Facebook that allows users to receive answers to their legal questions from an attorney by posting their questions to LegalZoom’s Facebook page).

<sup>129</sup> Robertson, *supra* note 91, at 84.

<sup>130</sup> *See, e.g.*, Randall Stross, *Advice for the Ill, and Points for Doctors*, N.Y. TIMES, Feb. 5, 2012, at BU3; HEALTHTAP, <http://www.healthtap.com> (last visited Oct. 17, 2013).

blog.<sup>131</sup> The site routinely crowdsources general advice in questions that range from attempts to identify dimly remembered childhood books,<sup>132</sup> queries about how to deal with roommates' different religious beliefs,<sup>133</sup> and requests for advice about which investment fund to choose for retirement contributions.<sup>134</sup> Some questions in the mix will seek advice in areas typically handled by professionals; legal, medical, and tax advice are commonly sought.<sup>135</sup> The community – made up of both professionals and laypeople – has struggled with the issue of how to handle such questions.<sup>136</sup> Some have advocated a minimal response suggesting only that the asker seek help from a licensed professional – though even a suggestion to “go to the emergency room” is a type of medical advice itself.<sup>137</sup> Others, however, have been willing to provide more detailed answers, often with the disclaimer IANAL (I Am Not A Lawyer) or IAALBIANYL (I Am A Lawyer, But I Am Not Your Lawyer).<sup>138</sup>

Members of these online communities have expressed concern that offering advice about professional matters can lead to problems, for the individuals who may get bad advice and for the potential professional liability issues of those who offer it.<sup>139</sup> But in spite of these concerns, attempts to discourage such

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<sup>131</sup> Robertson, *supra* note 91, at 84.

<sup>132</sup> *What Children's Book of Horror Stories Am I Trying to Remember?*, ASK METAFILTER (Feb. 15, 2013, 10:59 PM), <http://ask.metafilter.com/235380/What-childrens-book-of-horror-stories-am-i-trying-to-remember>.

<sup>133</sup> *Jesus Says No!*, ASK METAFILTER (Feb. 15, 2013, 8:39 PM), <http://ask.metafilter.com/235378/Jesus-says-no>.

<sup>134</sup> *Help Me Choose Between 5 Vanguard Funds*, ASK METAFILTER (Feb. 15, 2013, 8:04 PM), <http://ask.metafilter.com/235377/Help-me-choose-between-5-Vanguard-Funds>.

<sup>135</sup> *Policy Against Legal, Medical, and Tax Advice?*, METATALK (Mar. 1, 2004, 8:34 AM), <http://metatalk.metafilter.com/5554/Policy-against-legal-medical-and-tax-advice>.

<sup>136</sup> *Id.* (“Requests for very specific legal, medical, and tax advice make me nervous. There should be some policy against these, or at least a very bold warning strongly discouraging and expressly disclaiming liability against responses in these threads.”).

<sup>137</sup> Taz, Comment to *Irresponsible Medical Advice and What to Do with It*, METATALK (Feb. 1, 2013, 9:58 PM), <http://metatalk.metafilter.com/22388> (“Medical questions are always a bone of contention, but mostly people are pretty good about telling people to go to the doctor / emergency room instead of relying on the advice of people who are not trained, . . . I do think that it can be better for someone who doesn't have access to medical care because of lack of insurance or whatever to get a whole lot of comments saying 'go ahead and go to ER because this sounds bad,' when that's the case.”).

<sup>138</sup> ClaudiaCenter, Comment to *IAALBIANYL*, METATALK (Dec. 21, 2007, 9:23 PM), <http://metatalk.metafilter.com/15513/IAALBIANYL> (“I think it's really important for lawyers to provide access to legal information so that non-lawyers can assess their situations. We [lawyers] often know very easily where is the relevant guidance, document, statute, regulation to review, and just giving the lay of the land can be very useful to people.”).

<sup>139</sup> See, e.g., *Irresponsible Medical Advice and What to Do with It*, METATALK (Feb. 1, 2013, 9:58 PM), <http://metatalk.metafilter.com/22388>; *Policy Against Legal, Medical, and Tax Advice?*, METATALK (Mar. 1, 2004, 8:34 AM), <http://metatalk.metafilter.com/5554/>

advice have proven unsuccessful.<sup>140</sup> As one scholar has noted about the online discussion of legal problems, “what may be most surprising to the casual observer is not that so many laypeople want legal advice to help them solve their problems. Rather, it is that so many lawyers are apparently willing to provide it.”<sup>141</sup>

But while professional liability or other sanctions are a theoretical possibility for professional advice rendered without due care or full information, lawyers, doctors, and other professionals may rightly perceive their online discussions to be beyond the bounds of the state’s effective regulatory power.<sup>142</sup> Their advice may be rendered anonymously; it may cross geographical borders; it may form only a small part of the advice given to a particular individual, and therefore pose less of a risk of undue reliance.<sup>143</sup> None of these factors necessarily insulates the professional from liability or discipline, but those factors taken together may make such consequences unlikely enough that the professionals do not feel the need to self-censor online.<sup>144</sup> As a result, the online marketplace for advice about medical and legal matters remains robust, and regulatory attempts to limit or restrict individuals’ exposure to risky information will be ineffective.<sup>145</sup>

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Policy-against-legal-medical-and-tax-advice; *see also* Robertson, *supra* note 91, at 84-85.

<sup>140</sup> *See supra* note 139.

<sup>141</sup> Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 156 (1999).

<sup>142</sup> Robertson, *supra* note 91, at 86-87 (explaining that “limited-advice services like those offered by LegalZoom may be vulnerable to challenge if the attorneys offering the advice are not licensed in the client’s jurisdiction,” but that the online advice sites nevertheless remain active and robust).

<sup>143</sup> *Id.* (“The automated services are vulnerable to challenges by state unauthorized-practice committees, however – and even semi-automated limited-advice services like those offered by LegalZoom may be vulnerable to challenge if the attorneys offering the advice are not licensed in the client’s jurisdiction.”).

<sup>144</sup> *See* ClaudiaCenter, *supra* note 138 (explaining a lawyer’s belief in the importance of open communication about legal information). Another poster to *MetaTalk* was similarly straightforward about his or her profession:

[M]edical questions are not going away and I have no problem being public about my profession. But these days I tend to limit my participation in threads to the very easily answerable (what is this rash I took a picture of? Should I keep playing soccer when I have this pain right here?) or to questions about navigating the medical system (what questions should I ask my doctor before my gall bladder surgery? How can I find a mental health doctor in Seattle without insurance?) and stay far away from anything trickier (I’m peeing blood, what kind of cancer do I have?).

Slarty Bartfast, Comment to *Irresponsible Medical Advice and What to Do with It*, METATALK (Feb. 2, 2013, 8:43 PM), <http://metatalk.metafilter.com/22388>.

<sup>145</sup> Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEW ENG. L. REV. 421, 438 (2007) (“Other than urging ‘surfer-beware’ and promoting information about high quality sites, there is little to be done to protect American virtual tourists against the harm they might suffer from relying on either

### B. Globalization

While online sources of information may extend beyond the state's regulatory reach as a de facto matter, global professional service providers may exceed the state's regulatory power even de jure if there is no coordinated international regime.<sup>146</sup> For example, telemedicine allow doctors in one country to treat patients in another.<sup>147</sup> In addition, a growing number of patients are engaging in "medical tourism" and traveling outside the United States for more affordable medical procedures than the patients could obtain in the United States.<sup>148</sup> Because the foreign health care providers fall outside the state's regulatory reach, however, any attempt to discourage or limit such medical tourism would require placing restrictions on the individuals who seek such care, such as limiting their right to travel or placing criminal sanctions on their pursuit of foreign medical treatment; and, even if such restrictions could be constitutionally enacted, they would be nearly impossible to enforce.<sup>149</sup>

Legal services are even easier to outsource across borders – and concomitantly harder to regulate – because most legal work can be done remotely, with no need to travel.<sup>150</sup> To the extent that U.S. lawyers are involved in the outsourcing process, their actions will fall under their state's

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domestic or foreign Web content.”).

<sup>146</sup> See Julian Ku & John Yoo, *Globalization and Structure*, 53 WM. & MARY L. REV. 431, 452 (2011) (“Globalization has produced an impact on the economy and society that is equally as remarkable today as nationalization was more than a century ago. . . . As with nationalization, effective solutions need to be global.”).

<sup>147</sup> Amar Gupta & Deth Sao, *The Constitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of Its Relationship to National and International Health Care Reform*, 21 HEALTH MATRIX 385, 442 (2011) (“The cross-border nature of telemedicine involves opportunities and challenges, as the ability to deliver health care across distances not only achieves public policy goals of greater quality and access to health care, but also creates jurisdictional conflicts within and among nations.”).

<sup>148</sup> I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1566 (2010) (“Medical tourism is already an important phenomenon in U.S. healthcare and growing steadily.”).

<sup>149</sup> *Id.* at 1512 (“[A]dministering such a system would not be easy: it would require the detection of the consumption of medical services abroad in a situation where neither party has an incentive to alert the U.S. government. It would also require prosecutors and courts to distinguish medical care purchased incident to other travel from medical tourism pursued as the primary purpose for a trip.”).

<sup>150</sup> Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 PENN ST. INT'L L. REV. 639, 639 (2004); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 324 (2004) (“Internet law practice can provide effective legal assistance on routine matters . . . . [T]hese new business methods demand a clearer theory of the appropriate scope of regulation than is provided by the existing analytical framework.”); Robertson, *supra* note 91, at 178-79.

regulatory authority.<sup>151</sup> In other cases, however, potential clients may communicate directly with overseas legal services vendors, bypassing U.S. lawyers altogether.<sup>152</sup> One company, located in India, advertises its ability to work with self-represented litigants; it provides advice, document drafting and preparation, and legal research.<sup>153</sup> Foreign companies and individuals can also bid for legal projects on Elance.com, a network for freelancing.<sup>154</sup> One U.S. resident – a nonlawyer – sought legal assistance with a foreclosure proceeding in which he was attempting to represent himself.<sup>155</sup> The client ended up hiring a “Global Virtual Law Firm” based in India; the client awarded the firm “five stars” for price, though only “two stars” for quality, commenting that the firm “did not know local court rules very well, and answered some questions about that incorrectly.”<sup>156</sup> Another pro se litigant (a self-reported “demanding client” and “very active pro se litigant”) hired the same firm to prepare a motion for partial summary judgment to be filed in a court in Orange County, California; that litigant awarded the firm five stars for quality, expertise, and cost.<sup>157</sup> Self-represented litigants are at a significant disadvantage in litigation generally; even a limited amount of help from an overseas legal service provider may improve the litigant’s courtroom experience.<sup>158</sup>

These overseas service providers may violate state unauthorized practice of law rules by providing legal advice and document drafting for state residents pursuing litigation in state courts.<sup>159</sup> Nonetheless, this activity is likely to be

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<sup>151</sup> Robertson, *supra* note 91, at 90 (“As with automated services, outsourcing the preparation of legal documents may run up against state prohibitions on the unauthorized practice of law.”).

<sup>152</sup> *Id.* at 89-90 (“Offshore legal outsourcing supplies a global-labor arbitrage, making legal services affordable to a broader range of litigants – but also putting some legal service providers beyond the state’s regulatory reach.”).

<sup>153</sup> *Testimonials*, SUNLEXIS, <http://www.sunlexis.com/testimonials.html> (last visited Nov. 16, 2013).

<sup>154</sup> ELANCE, <https://www.elance.com> (last visited Oct. 18, 2013).

<sup>155</sup> *Foreclosure Litigation Support*, ELANCE (Jan. 9, 2012), <https://www.elance.com/s/advjollyjohn/job-history/?t=1&k=foreclosure#search>.

<sup>156</sup> *Id.*

<sup>157</sup> *Motion for Partial Summary Judgment-Orange County Ca Court [OCSC]*, ELANCE (Oct. 22, 2011), <https://www.elance.com/s/advjollyjohn/job-history/?t=1&k=Motion#search> (“NOT only is the work produced timely, its thorough, complete, well researched, professionally [sic] presented, properly formatted and ready for filing.”).

<sup>158</sup> See Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship – a Legal Crisis and Its Solutions*, 45 FAMILY L.Q. 45, 46 (2011) (“Sixty-two percent of judges said that outcomes were worse for the unrepresented parties.”); Cf. Cassandra Burke Robertson, *Regulating Electronic Legal Support Across State and National Boundaries*, 47 AKRON L. REV. (forthcoming 2014) (manuscript at 6) (on file with author).

<sup>159</sup> Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401, 427-30 (2007) (“[O]ffshoring frequently raises the threshold issue of the unauthorized

even harder for regulators to reach than medical tourism; the litigants' free speech rights likely protect their communications with offshore legal service providers.<sup>160</sup> The offshore service providers are also likely beyond the state's regulatory reach, as it would be an excessive assertion of legislative jurisdiction for the United States to regulate the conditions under which such providers can offer legal advice or assistance; an individual located in a foreign country who merely communicates with individuals in the United States does not thereby subject himself or herself to speech restrictions of domestic law.<sup>161</sup>

Furthermore, the opportunities for global cooperation in legal services are increasing. Other countries have recently liberalized their practice rules in ways that may allow them to compete for business with U.S. clients.<sup>162</sup> In England and Wales, the 2007 Legal Services Act liberalized the provision of legal services.<sup>163</sup> Provisions of the Act that went into effect in late 2011 permitted "law firms [to] seek investment from third parties for the first time

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practice of law (UPL) because the work is being sent directly to foreign lawyers who are not authorized to practice law in the United States or to vendors outside the United States who employ the foreign lawyers and/or non-legal professionals."); Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 314 (2010) ("[A] large majority of states that explicitly define the practice of law consider the drafting of legal documents to fit within the definition."); Robertson, *supra* note 91, at 90-91.

<sup>160</sup> Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 62 (1981) ("Unauthorized practice prohibitions plainly implicate first amendment values by restricting both the lay speaker's ability to convey information and the public's opportunities to receive it. If such restrictions impede access to the courts or the exercise of associational interests, further constitutional questions arise."); Robertson, *supra* note 91, at 91.

<sup>161</sup> Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 874 (2009) ("Global governance based on extraterritorial domestic laws is an unsustainable and unstable system.").

<sup>162</sup> See Bruce MacEwen et al., *Conversation: Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61, 61 (2008) (exploring how the "prospect of major UK firms raising capital in the equity markets . . . has the potential to produce seismic shifts in the global market for legal services [including] far-reaching implications for the legal profession that we can barely anticipate").

<sup>163</sup> Legal Services Act, 2007, c. 29, §§ 71-111 (Eng.); see also Thomas D. Morgan, *The Rise of Institutional Law Practice*, 40 HOFSTRA L. REV. 1005, 1020 (2012) ("Although U.S. lawyers are now barred from participating in multi-disciplinary firms that deliver legal services in the United States, American clients can often get the services from firms operating out of the United Kingdom or Australia, which have adopted programs permitting – but registering and regulating – what the British call 'alternative business structures.'"); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2242 (2010) ("The English and Australian experiences, in particular, demonstrate that thinking about the profession as a business does not have to mean the abandonment of 'core values' as the profession evolves.").

and companies that are not law firms [to] provide legal services.”<sup>164</sup> The Act was dubbed the “Tesco Law” after a large British grocery retailer: with retailers allowed to offer legal services, the law was thought to make it as easy to buy legal services as it was to buy beans.<sup>165</sup> In Australia, the Legal Profession Acts permit “incorporated legal practices” and allow revenue sharing with nonlawyers.<sup>166</sup> As a result of the Australian reforms, the firm of Slater & Gordon became the world’s first publicly traded law firm; its IPO raised twenty-nine million dollars.<sup>167</sup> After the English reforms of 2011 were implemented, Slater & Gordon then purchased the U.K. firm of Russell Jones & Walker for eighty-five million dollars.<sup>168</sup>

As these reforms take root, potential clients in the United States may be able to work with legal services providers headquartered in England or Australia because the General Agreement on the Trade of Services (GATS) prohibits signatories from restricting “trading in a domestic market purely on the basis of their business structure.”<sup>169</sup> Thus, the effects of these international reforms may hasten the pace of Professor Bill Henderson’s prediction: “In ten years, much of the deregulation agenda will come to pass without any formal

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<sup>164</sup> Caroline Binham, *OFT Says ‘Tesco Law’ Approvals Too Slow*, FIN. TIMES (Jan. 18, 2013, 2:26 PM), <http://www.ft.com/intl/cms/s/0/67a46fb8-615e-11e2-9545-00144feab49a.html#axzz2L7w0hHdl>.

<sup>165</sup> Douglas McCollam, *Law as a Tin of Beans: British Government Proposes Alternative Business Structures for Law Firms to Make Legal System More Consumer-Friendly*, N.J. L.J., Oct. 31, 2005, at 20 (“Bridget Prentice, a minister at the Department of Constitutional Affairs, said she envisioned a legal system where someone could pick a lawyer ‘as easily as they can buy a tin of beans.’ Indeed, wags have dubbed the reforms the ‘Tesco Law’ after the well-known British supermarket chain.”).

<sup>166</sup> See, e.g., *Legal Profession Act 2007* (Qld) ch 2 ss 111(1), 128(1) (Austl.) (designating corporations as “incorporated legal practices” regardless of whether they provide additional nonlegal services or receive revenue from said services); Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2817 n.143 (2012) (“Every Australian state and territory but South Australia has passed a similar act based on the Model Legal Profession Bill.”).

<sup>167</sup> Johnson, *supra* note 112.

<sup>168</sup> *Id.*; see also Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 535 (2009) (“On May 21, 2007, Slater & Gordon became the first law firm in the world to list its entire practice on the Australian Stock Exchange. As this case study will illustrate, the process of listing raised significant ethical and practical issues that had to be considered.”); Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT’L L. REV. 407, 407-08 (2008).

<sup>169</sup> Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 518-19 (2009); see also INT’L BAR ASS’N, GENERAL AGREEMENT ON TRADE IN SERVICES, A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS 10, <http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf>, Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 881-82 (2010).

deregulation. U.S. consumers and businesses are already voting with their feet.”<sup>170</sup> If this de facto deregulation excludes professionals licensed in the United States, however, no one benefits – not the professionals who become marginalized in the market for professional services, and not the clients seeking affordable professional care.<sup>171</sup>

#### IV. CHALLENGING CORPORATE PRACTICE RESTRICTIONS

Given the counterproductive effects of the corporate practice doctrine, it may surprise onlookers that the political process has not yet unseated the doctrine. As the Supreme Court noted when upholding a state regulation that forbade anyone but a licensed optometrist or ophthalmologist from dispensing glasses (including merely putting previously dispensed lenses into new frames), legislative solutions are the preferred cure for unwise and improvident state regulations.<sup>172</sup> Legislative solutions, however, can be difficult to obtain.

It is true that the political process has had some limited success in the medical field, as Congress has enacted laws allowing corporate practice for HMOs and for the new “Accountable Care Organizations.”<sup>173</sup> In addition, the Federal Trade Commission’s challenge to the AMA rule may represent a mixed political-judicial challenge to the rule against corporate practice.<sup>174</sup> What we have not seen, however, is concerted action at the state legislative level – for the most part, states have not been willing to overrule previous restrictions on corporate practice systematically.<sup>175</sup> This reluctance is especially prevalent in the legal field,<sup>176</sup> though it is also a factor in medicine

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<sup>170</sup> William Henderson, *Are We Asking the Wrong Questions About Lawyer Regulation?*, TRUTH ON MKT. (Sept. 19, 2011), <http://truthonthemarket.com/2011/09/19/william-henderson-on-are-we-asking-the-wrong-questions-about-lawyer-regulation>.

<sup>171</sup> See, e.g., Bill Henderson, *Who Are These Companies?*, LEGAL WHITEBOARD (Feb. 2, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/02/who-are-these-companies.html> (demonstrating that legal services companies are already making inroads into the domestic legal market by posting a photo of the exhibitor list at the LegalTech New York trade show and commenting, “[i]f you think that the ethics rules (MR 5.4) are keeping nonlawyers out the legal industry, you need to come to LegalTech”).

<sup>172</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“For protection against abuses by legislatures the people must resort to the polls, not to the courts.” (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876))).

<sup>173</sup> See *supra* notes 34-41 and accompanying text (detailing how two instances of federal legislation preempted state law restrictions on corporate practice in the medical services industry).

<sup>174</sup> See *supra* notes 31-33 and accompanying text (explaining the FTC’s challenge and its subsequent affirmation by the Second Circuit).

<sup>175</sup> See *supra* notes 37-40 and accompanying text (describing how certain state restrictions on corporate practice have been preempted by federal law, while some states actively attempted to restrict corporate practice with few states revisiting the issue in order to permit it).

<sup>176</sup> Hadfield, *supra* note 3 (manuscript at 3-4) (describing the results of a New York State

as well; in fact, it helps explain why laws against the corporate practice of medicine remained on the books even when they were unenforced at the state level.<sup>177</sup>

Thus, as a practical matter, it is hard to obtain a political solution to the corporate practice problem even when a majority of a state's voters would, in theory, favor such an outcome if given a voice on the matter. In practice, state legislators may be reluctant to eliminate regulatory restrictions when those who would benefit (middle class individuals seeking access to services) remain unaware of the doctrine, while those who might face competition (licensed professionals) are not only keenly aware of the doctrine, but in fact lobby vigorously in favor of retaining the rule.<sup>178</sup> State courts have also been reluctant to abolish the doctrine under the common law, instead preferring to defer to legislative bodies.<sup>179</sup> Courts have expressed this deference even in cases where the corporate practice doctrine itself had no statutory basis, but was instead created as a common law doctrine by the same courts that were, decades later, unwilling to repeal those doctrines without explicit legislative permission.<sup>180</sup>

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Bar Association survey in which “78% of lawyers in New York opposed the . . . proposal to allow nonlawyer ownership in law firms”).

<sup>177</sup> See *supra* note 38 and accompanying text (highlighting unenforced state law that, if enforced, would restrict corporate practice in the medical services industry).

<sup>178</sup> Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 403 (2013) (asserting that lawyers “lobbied hard” against even the mere discussion of opening the profession to outside investment); Gustavson & Taylor, *supra* note 100, at 493 (explaining that states adopted corporate practice restrictions in response to lobbying from physicians through the American Medical Association); Elizabeth A. Snelson, *Physician Employment and Alternative Practice Strategies: Avoiding “Company Doctor” Syndrome & Other Hospital Medical Staff Issues*, HEALTH LAW., Dec. 2008, at 14, 14 (explaining that the decision of some states to exempt hospitals from the corporate practice ban arose in part “through hospital industry lobbying in the legislatures and as parties and amici curiae in the courts”).

<sup>179</sup> See, e.g., *Isles Wellness, Inc. v. Progressive N. Ins.*, 703 N.W.2d 513, 524 (Minn. 2005) (“We do not agree, however, that the courts are the proper forum to enact such policy change. The legislature is the appropriate branch of government to debate and evaluate the necessity of alternative forms of health care delivery in this state.”); *Wash. Imaging Servs. v. Wash. State Dep’t of Revenue*, 252 P.3d 885, 890 (Wash. 2011) (“It is true that under the common law corporate practice of medicine doctrine, absent legislative authorization, a business may not engage in the practice of medicine by employing licensed physicians. . . . However, the common law corporate practice of medicine doctrine does not prevent persons without medical licenses from providing medical services through independent contractor physicians.”).

<sup>180</sup> *Isles Wellness*, 703 N.W.2d at 524; see also *id.* at 527 (Hanson, J., concurring in part and dissenting in part) (stating that to the extent that the corporate practice doctrine was part of Minnesota’s common law, “I would not defer to the legislature, but see it as the court’s responsibility to reexamine our own ruling”); *Wash. Imaging Servs.*, 252 P.3d at 890 (“[U]nder the common law corporate practice of medicine doctrine, absent legislative

Political solutions are doubly difficult to obtain in the field of lawyer regulation. Because state courts have historically been charged with exclusive authority to regulate the practice of law under the separation of powers doctrine, legislative changes by themselves may have no practical effect even if adopted – state courts have shown a willingness to strike down legislation that infringes on the courts’ exclusive power to regulate legal practice.<sup>181</sup> And when both the state legislature and the state courts have adopted restrictions on the corporate practice of law, then it can be especially difficult to challenge those restrictions.<sup>182</sup> First, success in one arena would be insufficient to change the rule – to be successful, a challenger would have to challenge both the statute and the court rule. Second, and further complicating the issue, is a question of timing: If the statute’s effect is not clear, judges may want to abstain from deciding a constitutional challenge to it; but if the statute is not challenged, then a challenge to the court rule may well be moot.<sup>183</sup>

Jacoby & Meyers’s challenge to New York’s corporate practice restrictions demonstrates the difficulty of challenging these restrictions within the larger thicket of lawyer regulation.<sup>184</sup> If the firm challenged a state statute that was less than clear, but that could be interpreted to forbid corporate practice, the district court might reasonably abstain from deciding the case under *Railroad Commission v. Pullman Co.*, as the state courts had not yet had an opportunity to interpret the statute.<sup>185</sup> If the firm did not challenge the statute, however,

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authorization, a business may not engage in the practice of medicine by employing licensed physicians.”).

<sup>181</sup> See Hadfield, *supra* note 3 (manuscript at 17) (“[M]ost state courts assert their right to independently, if not exclusively, regulate the legal profession and as we have seen, caselaw states that the doctrine is judicial not legislative in origin.”); e.g., *Beyers v. Richmond*, 937 A.2d 1082, 1089 (Pa. 2007) (“Any legislative enactment encroaching upon this Court’s exclusive power to regulate attorney conduct would be unconstitutional.”); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730, 736 (Wash. 1981) (“Since the regulation of the practice of law is within the sole province of the judiciary, encroachment by the legislature may be held by this court to violate the separation of powers doctrine.”).

<sup>182</sup> See *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Departments, Appellate Division of the Supreme Court of the State of New York*, 488 F. App’x 526, 527 (2d Cir. 2012) (“The district court held that plaintiffs’ injury could not be redressed by invalidation of Rule 5.4 because other provisions of New York state law, the constitutionality of which plaintiffs specifically declined to challenge, independently and unambiguously prohibit non-lawyer investment in law firms and would continue to prohibit them from accepting non-lawyer equity investors even if Rule 5.4 were struck down.”).

<sup>183</sup> *Id.* at 527 (“The district court concluded that, in light of the multiple laws prohibiting plaintiffs’ proposed conduct, any ruling it might issue regarding Rule 5.4 would be merely advisory.”).

<sup>184</sup> *Id.* (remanding to permit amendment to the complaint so that all provisions of state law prohibiting nonlawyer investment are challenged).

<sup>185</sup> *Id.* (“At oral argument, Jacoby & Meyers confirmed that it had declined to challenge the other provisions of New York state law out of a concern that the district court, relying on uncertainty about the meaning of state law, would abstain from deciding the case . . . .”)

then any challenge to the ethics rule would be merely advisory, as long as the statute prohibited the same conduct.<sup>186</sup> The Second Circuit resolved the dilemma by accepting the State's assertion that the statute should in fact be interpreted to prohibit corporate practice, and concluded that the State would therefore be judicially estopped from arguing in favor of *Pullman* abstention, paving the way for the district court to consider the challenge on its merits after remand.<sup>187</sup>

A. *A Rational Basis?*

Given the political difficulties inherent in eradicating corporate practice restrictions, it is not surprising that opponents would turn to constitutional arguments.<sup>188</sup> The corporate practice doctrine remains something of a "zombie" legal rule at the current time.<sup>189</sup> Almost no one believes that it serves a legitimate policy purpose,<sup>190</sup> but it remains propped up by rent-seeking individuals who are loath to give up regulations protecting them from competition.<sup>191</sup> And killing part of the doctrine does nothing to stop the remaining pieces from creating mischief;<sup>192</sup> instead, the doctrine has a way of

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(citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)).

<sup>186</sup> *Id.* ("The district court concluded that, in light of the multiple laws prohibiting plaintiffs' proposed conduct, any ruling it might issue regarding Rule 5.4 would be merely advisory.").

<sup>187</sup> *Id.* ("Because the district court and appellees agree that Judiciary Law § 495 and LLC Law § 201, as authoritatively interpreted by the state courts; unambiguously prohibit non-lawyer investment in law firms, *Pullman* abstention is unnecessary, and the district court can proceed to adjudicate the parties' dispute as to whether those statutes, and Rule 5.4, are constitutional.").

<sup>188</sup> *See id.*

<sup>189</sup> *See, e.g.*, Daniel R. Shulman, *Refusals to Deal: Is Anything Left; Should There Be?*, 11 SEDONA CONF. J. 95, 111 (2010) (defining a "zombie doctrine" as one that "even though it should be dead, . . . keeps on coming").

<sup>190</sup> *See supra* notes 19-20 and accompanying text (making the case that the primary goals of the corporate practice doctrine are economic protectionism and a misguided attempt to protect clients); *see also* Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 694 (2009) ("[A] law firm's goal of making profit and its duty to provide competent, ethical representation to its clients are not in opposition to each other; a law firm can only maximize its profits by providing competent, quality, ethical representation."); Rhode, *supra* note 160, at 99 ("Absent evidence of significant injury resulting from lay assistance, individuals should be entitled to determine the cost and quality of legal services that best meet their needs. Where there are demonstrable grounds for paternalism, it should emanate from institutions other than the organized bar.").

<sup>191</sup> *See supra* Part II (arguing that the corporate practice doctrine keeps legal fee rates prohibitively high for middle class consumers).

<sup>192</sup> *See supra* text accompanying notes 183-86 (describing the difficulty in assailing a doctrine comprised of both statutes and regulations, which can neither be adequately attacked together or apart for procedural and practical reasons).

springing back into life after being pronounced dead.<sup>193</sup> A successful constitutional challenge, however, would decapitate the doctrine, successfully eradicating it once and for all, in both medicine and law.<sup>194</sup> Such a constitutional challenge presents an uphill battle under current doctrine, but it is a battle worth fighting.

Under the Supreme Court's "freedom of contract" jurisprudence of the late-nineteenth and early-twentieth centuries, the case against the corporate practice doctrine might have gained traction had a challenge been brought at that time. The legal conception of freedom of contract arose in England with the growth of laissez faire economics, and migrated from there into British and U.S. law.<sup>195</sup> By the early part of the twentieth century, the Supreme Court had held that "the right to contract about one's affairs is a part of the liberty of the individual protected by [the Due Process Clause], is settled by the decisions of this Court and is no longer open to question."<sup>196</sup> During this period, however, the Court was criticized for going too far with the freedom of contract doctrine, especially to the extent that the Court struck down labor legislation perceived as beneficial to the working class and important to improving industrial conditions.<sup>197</sup> *Lochner v. New York*,<sup>198</sup> in which the Court struck down a state statute limiting work hours for bakery employees, became emblematic of the Court's freedom of contract jurisprudence.<sup>199</sup>

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<sup>193</sup> Huberfeld, *supra* note 3, at 253 ("While the doctrine may seem too outdated to be enforced, the statutes and regulations that form the doctrine remain in current statutory compilations and, like a sleeping dragon, need only a slight stimulus to be set into action.").

<sup>194</sup> Cf. Erik Henrickson, *How to Kill a Zombie*, PORTLAND MERCURY (Sept. 16, 2004), <http://www.portlandmercury.com/portland/how-to-kill-a-zombie/Content?oid=32136> ("To kill zombies, you need to destroy their brains. The most surefire route is simply lopping off the cranium . . . [A]nything less than 100 percent severance just isn't good enough.").

<sup>195</sup> P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 294 (1979) ("The fact is that the concept of freedom of contract was at the very heart of classical economics, and there is good ground for thinking that the common lawyers may have taken over the concept from the economists in the early part of the nineteenth century."); see also Martin J. Doris, *Did We Lose the Baby with the Bath Water? The Late Scholastic Contribution to the Common Law of Contracts*, 11 TEX. WESLEYAN L. REV. 361, 361 (2005) ("Common law opinion, in particular, has almost universally accepted that the emergence of the doctrine of freedom of contract in English law is owed much to the dominance of classical liberalism and *laissez-faire* economics in the late eighteenth and nineteenth centuries.").

<sup>196</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923) (citations omitted).

<sup>197</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 474 (1909) ("After 1900, the pendulum had clearly begun to swing the other way. But there are a number of striking decisions taking extreme views as to liberty of contract prior to the Adair case." (discussing *Adair v. United States*, 208 U.S. 161 (1908))).

<sup>198</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905) ("Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

<sup>199</sup> BERNSTEIN, *supra* note 10, at 1 ("*Lochner* is likely the most disreputable case in

In the 1930s, the Court became more willing to uphold state labor regulations, signaling a new direction in *West Coast Hotel Co. v. Parrish*, which overruled earlier precedent and upheld a state act establishing a minimum wage for female employees.<sup>200</sup> The Court's jurisprudential shift arrived just as professional licensing was growing and corporate practice restrictions were arriving in the wake of licensing laws.<sup>201</sup> In changing directions on freedom of contract, the Court swung the pendulum to its opposite extreme.<sup>202</sup> Under the framework of rational basis review, the Court became willing to uphold state economic regulations on the most tenuous grounds – even when there was no evidence of the effectiveness of the regulation, as when Oklahoma refused to allow nonmedical professionals to fit new frames for pre-existing eyeglass lenses,<sup>203</sup> or when Kansas prohibited anyone but a licensed attorney from negotiating with creditors for debt reduction.<sup>204</sup> In contrast to its earlier freedom of contract jurisprudence, the Court now took an entirely hands-off position with regard to economic regulation, stating that it “refuse[d] to sit as a ‘superlegislature to weigh the wisdom of legislation,’”<sup>205</sup> and “emphatically refuse[d] to go back to the time when courts used the Due Process Clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’”<sup>206</sup> Thus, even a law enacted for overtly protectionist purposes would not be struck down.<sup>207</sup>

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modern constitutional discourse.”); Pound, *supra* note 197, at 479 (describing the *Lochner* opinion as “the reactionary view” of “a bare majority” of the Court).

<sup>200</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty.”).

<sup>201</sup> See *supra* notes 42-43 and accompanying text (estimating that the doctrine arose in both the medical and legal professions around 1928).

<sup>202</sup> See BERNSTEIN, *supra* note 10, at 103 (“Debate has raged among historians as to whether *West Coast Hotel* marked an abrupt break with the past, or whether the Court simply chose to follow the more liberal precedents regarding the police power’s scope. . . . Regardless, it seems reasonably clear that as of 1937 there were not yet five votes to completely abandon liberty of contract.”).

<sup>203</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

<sup>204</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (“It is now settled that States ‘have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.’” (quoting *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949))).

<sup>205</sup> *Id.* at 731 (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

<sup>206</sup> *Id.* at 731-32 (quoting *Lee Optical*, 348 U.S. at 488).

<sup>207</sup> *Id.* at 732 (“Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.”).

The corporate practice doctrine survived the Supreme Court's review in the 1930s because it protected the profession against "unseemly rivalry" – a sufficient basis even under the stricter rational basis review of the *Lochner* era.<sup>208</sup> In later years, other protectionist laws that were adopted at the same time, and with the same goals as the corporate practice doctrine (most notably the prohibitions on professional advertising), were subsequently struck down on First Amendment grounds.<sup>209</sup> The corporate practice doctrine, however, remained in play. Unlike the advertising restrictions that had to stand up to heightened scrutiny under the First Amendment, the corporate practice doctrine merely had to survive under the lower rational basis standard, and by this era, the courts applied that standard exceedingly deferentially.<sup>210</sup> As scholars have pointed out, the Supreme Court was then willing to uphold legislative action as long as "there was any rational thought conceivable behind the law – even if it was not actually on the minds of most of the legislators who voted for it."<sup>211</sup> Under this extraordinarily deferential standard, almost any law would be upheld.<sup>212</sup> So the corporate practice restrictions that were originally intended to prevent the same "unseemly rivalry" as advertising prohibitions could now be upheld on the basis that they might protect the public from harmful professional services.<sup>213</sup>

Nevertheless, some have suggested that the Court's extreme deference in rational basis review has reached its outer limits and have posited that there are signs the Court may be willing to inquire into the "rationality" of legislation a bit more skeptically.<sup>214</sup> In fact, in a few cases in subsequent decades, the Court

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<sup>208</sup> *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611-12 (1935) ("We have held that the state may deny to corporations the right to practice, insisting upon the personal obligations of individuals and that it may prohibit advertising that tends to mislead the public in this respect . . . the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." (citing *Miller v. State Bd. of Dental Exam'rs of Colo.*, 287 U.S. 563 (1932))).

<sup>209</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

<sup>210</sup> *Id.* at 368-79; *Semler*, 294 U.S. at 611.

<sup>211</sup> Elizabeth Price Foley, *Judicial Engagement, Written Constitutions, and the Value of Preservation: The Case of Individual Rights*, 19 GEO. MASON L. REV. 909, 921 (2012).

<sup>212</sup> *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . .'" (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960))).

<sup>213</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

<sup>214</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 679 (3d ed. 2006) ("[I]t also can be argued that the Court has gone too far in its deference under the rational basis test. Unfair laws are allowed to stand because a conceivable legitimate

has actually struck down legislation even under a rational basis standard,<sup>215</sup> including a state licensing decision excluding former members of the Communist Party from the practice of law.<sup>216</sup> Others, however, have suggested that such review is not a sign of retrenchment, but rather a moderately heightened standard to be applied in cases of political or social animus.<sup>217</sup>

The question of how much “bite” to give rational basis review took a central position in the argument over the constitutionality of the Defense of Marriage Act (DOMA) in *United States v. Windsor*.<sup>218</sup> The district court concluded that “the rational basis analysis can vary by context,” with “a more searching form”

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purpose can be identified for virtually any law.”); Sandefur, *supra* note 11, at 487 (“But as *Romer*, *Cleburne*, and similar cases have demonstrated, a realistic rationality review need not intrude upon the abilities of legislatures to make legitimate policies.”); *see also* Hettinga v. United States, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, C.J., concurring) (“The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.”).

<sup>215</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down a law prohibiting local governments from including sexual orientation as a protected category in antidiscrimination laws, and finding the ostensible purpose of the legislation to be “so far removed” from the “breadth of the amendment” that it was “impossible to credit them”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (striking down a zoning law that excluded group homes for individuals with developmental disabilities, and emphasizing that even under rational basis review, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”); *Metro. Life Ins. v. Ward*, 470 U.S. 869, 883 (1985) (striking down a discriminatory tax on insurance companies).

<sup>216</sup> *Schware v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 246-47 (1957) (“There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law.”).

<sup>217</sup> Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 937 (2012). The Obama Administration, in a recent Supreme Court brief, referred to this idea as rational basis review “with added focus” in order to distinguish it from the traditional notion of heightened scrutiny. Even here, however, the Administration limited the role of “added focus” to cases involving animus against politically disfavored groups. Brief for the United States on the Merits Question at 52-54, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048 (“[T]he history of discrimination and the absence of relation to one’s capabilities associated with this particular classification would uniquely qualify it for scrutiny under an approach that calls for a measure of added focus to guard against giving effect to a desire to harm an ‘unpopular group.’” *Id.* at 53).

<sup>218</sup> *Windsor*, 133 S. Ct. at 2692 (“DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. ‘[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))); *see* Nancy C. Marcus, “*Argle Bargle, or Deeply-Rooted Principles of Equal Liberty? The Inevitability of Marriage Equality After Windsor*,” 23 *TUL. J.L. & SEXUALITY* (forthcoming 2014).

applied in cases of animus against the politically disfavored, and a more deferential form in cases involving economic or regulatory issues.<sup>219</sup> On appeal, the Second Circuit held that heightened scrutiny applied and provided an alternate basis to strike down the law, which allowed the court to avoid deciding whether the district court correctly applied the more stringent version of the rational basis test.<sup>220</sup> The Second Circuit expressed gratitude for the escape valve, observing that “fortunately” it need not decide which formulation of rational basis review to apply, an area that the court found was subject to “doctrinal instability,” as the Supreme Court had never “expressly sanctioned such modulation in the level of rational basis review.”<sup>221</sup>

In its decision in *Windsor*, the Supreme Court did not eliminate this “doctrinal instability.”<sup>222</sup> As Justice Scalia pointed out in dissent, “[t]he opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”<sup>223</sup> The Court did, however, appear to invoke the rational basis standard in striking down the federal ban on same sex marriage: the Court held that “no legitimate purpose” supported the statute in light of the fact that DOMA was intended to “disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>224</sup> Thus, the Court appeared to weigh the statute’s reported animus in its analysis of a legitimate purpose; the existence of such animus perhaps reduced the deference the Court was willing to give to the legislative purpose, even under the rational basis standard.<sup>225</sup>

Although dealing with a challenge to a very different statute, the Supreme Court in *Windsor* appeared to extend the rational basis test that it had earlier applied in *Metropolitan Life Insurance v. Ward*, where the Court struck down an Alabama statute that charged out-of-state insurance companies higher tax

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<sup>219</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012), *aff’d*, 699 F.3d 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

<sup>220</sup> *Windsor*, 699 F.3d at 180-81, *aff’d*, 133 S. Ct. 2675 (2013) (“The Supreme Court has not expressly sanctioned such modulation in the level of rational basis review; discussion pro and con has largely been confined to concurring and dissenting opinions. We think it is safe to say that there is some doctrinal instability in this area. Fortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.”).

<sup>221</sup> *Id.*

<sup>222</sup> *Windsor*, 133 S. Ct. at 2692, 2696 (asserting that DOMA requires “careful consideration” while simultaneously inquiring whether the law serves a “legitimate purpose,” the language of traditional rational basis review).

<sup>223</sup> *Id.* at 2706 (Scalia, J., dissenting).

<sup>224</sup> *Id.* at 2696.

<sup>225</sup> *Id.*

rates than in-state companies.<sup>226</sup> In *Ward*, the Court likewise found that there was “no legitimate state purpose” that could counteract the discriminatory nature of the tax.<sup>227</sup> As in *Windsor*, the Court in *Ward* appeared to weigh the policy interests advanced by the government against the discriminatory means employed: thus, while encouraging in-state capital investment might be a legitimate state purpose in a vacuum, it would not be a legitimate state purpose “when furthered by discrimination.”<sup>228</sup>

Justice O’Connor dissented in *Ward*, stating that she found the Court’s holding “astonishing” and “threatening [to] the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation.”<sup>229</sup> She criticized the Court’s decision for “collapsing the two prongs of the rational basis test into one” and thereby avoiding the need to “engag[e] in the deferential inquiry we have adopted as a brake on judicial impeachment of legislative policy choices.”<sup>230</sup> Justice O’Connor was right that the Court had merged the two prongs of the rational basis test into a single scale, and right that by merging the two, the Court was able to apply a stricter version of the rational basis test than it had in earlier decades.<sup>231</sup> Nearly three decades later, Justice Scalia made a similar point in his *Windsor* dissent, stating:

I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.<sup>232</sup>

Both *Ward* and *Windsor* suggest that the Court may be applying a rational basis test that is less deferential than the one it applied in *Lee Optical*, and one that allows the legitimacy of the state’s purpose to be evaluated in the context of the facts at hand, not merely in a hypothetical vacuum. Thus, the purpose of

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<sup>226</sup> *Metro. Life Ins. v. Ward*, 470 U.S. 869, 883 (1985) (assessing whether the state law served a “legitimate” purpose, while investigating the proffered purposes at length, suggesting a less deferential approach than that employed in traditional rational basis review).

<sup>227</sup> *Id.* (“We conclude that neither of the two purposes furthered by the Alabama domestic preference tax statute . . . is legitimate under the Equal Protection Clause to justify the imposition of the discriminatory tax at issue here.”).

<sup>228</sup> *Id.* at 882.

<sup>229</sup> *Id.* at 883 (O’Connor, J., dissenting).

<sup>230</sup> *Id.* at 898.

<sup>231</sup> *Id.* at 884 (“Our precedents impose a heavy burden on those who challenge local economic regulation solely on Equal Protection Clause grounds. In this context, our long-established jurisprudence requires us to defer to a legislature’s judgment if the classification is rationally related to a legitimate state purpose.”).

<sup>232</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (citation omitted).

ensuring uniformity in the definition of marriage might be a legitimate legislative purpose – but not when motivated by malice and discriminatory motivations. Likewise, protecting capital investment could be a legitimate state purpose – but not when motivated by a desire to discriminate against out-of-state businesses. Such a contextual test also finds support in Justice Kennedy’s concurrence in *Kelo v. City of New London*, where he wrote:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.<sup>233</sup>

For Justice Kennedy in *Kelo*, and for the Court in *Ward* and *Windsor*, context is important: what might be a legitimate state interest in the abstract may not be a legitimate state interest in a particular context of discrimination.

Thus, context matters in rationality review.<sup>234</sup> But what are the limits of this doctrine? What counts as a discriminatory or improper motive sufficient to overcome an otherwise legitimate state purpose? These questions are paramount in the so-called “economic liberty” cases,<sup>235</sup> where a recent circuit

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<sup>233</sup> *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

<sup>234</sup> Although the importance of a fact-based contextual analysis has often been overlooked in rational basis review, the idea is not a new one. The Supreme Court advocated this approach in a 1938 decision:

[U]nder the burden of proof favored by Justice Harlan and adopted by Justice Brandeis, it was still permissible for a person to challenge a legislative restriction on liberty by showing that it was unreasonable, arbitrary, or discriminatory. This was made abundantly clear by the New Deal Court in the landmark 1938 case of *United States v. Carolene Products Co.* Although this case is known for the most famous footnote in the history of the Supreme Court—the celebrated Footnote Four—in the less well-studied body of the case, Justice Stone reaffirmed judicial scrutiny of the reasonableness of a statute was still available. “Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”

See Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845, 849 (2012) (footnote omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938)).

<sup>235</sup> Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 *CATH. U. L. REV.* 475, 501 (2013) (“[M]any licensing laws not only curb competition, but also stunt social mobility. Licensing regulations are particularly harmful to low-income workers who have the requisite skills to compete, but lack either formal training or financial resources to meet the onerous licensure requirements.” (footnote omitted)); Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why “Rational Basis with Bite” Review Makes Sense for Challenges to*

split regarding casket-sale restrictions provides an excellent test case to give shape to this contextual rational basis test.

A number of states have restricted casket sales to licensed mortuary professionals; like other protectionist practices, however, this restriction raises prices and proponents offer no evidence that the public suffers any actual harm by an open market for caskets.<sup>236</sup> Nevertheless, circuit courts adopted different positions representing the two views of rational basis review.

The Sixth Circuit in *Craigmiles v. Giles* affirmed a decision striking down Tennessee's restriction on casket sales to licensed funeral directors.<sup>237</sup> The court took care to distinguish its holding from *Lochner*'s more stringent review of economic regulations.<sup>238</sup> Nevertheless, the court found that each of the Government's proffered defenses of the measure failed a rational basis review. The court first concluded that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."<sup>239</sup> Then, turning to the State's consumer protection rationales, the court rejected arguments that licensing vendors would improve the quality and safety of the caskets themselves; the court noted that the State could certainly regulate

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*Occupational Licenses*, 58 LOY. L. REV. 721, 758 (2012) ("While there are many good arguments in support of the use of rational basis with bite review whenever *any* economic regulation enacted under the state police power is challenged, this comment takes a much narrower position: that *occupational licensing statutes* (i.e., regulations that infringe on the specific part of economic liberty that encompasses the right to pursue one's chosen profession) should be subjected to rational basis with bite review.").

<sup>236</sup> Lana Harfoush, Comment, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 159 (2011) ("Those occupational licensing laws are based upon a meritless 'because I said so' justification. This helps a select few, but leaves many hardworking, honest entrepreneurs, who labor in harmless occupations, out in the cold. The circuit split that exists today provides some hope that *purely protectionist* occupational licenses will not stand."); Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 687 (2004) ("Testimony was taken at trial in *Craigmiles* that a leaky casket could pose a threat to public health, but in practice that threat is nonexistent. . . . Caskets are not even meant to protect health and safety. The very concept of an 'unsafe casket' is a hollow one.").

<sup>237</sup> *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (holding that a licensure requirement designed for a funeral directors' application to an independent casket retailer was not rationally related to any legitimate government purpose, therefore violating both equal protection and due process, and further holding that protection of discrete interests from economic competition is not a legitimate governmental purpose).

<sup>238</sup> *Id.* ("Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies . . . no sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations for the 1972 amendment.").

<sup>239</sup> *Id.* at 224 ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

casket quality directly – in the absence of such regulation, allowing competition for casket sales would be more likely to raise quality relative to price.<sup>240</sup> Additionally, while the State had argued that “the course of study required for licensure trains directors in the best ways to treat individuals who have suffered profound loss,” and therefore “[u]nlicensed casket retailers, without this psychological training . . . may aggravate the grief of the decedent’s survivors who are shopping for a casket,”<sup>241</sup> the court disagreed. Instead, it concluded that consumers would still deal with trained funeral directors for mortuary services, thus receiving the benefit of their training, but would also deal with “panoply” of unlicensed vendors for other services.<sup>242</sup> Thus, the court concluded that the measure “privilege[d] certain businessmen over others at the expense of consumers,” was “not animated by a legitimate governmental purpose,” and therefore “cannot survive even rational basis review.”<sup>243</sup>

The Tenth Circuit applied a more deferential standard of review in *Powers v. Harris*,<sup>244</sup> and consequently upheld Oklahoma’s casket law.<sup>245</sup> Interestingly, the court’s most fundamental disagreement with *Craigmiles* arose from the question of whether pure protectionism could constitute a legitimate state interest; while the Sixth Circuit had rejected that proposition, the Tenth Circuit was willing to accept it.<sup>246</sup> The court concluded that the Supreme Court’s jurisprudence allowed protectionism as long as it merely favored one industry over another without burdening interstate commerce, and concluded that “while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”<sup>247</sup> The court therefore held that “[b]ecause we find that intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state

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<sup>240</sup> *Id.* at 226 (“Generally, however, the cost of more protective caskets is higher . . . [i]f casket retailers were to increase competition on casket *prices* and bring those prices closer to marginal costs, then more protective caskets would become more affordable for consumers with limited funds and their use would likely increase.”).

<sup>241</sup> *Id.* at 228.

<sup>242</sup> *Id.* (“Moreover, survivors must deal with a panoply of vendors in order to make funeral arrangements, from churches to food vendors for a wake, none of whom is required to have this psychological training. This justification is very weak, indeed.”).

<sup>243</sup> *Id.* at 229.

<sup>244</sup> *Powers v. Harris*, 379 F.3d 1208, 1214 (10th Cir. 2004).

<sup>245</sup> *Id.* at 1225 (“Because we hold that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the [statute] is rationally related to this legitimate end, we AFFIRM.”).

<sup>246</sup> *Id.* at 1218-19 (“Because the four Supreme Court cases cited in *Craigmiles* and *Santos* do not stand for the proposition that intrastate economic protectionism, absent a violation of a specific constitutional provision of federal statute, is an illegitimate state interest, we cannot agree [that such protectionism is illegitimate].”).

<sup>247</sup> *Id.* at 1219-21.

interest, we have little difficulty determining that the [statute] satisfies rational basis review.<sup>248</sup> Finally, though the protectionism argument was dispositive, the court also expressed approval of the State's hypothetical consumer protection rationale<sup>249</sup> in spite of the fact that, as in *Craigmiles*, the evidence contradicted the assertion of actual improvement in consumer welfare.<sup>250</sup>

More recently, after considering the split between the Sixth and Tenth Circuits, the Fifth Circuit concluded that the Sixth Circuit's decision in *Craigmiles* was correct in concluding that mere economic protectionism could not be a legitimate government interest, as it would be "a naked transfer of wealth."<sup>251</sup> Nevertheless, the court concluded that under the Supreme Court's decision in *Lee Optical*, even a policy founded on economic protectionism would be constitutionally permissible if "supported by a post hoc perceived rationale."<sup>252</sup> The court therefore concluded that casket-sale restrictions should be upheld only if the state could show a rational basis for such restrictions that was "not plainly refuted . . . on the record compiled by the district court at trial."<sup>253</sup> After examining the evidence presented at trial, the court affirmed the district court's decision to strike down the regulation; it agreed with the district court's findings that the facts belied the post hoc rationales proffered by the State.<sup>254</sup> For example, the State argued that the law could be justified by its protection of consumer interests, but the court concluded that the undisputed facts demonstrated that the exclusive-sale provision "adds nothing to protect consumers and puts them at a greater risk of abuse including exploitive prices."<sup>255</sup> Likewise, the court concluded that the State's health-and-safety rationale to limit casket sales was contradicted by the State's failure to require caskets for burial and failure to place any requirements on the design or construction of caskets.<sup>256</sup> The court concluded that both consumer protection

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<sup>248</sup> *Id.* at 1222.

<sup>249</sup> *Id.* at 1227 (Tymkovich, J., concurring) ("[T]he district court did not err in crediting the consumer protection rationale advanced by the Board.").

<sup>250</sup> *Id.* (Tymkovich, J., concurring) (acknowledging that the evidence showed that "[c]onsumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales").

<sup>251</sup> *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a post hoc perceived rationale . . . without which it is aptly described as a naked transfer of wealth.").

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 223.

<sup>254</sup> *Id.* at 226 ("That grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitive prices.").

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* ("That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads

and health and safety *could* justify state regulation of caskets in theory, but the record developed in the trial court negated the possibility that either consideration was actually related to the regulation in question.<sup>257</sup>

Thus, there is a split of authority over questions of rational basis review relevant to the corporate practice doctrine, including whether economic protectionism is a legitimate state interest,<sup>258</sup> what kind of showing is necessary to negate a hypothetical state interest,<sup>259</sup> and whether a purported rational basis can be overcome by countervailing “evidence of irrationality.”<sup>260</sup> If the Supreme Court ultimately sides with the Sixth Circuit’s interpretation on either of the first two counts – or accepts the Fifth Circuit’s invitation to allow evidentiary development as in the third – then economic liberty cases may receive greater attention, and economic liberties would receive greater protection.<sup>261</sup> Regardless of how the tea leaves should be read, it is apparent

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us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.”).

<sup>257</sup> *Id.* at 227.

<sup>258</sup> See, e.g., Katharine M. Rudish, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 *FORDHAM L. REV.* 1485, 1530 (2012) (“Making it unconstitutional for a state to protect a particular industry through regulation goes against the federalism and judicial-activism concerns underpinning the Court’s economic substantive due process jurisprudence since the demise of *Lochner*.”); Florman, *supra* note 235, at 734 (“[The Sixth Circuit in *Craigmiles*] reasoned that because ‘protecting a discrete interest group from economic competition is not a legitimate governmental purpose,’ the occupational licensing requirements were unconstitutional, as applied to the plaintiff casket retailers. The Tenth Circuit in *Powers* disagreed.”).

<sup>259</sup> Sanders, *supra* note 236, at 692-94 (“This failure of the *Craigmiles* court to emphasize the irrelevance of the licensing standards pertains to criticism of *Craigmiles* in *Powers v. Harris*. In that case . . . [t]he district judge critiqued *Craigmiles*, stating that the Sixth Circuit used policy arguments in striking down the licensing restrictions. Policy arguments are not allowed under the rational basis test, argued the court, so the Sixth Circuit [in *Craigmiles*] went beyond its authority in weighing the pros and cons of licensing versus increased competition in the casket market.” (citations omitted)); see also Harfoush, *supra* note 236, at 159.

<sup>260</sup> *Castille*, 712 F.3d at 223 (“[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”). Although the *Castille* court’s use of the phrase “evidence of irrationality” suggests that an evidentiary hearing could be a proper means of negating possible state interests, the Supreme Court has historically discouraged evidentiary proceedings. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”).

<sup>261</sup> Ezra B. Hood, *Interpreting in the Public Interest: How Macey’s Canon Can Restore Economic Liberty*, 19 *GEO. MASON U. C.R. L.J.* 441, 476-77 (2009) (“Where a court gives so much deference to a majoritarian legislature that even made up rationales for liberty-restricting laws are acceptable, the only check remaining on that legislature are the politics by which it is elected. . . . However, public choice theory’s insight into how collective

that the Supreme Court will need to decide the limits of rational basis review. The corporate practice doctrine provides a good vehicle to test whether the Court would be willing to retreat from the most extreme version of the rational basis test.

Moving away from the more extreme forms of deference that the Court has applied in the last few decades would require at most a change in interpretation, but not a change in the nominal standard. Even if it applied the “old-school” rule of rational basis review that invalidated only arbitrary and irrational legislation, the Court could still require “a real and substantial relation to the object sought to be attained,” and to the means of attaining it.<sup>262</sup>

If the Court is serious about requiring such a “real and substantial relation,” the corporate practice doctrine should not stand. One scholar has analyzed the factors that might go into such an evaluation, suggesting striking the law down under a rational basis test if some or all of the following conditions are met:

[E]vidence of an intent to benefit one group of people at the expense of others, i.e., protectionism; evidence refuting the law’s ostensible public-interest rationale; the presence of less restrictive alternatives to satisfy the law’s ostensible purpose; evidence showing a harm to competition and consumers; and, perhaps, evidence that the law may interfere with interstate commerce.<sup>263</sup>

These factors bear similarities to the Sixth Circuit’s approach in *Craigmiles*, as the court found that the casket-sale restrictions arose from protectionism, that the restriction caused consumer and commercial harm by raising prices, and that the evidence suggested that any hypothetical consumer protection benefits had failed to materialize in practice.<sup>264</sup> Similarly, the Fifth Circuit has agreed that evidence countering the state’s hypothetical rationale can “negate a seemingly plausible basis” for the law, observing that “a hypothetical rationale, even post hoc, cannot be fantasy.”<sup>265</sup> These factors provide a useful lens for

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majorities actually function gives solemn warning about how poorly majoritarian legislatures might be trusted truly to express the public interest.”)

<sup>262</sup> *Foley*, *supra* note 211, at 928 (internal quotation marks omitted) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

<sup>263</sup> Asheesh Agarwal, *Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry*, 3 J.L. ECON. & POL’Y 189, 213 (2007) (footnote omitted).

<sup>264</sup> *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

<sup>265</sup> *St. Joseph Abbey v. Castille*, 700 F.3d 154, 162 (5th Cir. 2012) (“[W]e question whether [the rationale offered] is betrayed by the undisputed facts as pretextual.”); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1706-07 (1984) (suggesting that the requirement for a rational basis “‘filters out’ illegitimate motivations,” so that “[w]hen the asserted benefits turn out to be illusory, or are minimal in relation to the burdens imposed, there is good reason to suspect that an illegitimate motivation – something other than the asserted benefits – in fact accounts for the regulation”).

applying the contextual type of rational basis review that the Court endorsed in *Ward* and *Windsor*.<sup>266</sup>

Applying these five elements to the corporate practice doctrine likewise suggests that the restrictions on outside investment should be struck down, and that the Supreme Court should recognize a right to contract within the market for professional services. First, even if protectionist intent was not clear at the time the doctrine was first adopted, it is certainly apparent in the failure of later attempts to repeal the doctrine.<sup>267</sup> In spite of warnings from the FTC as to the anticompetitive nature of the restrictions, and in spite of various committee proposals to permit outside investment, lawyers overwhelmingly expressed a fear of competition from outside parties and thus chose to retain the rule nearly every time the issue came up.<sup>268</sup> Likewise, the medical profession did not drop the national rule until it was forced to after losing the FTC's law suit; even afterward, a number of states continued to prohibit physicians from accepting employment with corporate entities.<sup>269</sup>

Similarly, evidence contrary to the stated public interest rationale and evidence showing harm to consumers are both apparent as well; there is ample evidence that the doctrine raises prices and decreases access to legal and medical services, and there is no countervailing evidence that it increases the quality of services rendered.<sup>270</sup> And, as in the casket cases, there are a number of less restrictive ways to achieve the same ends. To the extent that the state is interested in ensuring independent judgment, it can regulate that directly by prohibiting outside investors from interfering with professional care.<sup>271</sup> The

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<sup>266</sup> See *supra* notes 218-35 (analyzing the Supreme Court's approach in *Windsor*, where it "extend[ed] the rational-basis test that it had earlier applied in *Metropolitan Life Insurance v. Ward*, in which the Court struck down an Alabama statute that charged out-of-state insurance companies higher tax rates than in-state companies").

<sup>267</sup> See *supra* Parts I & II.

<sup>268</sup> See *supra* Parts I & II. The FTC brought suit against the AMA, after which the AMA dropped its corporate practice restrictions. The bar rebuffed pressure from the FTC and an ABA Commission, as well as proposals to liberalize the ABA's rules and align them more closely with the District of Columbia's, which would have allowed for limited investment by private individuals in firms providing exclusively legal services.

<sup>269</sup> See *supra* Part I.A.

<sup>270</sup> See *supra* Parts II & III.

<sup>271</sup> See *Isles Wellness, Inc. v. Progressive N. Ins.*, 703 N.W.2d 513, 524 (Minn. 2005) ("[T]he policy concerns underlying the doctrine—division of loyalty, conflict of interest, and the interference with and/or loss of independent, professional judgment—are more appropriately and accurately addressed through licensing laws, which can include requirements such as that health care providers use their independent judgment."); *Harris & Foran, supra* note 2, at 836 ("The experience of the medical profession suggests that legitimate concerns over loss of professional autonomy to the detriment of clients can be adequately addressed through a combination of ethical rules and liability deterrents."); Lisa Rediger Hayward, *Revising Washington's Corporate Practice of Medicine Doctrine*, 71 WASH. L. REV. 403, 430 (1996) ("Although the justifications for the doctrine were once

Model Rules of Professional Conduct already do this for conduct that is equally risky, but too common to prohibit; thus, for example, a lawyer may accept payment from a person other than the client (for example, the client's employer, parent, or spouse could pay for legal services) – but in the case of a third-party payer, a lawyer is simply told that he or she “shall not permit” the payer “to direct or regulate the lawyer’s professional judgment in the rendering of such services.”<sup>272</sup> Finally, the corporate practice doctrine may well interfere with interstate commerce. Certainly, the healthcare market operates within the stream of interstate commerce,<sup>273</sup> and recent trends toward globalization also help in erasing the importance of state barriers within the legal market.<sup>274</sup> Legal service providers such as LegalZoom and Law Pivot already operate across state borders; restricting their activity in an effort to promote independent solo practitioners would burden interstate commerce.<sup>275</sup> Thus, the Court could (and should) easily conclude that although protecting the public from substandard legal advice and medical care is a legitimate state interest, the corporate practice doctrine offers no such protection. As a result, there is no legitimate state interest in discriminating against corporate ownership in the provision of professional services.

B. *The Case for Heightened Scrutiny*

As the prior Section argues, a rational basis challenge to the corporate practice doctrine will succeed only if the Supreme Court is willing to apply the test less deferentially than it has done in past decades.<sup>276</sup> This is not impossible; there are signs that the Court may be willing to protect economic liberties somewhat more rigorously than it has for most of the last century, and the Fifth and Sixth Circuits’ approach to protectionist restrictions offers a guide for such a challenge.<sup>277</sup> Nonetheless, such a challenge offers an uphill

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valid, they are presently addressed by other measures and hence, have lost their legitimacy in the new health care market. Modern regulations are available to protect the patient from the ‘quackery’ that the corporate prohibition once sought to avoid.”).

<sup>272</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (1983) (“A lawyers shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”).

<sup>273</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (concluding that Congress’s commerce power did not authorize the Affordable Care Act’s mandate for people to buy health insurance, but nonetheless recognizing that the healthcare market itself is a useful part of interstate commerce).

<sup>274</sup> See *supra* Part II.B.

<sup>275</sup> Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (“[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.”).

<sup>276</sup> See *supra* Part IV.A.

<sup>277</sup> See *supra* Part IV.A.

battle: While it may be warranted, it would still be a significant divergence from prior jurisprudence for the Court to strike down a state law regulating professional practice.

If there is a basis to examine the corporate practice doctrine under intermediate scrutiny, proponents of outside investment will have a much greater chance of success. As other scholars have noted, applying either rational basis review or strict scrutiny largely foretells the fate of the challenged restriction; by contrast, applying an intermediate standard “establishes a level playing field upon which conflicting state and private interests do battle,” allowing the Court “to balance the private and state interests involved with no clear rules detailing its approach.”<sup>278</sup>

An argument can be made in favor of bringing the corporate practice doctrine within the scope of *Carolene Products*’ famous Footnote Four,<sup>279</sup> and thus examining the corporate practice doctrine with a higher level of scrutiny.<sup>280</sup> Forbidding physicians and attorneys from contracting for employment with corporate entities restricts their freedom of speech and freedom of association.<sup>281</sup> The individual professionals cannot associate with whom they choose, and they cannot seek to propose a variety of potential commercial transactions for professional services. Likewise, corporations can neither offer professional services in the commercial marketplace nor communicate with clients about the possible benefits of selecting a particular professional for legal or medical advice – communications that could assist clients with retaining legal counsel or medical care of their choice.<sup>282</sup>

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<sup>278</sup> Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2808 (2005) (“Though descriptively vague, intermediate scrutiny becomes clearer when viewed conceptually in conjunction with the two alternative standards of review. If either rational basis review or strict scrutiny is applied, then the outcome of the case is virtually preordained.”).

<sup>279</sup> *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, which are deemed equally specific when held to be embraced within the Fourteenth.”).

<sup>280</sup> See Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1101 (2013) (“[O]ccupational licensing is arguably the strongest candidate for heightened review under existing precedent.”).

<sup>281</sup> See Knake, *supra* note 3, at 10 (examining “the question of whether or not a corporation holds a First Amendment right to engage with lawyers for the purpose of delivering legal services (and, of course, whether or not an individual holds a corresponding interest in the delivery of those legal services)”).

<sup>282</sup> The right to retain a doctor or lawyer of one’s choice is part of an individual’s liberty interest. See *Armstrong v. State*, 989 P.2d 364, 380 (Mont. 1999) (recognizing “the seriousness of the infringement of personal autonomy and privacy that accompanies the government usurping, through laws or regulations which dictate how and by whom a specific medical procedure is to be performed, the patient’s own informed health care

Under current jurisprudence, restrictions on the freedom of speech are scrutinized more highly than restrictions on the freedom of association; laws restricting freedom of association in the commercial realm are generally examined under the rational basis test, whereas laws restricting freedom of speech in the commercial realm are examined under an intermediate scrutiny standard.<sup>283</sup> Traditionally, the intermediate scrutiny standard required the state to meet a four-part test to justify content-based restrictions: first, that the speech “concern[s] lawful activity and [is not] misleading”; second, that “the asserted governmental interest is substantial”; third, that “the regulation directly advances the governmental interest asserted”; and finally, that the restriction is “not more extensive than is necessary to serve that interest.”<sup>284</sup>

Historically, the Supreme Court adopted a distinction between restrictions on speech that proposed a commercial transaction (which was protected under intermediate scrutiny) and “ordinary commercial or regulatory legislation that affects speech in less direct ways” (which was reviewed under a rational basis standard).<sup>285</sup> But a pair of recent cases suggests that the Court may be moving toward providing heightened protection of regulations that infringe on speech rights; thus, even if the Court were willing to accept a “hypothetical” rational basis for regulatory action, it might require an evidence-based rational basis for regulatory action that infringes on speech.<sup>286</sup>

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decisions made in partnership with his or her chosen health care provider”); Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 360 (2001) (“The denial of the opportunity to retain counsel was consistent with the settled usage in England, but not the settled usage in this country, where recognition of a fundamental right to the assistance of retained counsel of choice was widespread at the time of its founding.”).

<sup>283</sup> Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 614 (1992) (“Under a First Amendment approach, the freedom of association theory is hampered by the possible application of a rational basis test of the legitimacy of the state’s regulatory scheme, while the commercial speech theory is generally understood to apply to advertising rather than other forms of conduct.”).

<sup>284</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>285</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2674 (2011) (Breyer, J., dissenting); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (“Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment’s protection only recently. In rejecting the notion that such speech ‘is wholly outside the protection of the First Amendment,’ we were careful not to hold ‘that it is wholly undifferentiable from other forms’ of speech. We have not discarded the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” (citations omitted)).

<sup>286</sup> *Sorrell*, 131 S. Ct. at 2672 (majority opinion); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356 (2010) (“[C]ertain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political

In *Sorrell v. IMS Health*, the Supreme Court struck down a Vermont law that forbade pharmacies and pharmaceutical companies from using prescription information for marketing purposes without the prescriber's consent.<sup>287</sup> Although the State had argued that the "sales, transfer, and use of prescriber-identifying information are conduct, not speech," the Court easily concluded this restriction constituted a "specific, content-based burden on protected expression."<sup>288</sup> The harder question was whether it was a burden that could stand under the commercial speech doctrine.<sup>289</sup> Here, the State argued that the law "advances important public policy goals by lowering the costs of medical services and promoting public health" by discouraging the marketing of more expensive brand-name medications when lower cost generic medications might be equally effective.<sup>290</sup> The Court did not disagree that the State's policy was a valid one, but it concluded that the goal was not strong enough to overcome the public interest in free and unfettered information; it stated that "the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."<sup>291</sup> Thus, the public's interest in obtaining information trumped the State's otherwise valid attempt to regulate the commercial marketplace.

The second case, *Citizens United v. Federal Election Commission*, likewise focused on the listener interest in unfettered expression.<sup>292</sup> In addition, however, the Supreme Court added an admonition that "the Government may not suppress political speech on the basis of the speaker's corporate identity," as "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."<sup>293</sup> In *Citizens United*, the Supreme Court struck down a federal law restricting corporate campaign contributions.<sup>294</sup> The Court concluded that restricting corporate speech infringed on the individual's rights by "command[ing] where a person may get his or her information or what distrusted source he or she may not hear," and that in so doing, the government unlawfully "uses censorship to control thought," as "[t]he First Amendment confirms the freedom to think for ourselves."<sup>295</sup>

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speech . . . . This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

<sup>287</sup> *Sorrell*, 131 S. Ct. at 2659 ("The State had burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.").

<sup>288</sup> *Id.* at 2657, 2664.

<sup>289</sup> *Id.* at 2664.

<sup>290</sup> *Id.* at 2670.

<sup>291</sup> *Id.* at 2670-71 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

<sup>292</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 364 (2010).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 372.

<sup>295</sup> *Id.* at 356 ("When the Government seeks to use its full power, including the criminal

Professor Renee Knake has pointed out that *Citizens United*'s emphasis on allowing individuals to obtain information from the sources of their choice, whether corporate or individual, is inconsistent with current restrictions on the corporate practice of law.<sup>296</sup> The Supreme Court's unwillingness to distinguish between nonprofit and for-profit entities in *Citizens United* further strengthens the argument in favor of applying heightened scrutiny to the corporate practice doctrine; the Court had already struck down both an ethical rule that restricted nonprofit and political advocacy groups from offering legal services and a public funding restriction that prohibited funding recipients from challenging the validity of state and federal statutes.<sup>297</sup> The same argument applies in the medical realm; *Sorrell*, after all, dealt with the public's right to receive information relevant to their health and medical care.<sup>298</sup>

In fact, *Sorrell* may provide an even stronger basis for exercising heightened scrutiny over corporate practice restrictions.<sup>299</sup> By emphasizing that commercial speech is an important part of protecting the public's access to information – and that the public's right to information should not be restricted just because some people might use that information to make bad decisions – it evokes the interests at issue in the market for professional services. People's right to legal and medical information is surely as strong as their right to receive information about pharmaceuticals; certainly the right to counsel is

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law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”)

<sup>296</sup> Knake, *supra* note 3, at 36 (“[C]ommercial speech about the delivery of legal services is inherently political speech, speech that goes to the heart of meaningful access to the law, speech deserving of the strongest protection that the Constitution offers.”).

<sup>297</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001) (striking down a restriction “prevent[ing] an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution”); *NAACP v. Button*, 371 U.S. 415, 428-49 (1963) (“We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.”); Knake, *supra* note 3, at 35-36 (“A word about *Citizens United*'s impact on commercial speech is also warranted here. Professor Randall Bezanson argues . . . ‘it will be impossible in principle to treat commercial speech by corporations as anything less than fully protected speech.’”).

<sup>298</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011) (“The State may not burden the speech of others in order to tilt public debate in a preferred direction. ‘The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.’” (quoting *Edenfield v. Fane*, 507 U.S. 761, 763 (1993))).

<sup>299</sup> *Id.*; see also Knake, *supra* note 3, at 32.

protected under the Constitution,<sup>300</sup> and a strong argument can be made that the right to medical autonomy is protected as well.<sup>301</sup> A state interest that is merely protectionist or that attempts to preserve the status and dignity of the profession would likewise fall to the public interest in free and unfettered communication.<sup>302</sup>

*Sorrell* also clarifies that “access to information” is a part of the protected speech interest.<sup>303</sup> As the Court pointed out, “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.”<sup>304</sup> Prohibiting attorneys and physicians from accepting employment with corporate entities that might provide legal services to the public certainly restricts those professionals’ ability to disseminate information and provide advice, and it similarly limits the public’s ability to access that information. Nevertheless, the Court made it clear that that “free and uninhibited speech” was constitutionally protected, even from paternalistic attempts to protect the public from potentially harmful knowledge.<sup>305</sup> These factors, combined with *Citizens United*’s warning that “the Government may not suppress political speech on the basis of the speaker’s corporate identity,”<sup>306</sup> suggest that the Court should – at a minimum – inquire into the actual basis of state policies supporting the corporate practice doctrine, and not merely defer to a

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<sup>300</sup> U.S. CONST. amend VI.

<sup>301</sup> *England v. La. State Bd. of Med. Exam’rs*, 259 F.2d 626, 627 (5th Cir. 1958) (“[T]he State cannot deny to any individual the right to exercise a *reasonable* choice in the method of treatment of his ills.”); B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 345 (2007) (“The issue of when governmental interests outweigh the individual right to protect one’s health through making autonomous medical treatment choices is one that is not easily resolved, but it is worthy of the sort of serious consideration it has not yet received.”).

<sup>302</sup> See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647-48 (1985) (“[A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State’s desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.”).

<sup>303</sup> *Sorrell*, 131 S. Ct. at 2665 (“An individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.” (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984))).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 2671.

<sup>306</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (“We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations.”).

hypothetical wish for “independent” professionals – especially when that independence restricts access without improving quality.<sup>307</sup>

Some scholars have concluded that *Sorrell* may portend a significant change in the Supreme Court’s scrutiny of economic liberties.<sup>308</sup> In particular, Professor Tamara Piety has criticized the Court for “[a]king] a doctrine that was conceived of as a species of consumer protection, and justified as furthering the *public* interest, and turn[ing] it into a weapon against Vermont’s effort to protect consumers and the public health, safety, and welfare,” and has suggested that the case may signal a change in course for the future.<sup>309</sup> Similarly, others have criticized the Court’s underlying premise that consumers benefit from a robust commercial speech environment; if that premise is not accepted, then commercial speech limitations may be an important part of consumer protection.<sup>310</sup> One possible limiting factor, however, is whether there is in fact evidence that the challenged regulation is counterproductive to the state’s articulated policy.<sup>311</sup> Twenty years ago, the Seventh Circuit resisted a constitutional challenge to corporate practice restrictions in law, concluding that improving the quality of legal services was a rational state goal and that there was no evidence “laypersons will be deprived of meaningful access to the

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<sup>307</sup> See *supra* Parts II & III.

<sup>308</sup> Tamara R. Piety, “*A Necessary Cost of Freedom?*” *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 53-54 (2012) (arguing that the speaker-centric corporate personhood recognized in *Citizens United* was “imported” into the commercial speech doctrine by the Court in *Sorrell* “without explicitly overruling *Central Hudson* or acknowledging that it was announcing a new standard by which to evaluate commercial speech”); see also Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2010-2011 CATO SUP. CT. REV. 129, 135 (“If heightened scrutiny is to be applied to any commercial speech regulation that is based on the content of the speech being regulated, one could reasonably conclude that *all* such regulations will be subject to heightened scrutiny.”).

<sup>309</sup> Piety, *supra* note 308, at 53 (“[T]he Court rendered the commercial speech doctrine incoherent and sowed further confusion about what the appropriate test is. Armed with this new (and inherently contradictory) ‘content-neutrality’ inquiry, the Supreme Court is in a position to pick and choose and selectively invalidate those parts of the regulation of commerce brought to it with which its majority disagrees.”).

<sup>310</sup> See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7-8 (“Citizens must be capable of making determinations that are both sophisticated and intricately rational if they are to separate truth from falsehood. On the whole, current and historical trends have not vindicated the market model’s faith in the rationality of the human mind, yet this faith stands as a foundation block for most recent free speech theory.” (citations omitted)).

<sup>311</sup> Essentially, this would require using the *Castille* court’s “evidence of irrationality” standard to negate state interests only when the asserted interests infringe on speech and communication rights. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223, *cert. denied*, 134 S. Ct. 423 (2013) (“[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”).

courts if lawyers are unable to form partnerships with laypersons.”<sup>312</sup> Now, however, the evidence is much clearer that corporate practice restrictions do not improve the quality of care, but do in fact reduce access to professional services.<sup>313</sup> Given the Supreme Court’s increasing recognition of a public interest in free and unfettered commercial speech, it should allow courts to consider this evidence in assessing the constitutionality of corporate practice restrictions.

It is difficult to predict how, or whether, the Court’s recent cases will be extended, and whether they will be used, as critics worry, to counteract state regulation in general. Nevertheless, at least as far as a corporate practice doctrine goes, the Court’s shift may suggest a reversion to the mean rather than a step away from the center. As discussed previously, the Court’s extreme deference to even hypothetical bases for state regulation of professional services stands as a barrier to effective and affordable legal counsel and medical care. Applying the more rigorous analysis of *Sorrell* and *Citizens United* would, at a minimum, require an evidence-based justification for the state’s restrictions on outside investment; it would no longer allow that interest to remain vaguely stated and merely hypothetical. Once the hypothetical justification is removed, however, it becomes apparent that there is no evidence that corporate investment in professional services reduces quality or infringes on independence; on the contrary, the evidence suggests that loosening these restrictions would increase access to services without diminishing quality. Unless and until proponents of the corporate practice restrictions can articulate an actual threat to professional judgment or quality of care, the prohibitions should be struck down.

#### CONCLUSION

By prohibiting professionals from freely contracting for corporate employment and from obtaining outside investment, the corporate practice doctrine distorts the market for professional services. In particular, the doctrine causes difficulties at the low end of the market, limiting middle-income individuals’ access to the market for professional service. Without this restriction, corporations and outside investors could offer capital infusions that would allow professional service providers to achieve economies of scale, making it more affordable to serve a middle class market.<sup>314</sup> Without such a

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<sup>312</sup> *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1387 (7th Cir. 1992); *id.* at 1385 (“Unless a governmental regulation draws a suspect classification or infringes on a fundamental right, the government need only show that its regulation is rationally related to a legitimate state interest. . . . [T]he two rules in question meet this test because they are designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach.”).

<sup>313</sup> See *supra* Parts II & III.

<sup>314</sup> See *supra* Part II; see also RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 66 (1998) (explaining that with freedom of contract, “rights to use

right, however, individuals' access to the market for professional services remains difficult; willing service providers lack the administrative ability and financial cushion needed to connect with willing clients, even in cases where the transaction would be beneficial to both parties.<sup>315</sup> Political efforts to relax the corporate practice restrictions have generally failed.<sup>316</sup> Although few onlookers defend corporate practice restrictions in theory, insiders – established professionals who see corporate investment as a competitive threat – have worked hard to defeat proposals that would open the professions to outside investment.

The time is now ripe for a challenge to corporate practice restrictions in both medicine and law. First, there is affirmative evidence in the medical field that loosening corporate restrictions does not reduce the quality of care.<sup>317</sup> Second, and more importantly, it is becoming clear that the perfect is the enemy of the good when it comes to access to professional services. In theory, the corporate practice doctrine tries to insulate the public from bad advice by requiring that physicians, attorneys, and other professionals remain economically independent. In actuality, however, the public is not – and cannot be – insulated at all; the information previously available only to licensed professionals is now easily found on the internet,<sup>318</sup> and professionals licensed in other countries are both able and willing to provide their services to U.S. clients.<sup>319</sup>

Evidence that the corporate practice doctrine restricts access to professional care without improving its quality is significant, because the Supreme Court appears to be moving toward a more evidence-based evaluation of legislative action – especially in cases where that legislative action restricts speech. In evaluating corporate practice restrictions, the Court may therefore require something more than a mere hypothetical state interest to support the restriction, regardless of whether it applies a contextual rational basis standard “with bite” or whether it applies a more heightened level of scrutiny.<sup>320</sup> Under either standard, the Court should not merely accept the assertion that the public could theoretically benefit from requiring professionals to remain economically independent. The costs to access and affordability are too great, and the public interest in communication too strong, to accept protectionist impulses that have only a vague possibility of improved quality of care in the professional realm. If proponents of the restrictions cannot show an actual – as opposed to a hypothetical – public benefit, then the corporate practice restrictions should fall.

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resources are permitted to flow to those who believe they know best how to use them”).

<sup>315</sup> See *supra* Part II.

<sup>316</sup> See *supra* Part IV.

<sup>317</sup> See *supra* Part III.

<sup>318</sup> See *supra* Part III.A.

<sup>319</sup> See *supra* Part III.B.

<sup>320</sup> See *supra* Part IV.