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Professional Speech, the *Lochnerized* First Amendment, and the Unauthorized Practice of Law

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The First Amendment has not traditionally been a powerful tool in the access-to-justice toolbox, but that may be about to change. Recent shifts in First Amendment doctrine have destabilized the law of professional regulation and called into question the constitutionality of even decades-old professional licensing laws. Access-to-justice advocates have taken advantage of this sea change in First Amendment law to challenge the constitutionality of the state bans on the unauthorized practice of law (UPL) that pose what many advocates believe to be an insuperable barrier to access to justice in many states. These challenges appear in at least one case to be succeeding.

In *Upsolve, Inc. v. James*, a federal district court held that New York state laws that prohibit nonlawyers from engaging in the UPL likely could not be constitutionally enforced against the nonlawyer Justice Advocates whom an access-to-justice nonprofit, Upsolve Inc., wanted to train to help poor New Yorkers defend themselves against debt collection lawsuits.[1] More specifically, the district court found that enforcement of the state's UPL laws likely violated both Upsolve's and the Justice Advocates' First Amendment rights because it imposed a content-based restriction on their speech.[2]

In reaching this conclusion, the district court relied on two recent Supreme Court cases that suggest, in marked contrast to the cases that came before them, that the same First Amendment principles that govern the regulation of speech in the public sphere also apply to regulations of the professional marketplace – at least, some of the time. The *Upsolve* decision is thus significant not only because it represents the first time in U.S. history that a federal court has interpreted the First Amendment to prohibit the enforcement of a ban on the UPL against nonlawyers who wish to give personalized legal advice to individual clients. It is also significant because it suggests how what some scholars have critically described as the "Lochnerian" turn in First

[1] Upsolve, Inc. v. James, 604 F. Supp. 3d 97 (S.D.N.Y. 2022). The relevant statutes include N.Y. Judiciary Law §§ 478, 484.

[2] Upsolve, Inc. v. James, *supra* note 1, at 104–05.

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Amendment law – namely, the increasing scrutiny that courts apply to laws that regulate the expressive practices of market actors – might be used to limit the reach of UPL laws, thereby enabling organizations like Upsolve to experiment with nonlawyer-based solutions to the access-to-justice crisis in the United States.[3] *Upsolve* is currently on appeal, but even if it is ultimately overturned, the decision provides a proof of concept for similar challenges elsewhere.

For access-to-justice advocates, this development is obviously a welcome one. Although recent years have seen some notable successes in the fight against the trade monopoly that lawyers have traditionally claimed over the provision of legal services, resistance by the judiciary and the established bar has frustrated otherwise promising avenues of reform.[4] In this context, the First Amendment may offer a useful alternative to ordinary politics, and one that may be less prone to the pathologies of self-dealing than other mechanisms of legal change.

The intrusion of the First Amendment into what was previously a largely deconstitutionalized area of law also has potential downsides, however. Scholars have criticized the Lochnerian turn in First Amendment jurisprudence for its imperial tendencies – that is to say, for its tendency to constitutionalize ever greater swathes of commercial regulation, thereby making it difficult for the government to protect consumers against fraud and exploitation, or advance other important regulatory goals.[5] This tendency is also evident in the professional speech cases. As I discuss below, in order to craft what it insisted was a narrow ruling in *Upsolve*, the district court relied upon a distinction between speech and conduct that is wholly unconvincing and susceptible to challenge. In practice, then, the logic of the opinion is sweeping; it could very easily be interpreted to mean that UPL laws violate the First Amendment, not only when they prohibit nonlawyers from giving personalized advice to clients but also when they prohibit nonlawyers from filing briefs in court or arguing cases. The opinion also could be extended to protect for-profit entities from state regulation, not just nonprofit advocacy organizations like Upsolve.

It is possible, then, that the Lochnerized First Amendment could help deregulate the entire arena of legal licensing just in time for the arrival of ChatGPT 5 and subsequent advances in generative artificial intelligence. It is not at all obvious that

[3] *See, for example*, Sorrell v. IMS Health Inc., 564 U.S. 552, 602–03 (2011) (criticizing the decision to apply heightened scrutiny to a regulation of commercial speech for "reawaken[ing] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue"); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015). For a fuller exploration of this point, see Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. Chi. L. Rev. 1241 (2020).

[4] Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 Yale L.J. F. 259, 265–67 (2022).

[5] *See, for example*, Post & Shanor, *supra* note 3, at 166 (warning of the tendency of the recent cases to "*constitutionalize* the unregulated operation of the laissez-faire commercial marketplace" thereby imposing "a straitjacket [on] our institutions of democratic governance").

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the ends that access to justice advocates seek would be advanced by this degree of deregulation. Improving access to justice does not mean leaving legal consumers at the mercy of hucksters, the incompetent, or the hallucinations of generative AI. And yet, in principle at least, this is the deregulatory outcome that the constitutionaliza tion of legal licensing could achieve.

In practice, however, this outcome seems quite unlikely. Courts that have applied the new precedents to strike down regulations of professional speech in other contexts have tended to do so narrowly. Older understandings of where and how the First Amendment applies are not so easily altered, and courts continue to insist that much of the existing regulatory framework survives the recent precedents. This is likely to be especially true of cases that call into question the privileges of the professional bar.[6]

The *Upsolve* decision certainly suggests as much. As I explain below, in reaching the conclusion that enforcement of New York's UPL laws against the Justice Advocates program would likely violate the First Amendment, the district court could have relied upon a different, much older but arguably more on-point set of Supreme Court precedents that hold that professional licensing laws and other regulations of professional speech violate the First Amendment when their enforcement threatens important democratic interests, including the democratic interest in ensuring meaningful access to the courts. So far, these precedents have not been interpreted to apply to efforts by nonlawyers to facilitate access to justice, but they absolutely could be. After all, as Rebecca Sandefur and Matthew Burnett point out in their contribution to this volume, the inability of poor Americans to access the courts is "not just a problem of social welfare policy or justice service delivery; it is a failure of democracy" – and one that makes it impossible to ensure the fundamental legal equality that self-government requires.[7]

Despite the obvious relevance of these older cases, the district court decided to rely instead upon the newer precedents because, the opinion suggests, it believed them to have *less* sweeping implications for the regulation of the legal profession. This is because, rather than relying upon a thick concept like democracy, the new cases rely instead upon the much thinner – and more judicially manipulable – distinction between speech and conduct. What the *Upsolve* decision thus suggests, somewhat surprisingly perhaps, is that the new doctrinal framework, with its overriding emphasis on content neutrality as the core commitment of First Amendment law, may be attractive to courts deciding UPL cases precisely because it can be wielded to permit only a very limited alteration to the regulatory status quo. If so, this

[6] *See* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 Fordham L. Rev. 569, 580–81 (1998) (noting courts' tendency to extend "greater deference to state interest in regulating lawyer speech than the comparable speech of others").

[7] *See* Chapter 1 in this volume.

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means that access-to-justice advocates should not think of constitutional litigation as an *alternative* to regulatory reform but instead as one of the means of spurring it. It also means, however, that it will be up to access-to-justice advocates to explain to courts why certain kinds of legal representation should be treated as speech for First Amendment purposes and why other kinds of legal representation should not be. It will be up to advocates, in other words, to infuse the arid framework of the Lochnerian First Amendment with the democratic values and concerns that have traditionally informed the First Amendment cases – albeit imperfectly – and that continue to inspire the access-to-justice movement.

The chapter proceeds in three sections. Section 14.1 describes the doctrinal shift that underpins recent efforts to challenge UPL laws on First Amendment grounds. Section 14.2 explores the reasoning and the complexities of the district court's decision in the *Upsolve* case. Section 14.3 examines its implications for access to justice and charts a more sensible path forward.

14.1 FIRST AMENDMENT BOUNDARIES AND THE REGULATION OF PROFESSIONAL SPEECH

The First Amendment guarantees that the government shall make "no law abridging the freedom of speech."[8] Despite the seeming absolutism of its language, however, this guarantee has never been understood to mean that the government may never enforce laws that restrict what private persons say, or even that it must always satisfy strict judicial scrutiny when it does so. Instead, the First Amendment's Speech Clause has been interpreted to provide very little constraint – and in some cases no constraint whatsoever – on the government when it regulates certain kinds of speech or regulates speech in certain kinds of ways. There is, as Fred Schauer notes, a "vast expanse of human communication that lies beyond the boundaries of the First Amendment."[9]

What kinds of speech or speech regulations lie beyond the First Amendment's boundaries has shifted over time, however. Where courts locate those boundaries reflects a contestable, and often contested, view of what kinds of speech need to be rendered mostly off-limits to regulation in order to protect the interests that the First Amendment protects. As judicial conceptions of those interests change, so too do the First Amendment's boundaries.

This fact – the mutability of the First Amendment's boundaries – has become starkly evident in recent years. As many commentators have noted, the court's changing understanding of the values that the First Amendment protects, and the means by which it protects them, has produced a noticeable expansion in the kinds

[8] U.S. Const. amend. I.

[9] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1784 (2004).

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of speech, and speech regulations, that are granted some degree of constitutional protection by the courts.[10]

One of the areas in which this change has been evident, if also highly contested, has been the law of professional regulation. Notwithstanding the fact that much of what lawyers, therapists, accountants, and doctors do when they provide service to clients is to listen and to speak, courts have traditionally interpreted the First Amendment to impose very few constraints on the government when it restricts who can practice these "speaking professions," and what they can say when they do.[11] Some courts have held that – as the Fourth Circuit put it recently – when the government "regulate[s] professionals providing personalized advice in a private setting to a paying client ... [t]he First Amendment does not come into play."[12] Other courts have reviewed licensing laws and other regulations of professional expression under a rather generous intermediate scrutiny standard.[13] The result has been, in both of these lines of cases, to vest states with "broad power to regulate the practice of [the professions]."[14]

In recent years, however, the scope of this broad power to regulate professional speech has come into question, as a result of the Supreme Court's turn away from what we might call "the democratic theory" of the Speech Clause that motivated the earlier, deferential approach, and its embrace instead of a broader, what some have described as Lochnerian, view of the Speech Clause's means and ends.

In this section, I explore the still somewhat tentative shift that has taken place in the past few years in judicial understandings of the constraints the First Amendment imposes on the government when it regulates professional speech, before examining in the next section how that shift impacted the district court's analysis of the constitutionality of New York's UPL laws in *Upsolve*.

14.1.1 *The Democratic Theory of Professional Regulation and the First Amendment*

The reason why courts have traditionally granted government actors broad discretion to regulate professional speech is because they have tended to view these kinds of regulations as efforts to regulate the commercial marketplace, not the political

[10] *See, for example*, Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 322 (2018) ("The First Amendment's borders are now in a period of great transformation – largely expansion, and rapid, at that").

[11] Lowe v. S.E.C., 472 U.S. 181, 228 (1985) (White, J., concurring).

[12] Nat'l Ass'n for the Advancement of Multijurisdictional Prac. v. Lynch, 826 F.3d 195–96 (4th Cir. 2016).

[13] *See for example*, Mothershed v. Justices of Sup. Ct., 410 F.3d 602 (9th Cir. 2005) (applying intermediate scrutiny to state rule that barred out-of-state attorneys from providing legal representation in the state).

[14] United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) (noting that this principle is "beyond question").

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sphere. For this reason, courts have tended to assume that these kinds of laws pose very little threat to the democratic interests that, until very recently, were assumed to be the primary interests that the Speech Clause protects.[15]

Justice Robert Jackson was perhaps the first, and certainly one of the most influential, jurists to articulate this view of how professional regulations fit into the First Amendment. In his concurring opinion in *Thomas v. Collins* in 1945, Jackson asserted that, while the First Amendment prevents the government from "stop[ping] an unlicensed person from making a speech about the rights of man or the rights of labor" the First Amendment does *not* prevent the government from "forbidding one without its license to practice law as a vocation."[16] The First Amendment applies differently in these two classes of cases, Jackson explained, due to the "different effects [the two kinds of government regulations] had . . . on interests which the state [was] empowered to protect." Laws that license who can practice law as a vocation attempt to protect members of the public "against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency," and this is obviously a legitimate thing for a democratic government to attempt to do.[17] In contrast, laws that license what Jackson described as public "speech-making" about the law do not protect consumers against this kind of abuse.[18] This is because, in these cases, there is no agency relationship for them to protect. Instead, the only purpose of these laws is to prevent the public from hearing what the government considered to be "false doctrine," and this is not a purpose that the government can legitimately pursue, consistent with the democratic principles that underpin the First Amendment. To the contrary, Jackson insisted, it was "[t]he very purpose of the First Amendment . . . to foreclose [the government] from assuming [this kind of] guardianship of the public mind."[19]

In the decades after *Collins*, courts largely agreed that laws that license the professions, or regulate what professionals can say in the course of their professional activities, ordinarily pose little problem from a First Amendment standpoint because what they regulate is not speech addressed to a public audience, on matters of public concern.[20] Instead, they typically restrict speech that emerges out of and relates to

[15] *See, for example*, Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 309 (1978) ("[T]he constitutional process of self-government provides an indispensable clue to the meaning of the first amendment").

[16] 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

[17] *Id.* at 545.

[18] *Id.*

[19] *Id.* at 547.

[20] *See, for example*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957); Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1386 (7th Cir. 1992); *see generally* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 951 (2007).

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the private, agency relationship between a professional and a client.[21] This means, courts assumed, that professional licensing laws and other kinds of professional speech regulations do not ordinarily threaten the "uninhibited, robust, and wide-open" public debate about public matters that the First Amendment protects in the name of democracy.[22] Instead, they protect important interests – not only the significant consumer welfare interest that Jackson identified in his concurrence but other public goods, such as the integrity of the justice system in the United States.[23]

Because courts viewed these laws as attempts to regulate the commercial practice of being a lawyer or accountant or doctor, rather than as an effort by the government to patrol the boundaries of public discourse, they tended to treat them as incidental rather than direct regulations of speech, and for that reason apply only very deferential scrutiny – if they applied any constitutional scrutiny at all.[24] This was true even when these laws made obvious speaker and content-based distinctions – as professional licensing laws commonly do.[25]

There were exceptions to this general rule of deference. First, in cases where the government attempted to use professional speech regulations to target speech that did *not* arise out of the relationship between a professional and a client, but instead addressed a public audience and touched on matters of more general public concern, courts did not defer to the government – just as Jackson's concurrence suggested that they should not. Instead, they tended to characterize the government's actions not as an incidental regulation of speech but as a "regulation of speaking or publishing as such" to which the very speech-protective rules that govern the content-based regulation of speech in the public forum apply.[26]

Second, courts strictly scrutinized governmental regulations when they understood enforcement of the regulations to threaten important democratic interests. For example, in a limited set of cases, the court recognized that the enforcement of

[21] Nat'l Ass'n for the Advancement of Multijurisdictional Prac. v. Lynch, *supra* note 12, at 196 ("The government may regulate professionals providing personalized advice in a private setting to a paying client . . . [because i]n this context, the professional's speech is incidental to the conduct of the profession") (quotation omitted).

[22] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[23] *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 792–93 (1975) (recognizing that the state interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice").

[24] *See, for example*, Lowe v. S.E.C., *supra* note 11, at 232 ("If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny"); People v. Shell, 148 P.3d 162, 173–74 (Colo. 2006) (same).

[25] *See* Section 14.2 for discussion of the content-based and speaker-based nature of these kinds of laws.

[26] Lowe v. S.E.C., *supra* note 11, at 232 (White, J., concurring); *see also* Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc., 952 P.2d 768, 773 (Colo. App. 1997); Dacey v. N.Y. Cnty. Laws.' Ass'n, 423 F.2d 188 (2d Cir. 1969).

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professional regulations against cause-oriented lawyers could undermine democratically important equality interests, and therefore required stricter constitutional scrutiny than otherwise was required.

Most famously, perhaps, in *NAACP v. Button*, the court held that a Virginia anti-solicitation law could not be used to prevent the racial justice advocacy organization the National Association for the Advancement of Colored People (NAACP) from connecting organization-funded attorneys to potential litigants in school desegregation cases unless the government could demonstrate that, in the circumstances of the case, enforcement of the law furthered a "compelling" state interest.[27] The First Amendment required this showing, the court explained, because of the important democratic interests that would be imperiled by enforcement of the anti-solicitation law, given the fact that, for the NAACP, "litigation [was] not a technique of resolving private differences [bu]t a means for achieving the lawful objectives of equality of treatment . . . for the members of the Negro community in this country."[28] Because the court recognized that the professional activities of the NAACP lawyers constituted "a form of political expression" that, in a country riven by racialized politics, represented "the sole practicable avenue open to a minority to petition for [a] redress of grievances," the court refused to apply the deferential scrutiny that applied in cases in which the government used anti-solicitation laws to prevent "the oppressive, malicious, or avaricious use of the legal process for purely private gain."[29]

In later cases, the court reached the same conclusion about the enforcement of anti-solicitation and UPL laws against other kinds of legal advocacy groups. In *In re Primus*, for example, the court held that South Carolina's anti-solicitation rules could not be applied to the American Civil Liberties Union (ACLU) without satisfying strict scrutiny because the organization "engaged in extensive educational and lobbying activities" and "devoted much of [its] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [its] declared purposes."[30]

And in a series of cases involving union litigation support programs, the court held that state professional regulations could not be used to prohibit trade unions from connecting their members to union-subsidized lawyers who could represent them in

[27] Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 439 (1963) ("[W]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling").

[28] *Id.* at 429.

[29] *Id.* at 443, at 431 ("The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.").

[30] *Primus*, 436 U.S. at 427–28 (concluding that "[f]or the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association'" (quoting Nat'l Ass'n for Advancement of Colored People v. Button, *supra* note 27, at 429, 431)).

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workers' compensation lawsuits without satisfying strict scrutiny.[31] Although these litigation programs were less self-consciously political than those at issue in *Button* or *Primus*, the court recognized that they nevertheless vindicated the same "fundamental First Amendment right" to engage in "collective activity ... to obtain meaningful access to the courts" that those cases recognized.[32]

Despite the court's embrace in these cases of a quite expansive view of what kinds of litigation activities vindicate democratic values, the number of cases in which the First Amendment was interpreted by lower courts to meaningfully limit the government's power over the professions turned out to be relatively few. Even when professionals spoke to a public audience, if their speech emerged out of and related to their relationship to a client, the court made clear that something far less that the rigorous standard of strict scrutiny should apply.[33] The court also made clear that the rights recognized by the *Button* line of cases only applied to nonprofit groups and actors. It was only where "political expression or association is at issue," the court explained in *In re Primus*, that the First Amendment does not "tolerate[] the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs."[34]

Lower courts accordingly interpreted these precedents narrowly, to not apply to any group that might have economically self-interested reasons to engage in collective action to facilitate clients' access to the courts.[35] Courts also rejected the idea that these precedents had anything to say about the enforcement of UPL laws, or other professional regulations, against *nonlawyers*.[36] In case after case, they rejected the idea that the trade monopolies created by professional licensing regimes posed any threat to the fundamental First Amendment right that the *Button* and *Primus* and union cases recognized. Courts instead measured infringements against this fundamental right against the baseline of the existing licensing system.

The result of this rather narrow, even we might say conservative, reading of the *Button* line of cases was a body of law that made the First Amendment useful as a mechanism for challenging the efforts by state governments to repress

[31] United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers v. Ill. State Bar Ass'n, *supra* note 14, at 217; Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

[32] United Transp. Union v. State Bar of Mich., *supra* note 31, at 585–86 ("The common thread running through our decisions in *Button* [and] *Trainmen* ... is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment").

[33] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1033 (1991).

[34] *Id.* at 430–31.

[35] *See*, *for example*, Cap. Associated Indus., Inc. v. Stein, 922 F.3d 198 (4th Cir. 2019).

[36] *See*, *for example*, S. Christian Leadership Conf. v. Sup. Ct., 252 F.3d 781, 790 (5th Cir. 2001) (noting that the "major difference between this case and *Button* and *Primus* is ... that the student practitioners are not licensed members of the bar" and that "[t]he ability of students to represent clients as attorneys in legal matters is entirely the relatively recent creation of the L[egal] S[ervices] C[orporation] and continues to exist entirely at the LSC's complete discretion").

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well-established legal advocacy groups like the NAACP, but largely useless as a mechanism for challenging the regulatory status quo when it came to legal licensing. This doctrinal state of affairs made good sense in a world in which the First Amendment was understood primarily as a mechanism for safeguarding the autonomy of public discourse from governmental control. In this world, the First Amendment had very little relevance to the regulation of the commercial market, including its less profit-oriented corners.

This was the world in which the crisis of legitimacy that helped usher in the modern constitutional order was created. By drawing the somewhat blunt distinction that Jackson's concurrence in *Collins* drew between the regulation of the public sphere and the regulation of profit-oriented activity, the court was able to justify vigorous judicial protection of First Amendment rights even in a post-*Lochner* age. Perhaps for this reason, this view of how the First Amendment worked and what it achieved remained largely unquestioned for many decades.

Beginning in the 1970s, however, members of the court began to express growing dissatisfaction with the assumptions that underpinned the New Deal and post-New Deal First Amendment cases. More specifically, members of the court began to question the sharp distinction between the political and the commercial realms when it came to thinking about the First Amendment's means and ends. The result was a shift in the rules that governed many areas of First Amendment law, including, recently, and in still somewhat uncertain ways, professional speech.

14.1.2 *The Lochnerian First Amendment*

The significant change in the composition of the Supreme Court that occurred under President Nixon produced a marked change in the tone and content of the Supreme Court's First Amendment jurisprudence. The Burger Court's First Amendment opinions emphasized, to a much greater than had previously been true, the importance of the Speech Clause as a guarantor of individual expressive autonomy, not just democratic rights and values.[37] At the same time, both liberal and conservative members of the court increasingly began to question the assumption that underpinned Justice Jackson's *Collins* concurrence, and many of the other early and mid-twentieth-century cases: namely, that the commercial marketplace was *not* an important arena for political discussion and debate, and that regulations of commercial relationships did not therefore threaten to create a "guardianship of the public mind." They recognized instead that, just like the speech that appears in newspapers, books, and public ceremonies, the speech that takes place on billboards, in boardrooms, and in doctor's offices can, and in some cases clearly does, shape public attitudes and beliefs, and that regulations of the commercial marketplace can consequently serve political ends, as well as consumer welfarist ones.

[37] *See* Lakier, *supra* note 3, at 1317–25 (describing the shift).

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The result of this changing view of the interests that the First Amendment protected was a marked shift in how the court analyzed the constitutionality of laws that regulated speech and expressive conduct in the commercial marketplace. This shift first became evident in the Court's commercial advertising cases.[38] Eventually, however, this shift in the court's view of the First Amendment also made its impact felt in the case law dealing with professional speech and licensing.

Two decisions in particular suggested a very different approach to the constitutional review of professional regulation than courts had taken so far. The first of these decisions was *Holder v. Humanitarian Law Project*, which the court decided in 2010.[39] The law at issue in *Holder* – a provision in the Patriot Act that made it a crime to provide "material support" to designated foreign terrorist organizations – was not what anyone would describe as a regulation of professional speech.[40] It was enacted to combat the distinctive harms associated with international terrorism, not the harms that flowed from untrustworthy or incompetent professional services. Nevertheless, because what the plaintiffs challenged in the case was the part of the law that defined material support to include the provision of "expert advice and assistance" to foreign terrorist organizations, the question it forced the court to confront was essentially the same question that confronted courts all the time in professional licensing cases: namely, what standard of scrutiny should apply to laws that restrict the provision of expert advice and assistance?[41] As the previous section makes clear, when confronted with this question in the professional regulation context, courts prior to 2010 almost invariably applied the deferential standard of scrutiny that First Amendment doctrine required when the government regulated speech only incidentally.

In *Holder*, however, the court insisted that the ban on providing expert advice to foreign terrorist organizations could not be treated as an incidental regulation of speech because application of the law turned on the *content* of the advice being provided and, more specifically, turned on whether that advice was "derived from scientific, technical or other specialized knowledge."[42] In cases where "the conduct triggering coverage under the statute consists of communicating a message," the court wrote, the law cannot be considered an incidental regulation of speech and courts must "[apply] a more demanding standard."[43]

The implications for the professional speech cases were obvious. After all, virtually all professional licensing laws make the distinction between expert and

[38] *See, for example*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976); Post & Shanor, *supra* note 3, at 167–68.
[39] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
[40] *Id.* at 8–9.
[41] *Id.* at 21.
[42] *Id.* at 27–28 (quoting 18 U.S.C. § 2339A).
[43] *Id.* at 28 (quoting Texas v. Johnson, 491 U.S. 397, 403–04 (1989)).

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non-expert advice-giving that the *Holder* Court insisted was content-based.[44] This is not surprising: The purpose of these laws is, after all, to limit who can claim to be expert in particular ways, and to structure the practice of that expertise. *Holder* thus very strongly suggested that many professional licensing laws should henceforth be treated as content-based regulations of speech, rather than as general regulations of conduct that only incidentally target speech.

This was certainly how some lower courts interpreted the decision. For example, in *King v. New Jersey*, the Third Circuit relied upon *Holder* to conclude that a New Jersey law prohibiting licensed counselors from using therapeutic methods to attempt to change the sexual orientation of their minor clients could not be considered an incidental speech regulation because application of the law turned on the content of the counselors' speech to their clients.[45] "Speech is speech," the Third Circuit insisted, "and it must be analyzed as such for purposes of the First Amendment."[46] The Eleventh Circuit relied upon *Holder* to reach the same conclusion about a Florida law that prohibited physicians from asking patients whether they possessed firearms in their home, or from noting as much in their medical records.[47] Here too, because the law turned on the content of what the physician said, the Eleventh Circuit concluded that, under *Holder*, it could no longer be treated as a regulation of conduct that only incidentally restricted speech.

The significance of this change for the actual regulation of the professions was not immediately apparent, however. This is because even those courts that interpreted *Holder* to change how they performed the incidental regulation of speech analysis quickly devised a new means of justifying a deferential standard of review in professional speech cases. They argued that, even if these regulations could no longer be considered incidental regulations of speech, they nevertheless triggered deferential scrutiny because the speech they directly regulated fell into a newly identified category of low-value speech that was not fully protected by the First Amendment.[48]

[44] Post, *supra* note 20, at 949–50 ("[I]n the context of [professional] practice we insist upon competence, not debate, and so we subject professional speech to an entirely different regulatory regime. We closely monitor the messages conveyed by professional speech, and we sanction viewpoints that are false when measured by the 'knowledge . . . ordinarily possessed and exercised by [professionals] in good standing.'") (quoting Larsen v. Yelle, 246 N.W.2d 841, 844 (Minn. 1976)).

[45] King v. Governor of the State of New Jersey, 767 F.3d 216 (3d Cir. 2014).

[46] *Id.* at 228.

[47] Wollschlaeger v. Governor of State of Fla., 814 F.3d 1159, 1183–84 (11th Cir. 2015). The decision was incredibly contested. *See* Wollschlaeger v. Governor of Fla., 649 F. App'x 647 (11th Cir. 2016), *aff'd in part and rev'd in part en banc*, 848 F.3d 1293 (11th Cir. 2017).

[48] *See, for example*, King v. Governor, *supra* note 45, at 232; *see also* Moore-King v. Cnty of Chesterfield, Va., 708 F.3d 560, 569 (4th Cir. 2013) (identifying a category of "professional speech" that the government could "license and regulate . . . without running afoul of the First Amendment").

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In 2018, however, the court appeared to decisively reject this new-wine-in-old-bottles approach to the constitutional analysis in professional speech cases when, in its decision in *National Institute for Life v. Becerra*, it insisted that professional speech was not in fact a low-value category of speech under the First Amendment.[49] Instead, the court made explicit what *Holder* had only implicitly suggested: When the government imposes a content-based restriction on what professionals can say to their clients or potential clients, courts should apply the same presumption of unconstitutionality they apply to the content-based regulations of public speech – at least in cases where, Justice Thomas wrote somewhat cryptically in his majority opinion, the government regulates professional "speech as speech."[50]

Courts should treat content-based regulations of professional speech with the same distaste they treated content-based regulations of public speech, Justice Thomas asserted, because in both cases, the content-based regulation of speech threatens important First Amendment values. Content-based regulations of professional speech could, like content-based regulations of other kinds of speech, be motivated by a desire "to suppress unpopular ideas or information" rather than any "legitimate regulatory goal."[51] Even when they aren't, Justice Thomas warned, they nevertheless interfere with the truth-promoting ends of the First Amendment:

> [W]hen the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," and the people lose when the government is the one deciding which ideas should prevail.[52]

In this remarkable passage, Justice Thomas appeared to not only reject the idea that professional speech was a low-value category of speech for purposes of the First Amendment. He also appeared to reject the core assumption that underpinned Justice Jackson's *Collins* concurrence and the rest of the seventy-odd years of professional speech cases. This assumption was, of course, that the content-based regulation of professional speech did *not* pose the same threat to First Amendment interests and values as the content-based regulation of speech about matters of

[49] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).
[50] *Id.* at 2374.
[51] *Id.*
[52] *Id.* at 2374–75 (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) and Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

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public concern because it regulated speech that emerged out of a commercial relationship – and a relationship that was characterized, as many commercial relationships are, by significant inequalities of power and knowledge – and therefore served important and legitimate ends that the content-based regulation of the public sphere did not further. The quote above suggests instead that courts should show the same skepticism to regulations of professional speech as they show to laws that regulate public discourse because the physician's waiting room is just as important a place for what Justice Holmes called "the free trade in ideas" as the Speakers' Corner in Hyde Park.[53]

In fact, notwithstanding the passage above, the *Becerra* opinion implicitly acknowledged that the government possesses greater power to regulate professional speech than to regulate speech in the public sphere. Justice Thomas noted, for example, that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech" and asserted that "[l]ongstanding torts for professional malpractice" as well as laws that require informed consent before medical procedures should still be characterized as "regulations of professional conduct that incidentally burden speech."[54] Thomas asserted as much even though these laws clearly would not, in many instances at least, qualify as incidental regulations of speech under the rule set out in *Holder*.[55] The obvious implication of this assertion is that, when it comes to the kinds of speech acts to which these laws apply, the First Amendment rule against content-based regulation that governs regulation of the public forum does not apply – just as Jackson's concurrence suggested it should not.

The opinion nevertheless made clear that the category of otherwise content-based speech acts that now could be treated as incidental regulations of professional conduct was considerably narrower than it had traditionally been understood to be. It no longer includes virtually anything the professional speaker says in the course of serving a client. Instead, there has to be some kind of direct "tie[]" between the speech targeted by the regulation and a professional act or procedure.[56] The court did not explain what it means for a regulation of professional speech to be

[53] Abrams v. United States, *supra* note 52, at 630.

[54] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, *supra* note 49, at 2373.

[55] Whether professionals violate informed consent laws, or commit tortious malpractice, often depends on "what they say." Holder v. Humanitarian Law Project, *supra* note 39, at 27. As Robert Post notes, "doctors are routinely held liable for malpractice . . . for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist." Post, *supra* note 20, at 950–51. This makes it hard to understand how these kinds of laws could be considered incidental under the *Holder* rule.

[56] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, *supra* note 49, at 2373–74 (rejecting the claim that the law at issue in the case constituted an incidental regulation of speech because it did not "facilitate informed consent to a medical procedure" and was "not tied to a procedure at all" but "applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed").

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sufficiently "tied to a procedure" to warrant deferential scrutiny.[57] But the strong implication of the passage quoted above was that professionals could not be sanctioned for merely communicating their opinion to their clients – that when the government did so, it regulated "speech as such" and therefore had to satisfy the demanding standards of strict scrutiny.

Understood as such, *Becerra* appeared to authorize, even perhaps require, the "expansion [of the First Amendment] into areas long thought impervious to constitutional law" – specifically, areas "of economic regulation . . . courts had abandoned to the legislatures after the *Lochner* disaster."[58] This was certainly how some courts interpreted the decision. Although some courts interpreted *Becerra* narrowly, as merely reinstituting the doctrinal state of affairs that existed prior to *Holder*,[59] others read it in combination with *Holder* to require a markedly different approach to the constitutional analysis in professional speech and licensing cases. One of the courts that did so was the district court that decided the *Upsolve* case. In the next section I discuss the details and reasoning of that case, and what it tells us about the complexities of the Lochnerian turn in First Amendment jurisprudence, before exploring in Section 14.3 the normative implications of the decision for the access-to-justice movement.

14.2 THE *UPSOLVE* LITIGATION

Upsolve involved an as-applied challenge to the UPL laws that have been on the books, in one form or another, in New York since the early twentieth century.[60] The challenge was brought by the nonprofit access-to-justice organization, Upsolve, Inc.

Founded in 2016, Upsolve represents a new breed of legal aid. Started by a Harvard undergraduate, a lawyer, and an engineer, Upsolve received funding not only from traditional supporters of legal aid, like the Legal Services Corporation, but also from tech funders, like Y Combinator and Google CEO Eric Schmidt.[61] And rather than providing individual clients the services of pro bono lawyers, the organization instead employed tech tools to help expand access to justice to poor Americans. Indeed, the organization's signature product was an app that helped individuals file for Chapter 7 bankruptcy.[62]

[57] *Id.*

[58] Daniel J. H. Greenwood, *First Amendment Imperialism*, 1999 Utah L. Rev. 659, 659–61 (1999).

[59] *See infra notes* 107–108 and accompanying text.

[60] Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. 97, 117–21 (2019) (chronicling the emergence of the UPL regime in New York at the behest of the newly created bar associations in the late nineteenth and early twentieth centuries).

[61] Danny Crichton, *YC-Backed Upsolve Is Automating Bankruptcy for Everyone*, TechCrunch (Jan. 16, 2019), https://techcrunch.com/2019/01/16/upsolve-bankruptcy/ (last accessed Feb. 20, 2025).

[62] For details of how the app operated, see *In re* Peterson, No. 19-24045, 2022 WL 1800949, at *8 (Bankr. D. Md. June 1, 2022).

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Upsolve did not rely on technology alone to help its users, however. The organization recognized, as it should, that human advice and assistance represented an important part of any effort to expand access to the courts. It consequently integrated human review and assistance into the operation of its bankruptcy app.[63] And soon after launching the app, Upsolve began to develop plans for a non-technology-based access-to-justice program in New York.

The program, which Upsolve called the "Access to Justice Movement" (AJM), would train nonlawyer "Justice Advocates" to help defendants in debt collection lawsuits fill out the one-page form that the state provided those served with debt collection complaints.[64] Although the form was intended to help unrepresented defendants figure out how to respond to a complaint served against them, it failed to communicate in a manner that was always easy to understand. Its language was too technical, and it assumed a basic knowledge of the institutions and processes of the legal system that many defendants did not possess.[65] The job Upsolve envisaged for the Justice Advocates was to help make the form easier to use for more of the roughly 85 percent of defendants in debt collection lawsuits who either chose not to, or did not have the resources to, procure a lawyer.[66] The Advocates would do so by explaining to individual clients what the various questions on the form meant in ordinary language, and by advising clients how they should answer them.

In its complaint, Upsolve claimed that the only thing stopping it from starting the new program was the threat of prosecution under New York's UPL laws.[67] This threat is not insignificant. Like many other states, New York's UPL laws allow the imposition of criminal as well as civil penalties on anyone who engages in the UPL.[68] And although these laws, like similar statutes in other states, do not define what it means to engage in the UPL, New York courts had for many years interpreted them to prohibit, among other things, "the giving of legal advice and counsel" by all but duly licensed attorneys.[69] This meant that the laws forbade the

[63] Upsolve, *Internal Policy on Not Providing Legal Advice for Employees*, https://upsolve.org/no-legal-advice/ (last accessed Feb. 20, 2025) (describing the human review built into the Upsolve process).

[64] Complaint at 17, Upsolve, Inc. v. James, *supra* note 1, (No. 1:22-cv-00627).

[65] As Upsolve pointed out in its complaint, the form required defendants to know (among other things) whether service of the complaint against them "was not correct as a matter of law," or whether the statute of limitation that applied to the suit against them had run out. *Id.* at 11–12. Neither of these questions are likely to be easy to answer for nonlawyer defendants.

[66] *Id.* at 6–7.

[67] Upsolve, Inc. v. James, *supra* note 1, at 107.

[68] *See* N.Y. Judiciary Law §§ 476-a, 478, 484, 485, 750, 753 (proscribing the unauthorized practice of law and providing for criminal and civil penalties on the practice); Matter of Rowe, 80 N.Y.2d 336, 341–42 (N.Y. 1992) (defining the practice of law in New York as "the rendering of legal advice and opinions directed to particular clients")

[69] Spivak v. Sachs, 16 N.Y.2d 163, 166 (1965) ("It is settled that the practice of law forbidden in this State . . . to all but duly licensed New York attorneys includes legal advice and counsel as well as appearing in the courts and holding oneself out as a lawyer") (citing cases).

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one thing that the Justice Advocates would be trained to do: provide their "legal advice and opinions . . . to particular clients."[70]

In an effort to establish the legality of the new program notwithstanding the hostile statutory terrain, Upsolve turned to a higher power: the First Amendment. It filed suit in federal court, seeking a declaratory judgment that enforcement of the UPL laws against the Justice Advocates program would violate its First Amendment rights, and those of the Justice Advocates.

To support this claim, Upsolve made two arguments. Its first argument relied heavily on the *Button* line of cases. Upsolve argued that, just like the lawyers in those cases, the Justice Advocates possessed a fundamental right to engage in "collective activity to obtain meaningful access to the courts" that would be infringed were they prevented by the UPL laws from providing help and assistance to defendants faced with debt collection actions against them.[71]

This argument was a strong one. The parallels between the cases were striking. Like the NAACP and the ACLU, Upsolve was a nonprofit organization that provided legal services to clients, not because it wanted to make a profit but because doing so furthered its vision of a just democratic society. The organization described itself as a "movement to fight for a legal & financial system we can all access."[72] In its legal filings, it described the Justice Advocates program as a project of political advocacy that worked to ensure that all New Yorkers can access their legal rights with the goal of "fight[ing] the cycle of poverty and drawing attention to the shortcomings of the justice system for low-income New Yorkers."[73]

Furthermore, as in *Button* and *Primus*, the risk that commercial considerations would undermine how Upsolve promoted these grand democratic purposes appeared very low. This was because, like the NAACP and ACLU programs, there were no monetary stakes for the AJM program. Neither the Advocates nor Upsolve profited from the unrepresented defendants who participated in the program. Thus, for Upsolve, as in *Button* and *Primus*, there was little reason to worry that application of state law was necessary to prevent "the oppressive, malicious, or avaricious use of the legal process for purely private gain."[74]

Nevertheless, despite the strength of the analogy that Upsolve was able to draw between its aims and activities and those of the organizations that had famously prevailed in earlier access-to-justice cases, the district court rejected the idea that Justice Advocates possessed the same fundamental right to engage in "collective activity . . . to obtain meaningful access to the courts" as the lawyers in *Button* and

[70] Matter of Rowe, *supra* note 68, at 341.
[71] Upsolve, Inc. v. James, *supra* note 1, at 110.
[72] Upsolve, https://upsolve.org/ (last accessed Mar. 9, 2024).
[73] Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, Upsolve, Inc. v. James, *supra* note 1, at 97 (No. 1:22-cv-00627), 2022 WL 1057475, at *11.
[74] *Id.*

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Primus did.[75] Instead, the district court interpreted the principles articulated in *Button* and *Primus* to apply only to the associational and expressive activities of *licensed* attorneys. The court suggested, further, that the fundamental right those cases recognized might apply only to certain kinds of litigation campaigns – those in which licensed attorneys "sought to vindicate constitutional rights, such as equal protection against discriminatory laws," not more basic rights, like the right to access justice.[76]

The district court's opinion strongly suggested that the reason why the court adopted this exceedingly narrow interpretation of the relevant precedents – one that is, it is worth pointing out, very difficult to reconcile with the facts of the union litigation cases – was because the court feared that any other interpretation would have too destabilizing an effect on the regulatory landscape.[77] Were the First Amendment interpreted to grant nonlawyers a fundamental right to "[p]romote access to the courts," the court warned, the result would be to "allow any non-lawyer, so long as they do not charge a fee, to bootstrap a right to practice law."[78] It would mean that "[c]lients in any type of civil lawsuit would . . . enjoy the right to full non-lawyer representation."[79] Clearly alarmed by the specter of this deregulated world, the court adamantly rejected the idea that the democratic interests protected by the First Amendment access-to-justice cases were implicated here.

In marked contrast to the earlier cases, however, the district court's rejection of the relevance of the *Button* line of cases did not doom Upsolve's challenge. Instead, the court picked up the second argument that Upsolve made to challenge the enforcement of the UPL laws against the Justice Advocates program, and concluded that, even if the Justice Advocates lacked a fundamental First Amendment right to promote access to the courts, they nonetheless possessed a different fundamental First Amendment right not to be regulated by a content- or speaker-based law – and a right that was likely to be violated in this case. The court rejected Upsolve's *democracy* argument, in other words, but it accepted its *content neutrality* one.

The court's acceptance of this second argument required it to reject and/or distinguish what it acknowledged to be the significant body of prior case law that

[75] Upsolve, Inc. v. James, *supra* note 1, at 111.

[76] *Id.*

[77] The Court was quite explicit in the union cases that the First Amendment protected the right to associate to facilitate access to justice even when only statutory rights were at stake. *See* United Transp. Union v. State Bar of Mich., *supra* note 31, at 585 (noting that the "basic right to group legal action" protected "a cooperative union of workers seeking to assist its members in effectively asserting claims under the [Federal Employers' Liability Act]"); Bhd. of R.R. Trainmen v. Virginia, *supra* note 31, at 5 ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting . . . statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.").

[78] Upsolve, Inc. v. James, *supra* note 1, at 111.

[79] *Id.*

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assumed that lawyers (or, as in this case, nonlawyers) had no right to be regulated by content-neutral laws when they engaged in the practice of law.[80] In order to justify putting aside this very significant body of law, the court turned, as it had to, to more recent and more binding authority – namely, the decisions in *Holder* and *Becerra*.

The district court interpreted *Becerra* to stand for the proposition that, at least when they regulate "pure speech," professional licensing laws are subject to the same neutrality obligations as any other laws. "*Becerra* undermined the notion," the court wrote, that "licensing requirements are somehow *sui generis* under the First Amendment merely because they target professionals."[81] More specifically, the court argued, *Becerra* undermined the idea that the government could use the tool of professional licensing to "transform pure speech" into conduct and "evade First Amendment scrutiny altogether."[82]

This meant, the court concluded, that the crucial question in the case – or at least, the question that determined what level of scrutiny applied to Upsolve's First Amendment challenge – was not, as courts had previously assumed, whether the UPL laws regulated speech directed at a public audience about matters of public concern, or regulated speech that emerged out of the agency relationship between a professional expert and a client. Instead, the crucial question was whether the kind of activities the Justice Advocates wished to engage in constituted speech or something else called "conduct."[83]

The district court invoked *Holder*, in turn, for the proposition that the provision of personalized advice to another was an act of speech, not conduct.[84] This meant, the court asserted, that even if the use of UPL laws to prevent nonlawyers from filing briefs or from arguing cases could continue to be treated as an incidental regulation of speech, the same was not true when it came to the use of UPL laws to prohibit nonlawyers from providing individual clients with out-of-court legal advice.[85] The use of the law in this context had to be considered a direct regulation of speech – and more than that, under the logic of *Holder*, it had to be considered a *content-based* regulation of speech.[86] This was because, the district court explained, like the material support statute in *Holder*, application of New York's UPL ban depended on what the Justice Advocates said. The fact that the ban prohibited the Justice

[80] *Id.* at 112 (acknowledging that "[t]here is no doubt [that] lower courts have overwhelmingly concluded that UPL statutes regulate professional 'conduct' and merely burden a non-lawyer's speech incidentally").

[81] *Id.* at 116.

[82] *Id.*

[83] *Id.* at 112 (noting that "plaintiff's claim hinges on whether the act of giving legal advice should be conceptualized as conduct or speech").

[84] *Id.* at 114.

[85] *Id.* at 112 (noting that, although in the past, nonlawyers "have been excluded from 'drafting' pleadings and 'filing' legal documents" without triggering heightened First Amendment scrutiny, "[t]hese conduct-focused cases are inapposite, as Plaintiffs do not seek to do any of these activities" but instead seek merely to provide "out-of-court verbal advice").

[86] *Id.* at 114.

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Advocates from providing only advice about matters related to their legal rights and responsibilities, but did not prevent them from advising clients about any other topic, made the law "by definition [a] content-based [regulation of] speech" under *Holder*.[87] The logic of that opinion, it wrote, fit "seamlessly" with this one.[88]

The court accordingly held that enforcement of the UPL law against the Justice Advocates program would be consistent with the First Amendment only if the government could demonstrate that enforcement of the ban, in the specific circumstances in which it applied, furthered a compelling governmental interest by the least speech-restrictive means.[89] And the court ultimately concluded that, in all likelihood, New York could not meet this heavy burden.

Although the district court acknowledged that the interests New York invoked to defend its UPL laws – namely, protecting the welfare of legal consumers and safeguarding the integrity of the courts – are generally compelling interests for a government to pursue, it rejected the claim that these interests were compelling as applied to the Justice Advocates program.[90] According to the court, the fact that Upsolve permitted the Justice Advocates to only advise clients about a limited number of matters, did not allow them to appear in court or file legal documents on behalf of their clients, and required them to alert clients to the need for attorney representation when the problems posed by their cases proved too complex meant that the program posed little threat to the interests of legal consumers.[91] To the contrary: By giving clients who otherwise could not afford a lawyer some amount of legal advice, it promoted the welfare of legal consumers, as well as the integrity of the New York courts.[92]

The court also found that New York's ban on the provision of legal advice by nonlawyers was not narrowly tailored because there were many other ways that the state could protect the interests of legal consumers against incompetent advice-givers. It could – as it in fact did – sanction after the fact those who provided erroneous advice.[93] It could also require Justice Advocates to disclose to clients their (lack of) legal training and the limited scope of their services.[94] It could even require Justice Advocates and other nonlawyers to pass through a certification

[87] *Id.*
[88] *Id.*
[89] *Id.* at 117. The court also found that strict scrutiny was warranted because New York's ban on UPL made a speaker-based discrimination, and one that, as applied to the Justice Advocates, reflected a content preference. *Id.* at 115. Because this argument dovetails with the argument about content-based discrimination, I do not discuss it separately. Nevertheless, technically, the court found the New York laws to engage in two separate kinds of (presumptively unconstitutional) discrimination.
[90] *Id.* at 117.
[91] *Id.* at 118.
[92] *Id.* at 118.
[93] *Id.* at 119.
[94] *Id.*

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process similar to, but less rigorous than, the one licensed attorneys had to satisfy.[95] The court held, in other words, that New York could *regulate* the provision of legal advice by nonlawyers. What it could not do was simply ban it.

The district court consequently reached a conclusion that no prior court had reached: Nonlawyers possess a First Amendment right to provide out-of-court legal advice to individual clients, at least when they do so as part of an adequately structured and safeguarded legal aid program. The decision, in this respect, demonstrates quite vividly the expansiveness of the Lochnerian First Amendment. It suggests how the decisions in *Becerra* and *Holder* could be interpreted by lower courts to call into question the constitutionality of licensing regimes – in this case, the UPL laws – that had for decades escaped serious constitutional challenge.

The decision also demonstrates, however, the complexity of this project of First Amendment expansion. Scholars have warned that the Lochnerized First Amendment could be used to effectively "constitutionaliz[e] the unregulated operation of the laissez-faire commercial marketplace," thereby imposing "a straitjacket [on] our institutions of democratic governance."[96] But this is not the best reading of what the decision in *Upsolve* accomplishes. Rather than simply reading a laissez-faire vision of constitutional liberty into the First Amendment, the decision instead protects what not only access-to-justice advocates but the court itself had in prior decades recognized to be a fundamentally important democratic right. It protects the right of "[l]aymen . . . to associate together . . . to preserve and enforce rights granted them under federal [and state] laws."[97] This is true even if it does so on the basis of a formalist claim about the distinction between speech and conduct, rather than by reasoning more pragmatically about the kinds of rights that individuals need to possess to fully participate in democratic society, as the *Button* line of cases do.

Indeed, it may very well have been *because* of the formality of the content neutrality argument *Upsolve* made – *because* it did not require the court to reach potentially contested conclusions about the democratic deficits of the existing licensing regime – that the district court was willing to accept it. Whatever the case, the result was an opinion that protects democratic interests, not just commercial ones.

Nor does the opinion impose anything like a "straight jacket" on market regulation. To the contrary: The opinion makes clear that legislatures and state courts retain significant power under the court's interpretation of the First Amendment to regulate nonlawyer legal advocacy and advice-giving in all sorts of ways. Indeed, the district court went out of its way to emphasize the "narrowness" of its holding in this respect.[98]

[95] *Id.*

[96] Post & Shanor, *supra* note 3, at 166.

[97] Bhd. of R.R. Trainmen v. Virginia, *supra* note 31, at 7.

[98] Upsolve, Inc. v. James, *supra* note 1, at 111–12 ("At the outset, the Court underscores that an abstract 'right to practice law' is not at issue in this narrow challenge. . . . '[T]he issue here is a

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The trouble the court took to emphasize this aspect of its ruling suggests another reason why the court may have embraced the plaintiffs' content neutrality argument: It may have believed it imposed *less* of a straightjacket on the regulation of the professions than an argument based on the *Button* line of cases because it would apply only to the provision of out-of-court legal advice, rather than to other kinds of legal practice. It is not at all clear that this perception – if indeed it was what motivated the court to rule as it did – is an accurate one, however. Judicial recognition that Justice Advocates possessed a fundamental right to engage in collective action to facilitate access to the courts would not necessarily mean that future courts would have to grant "clients in any type of civil lawsuit . . . the right to full non-lawyer representation," as the district court warned. It would only mean that courts would have to apply strict scrutiny in all cases in which UPL laws prevent nonprofit groups from providing clients with non-licensed legal assistance. And, although strict scrutiny is a rigorous standard, its application is obviously not always fatal in fact. It is perfectly plausible that, even under such a standard, courts could and would find that a ban on the nonlawyer provision of complex legal tasks such as drafting briefs or arguing in court furthered the state's compelling interests in the welfare of legal consumers and the integrity of the justice system, even if a wholesale ban on the nonlawyer provision of other legal advice wouldn't pass muster.

At the same time, the fact that the decision in *Upsolve* was grounded in the Justice Advocates' right to content neutrality, not their right to engage in collective political expression, meant that the right the court articulated could potentially be invoked by for-profit actors quite unlike Upsolve. After all, most of the alternative mechanisms that the district court cited as support for its conclusion that New York possessed alternative, less speech-restrictive means to achieve its regulatory objectives – legal malpractice liability, disclosure requirements, and the like – could easily be adopted by commercial actors also.

Viewed objectively, it is safe to say as a result that the *Upsolve* decision is in some respects broader than a ruling based on the *Button* line of cases would have been, even if in other respects it may be somewhat narrower. What it reflects, overall, is a doctrinal logic that results in a *different* distribution of First Amendment rights than an approach grounded in an access-to-justice logic would have produced.

Nevertheless, this was no doubt a ruling that was intended to fit within, rather than undermine, New York's existing regulatory framework. Indeed, one way to read the opinion was as a spur to the New York courts and legislatures not to deregulate but to regulate more expansively by creating a two-tier system of regulation and licensing for law, similar to that which exists in medicine. How should access-to-justice advocates feel then about this far-from-radical but also quite significant

narrow one: whether the First Amendment protects the precise legal advice that Plaintiffs seek to provide, in the precise setting in which they intend to provide it. The Court holds that it does.'").

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decision? And what are its implications going forward? These are the questions I take up in the final section.

14.3 IMPLICATIONS

The district court's decision in *Upsolve* is clearly good news for access to justice. As advocates have long argued, the serious crisis of legal representation that besets so much of the American legal system is unlikely to be solved without significant reform to the existing regulatory system and to the monopoly that the licensed bar enjoys over the practice of law in the vast majority of states.[99]

The trial court's opinion in *Upsolve* provides an avenue for reform of this kind in states where ordinary regulatory pathways are blocked. It not only gives the green light to Upsolve's experimental project in New York; it lays out the doctrinal argument that advocates in other states can make to demand reform, and it also provides persuasive authority they can rely on when they do so. Indeed, advocates have already taken advantage of the opportunity it offers. In South Carolina, the NAACP recently filed a First Amendment lawsuit, challenging the constitutionality of enforcing the state's UPL laws against the organization's proposed Housing Advocates program, which would train nonlawyers to provide assistance to individuals faced with eviction.[100] In its brief, the organization heavily cited *Upsolve* as support for its claim that the application of the law to the Housing Advocates program triggered strict scrutiny, because it represented a "content-based regulation of . . . speech."[101] And while there are signs that the South Carolina district court is attempting to avoid having to deal with the difficult First Amendment question it raises, similar constitutional challenges are very likely to emerge in other states before too long.[102]

If these lawsuits succeed, the result will be, as the previous section makes clear, only a limited alteration to the existing licensing regime, but nevertheless a significant one. This is because even relatively simple legal advice – such as, for example, the advice the Justice Advocates are instructed to provide their clients, to whenever possible "deny the allegations" in complaints filed against them – can help avoid

[99] *See, for example*, Gillian K. Hadfield, *Legal Markets*, 60 J. Econ. Literature 1264 (2022); Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 Fordham Urb. L.J. 1227 (2014); Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 Stan. J. C.R.-C.L. 283 (2020).

[100] *See* S.C. State Conf. of NAACP v. Wilson, No. 2:23-CV-01121-DCN, 2023 WL 5207978, at *1 (D.S.C. Aug. 14, 2023).

[101] Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at *16-17, S.C. State Conf. of NAACP v. Wilson (D.S.C. 2023) (No. 2:23-CV-01121-DCN).

[102] In a recent order, the district court invoked the doctrine of Pullman Abstention to stay the case until the South Carolina Supreme Court has an opportunity to determine whether the Housing Advocate program did in fact violate the state's UPL laws. S.C. State Conf. of NAACP v. Wilson, *supra* note 100, at *9. The NAACP is currently appealing this decision.

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some of the most serious harms produced by the crisis of legal representation, such as the harm of default judgments. And it is the kind of advice that can be imparted to nonlawyers relatively easily, as the twenty-eight-page Justice Advocates training guide makes clear. A limitation on the monopoly of legal work by lawyers therefore provides an opportunity for access-to-justice organizations like Upsolve to address some of the most egregious and easily addressed problems caused by the crisis of representation in the United States, while still providing the professional bar the power to dictate who can engage in more complex, and less easily trainable, lawyerly tasks.

This is not to say that granting nonlawyers the power to provide this kind of advice poses no risks to the consumer welfare and judicial integrity interests that New York and other states insist are served by UPL laws. Indeed, many of the most established legal aid organizations in the state filed an amicus brief in support of New York state because they believed that granting a First Amendment right to the Justice Advocates to provide individualized legal advice would do more harm than good.[103] More specifically, these organizations argued that extending a First Amendment right to Justice Advocates to provide individualized legal services would create a kind of two-tier system of justice, in which those with sufficient economic resources to pay for a lawyer would receive the kind of nuanced and tailored advice that legal education enables, whereas those without the money to pay for a lawyer would have to rely upon the inevitably simplified – and for that reason, sometimes wrong – advice of those trained by an eighteen-page manual.[104] The aid organizations warned that this two-tier system of justice would not only be stratified along class lines but also racially – the result being to force the "Black and Latinx communities that are … disproportionately impacted by debt collection abuses" to rely upon "lower-quality legal services" than other communities receive, thereby only "further entrench[ing] the harms of a discriminatory, two-tiered financial system."[105]

These organizations are likely correct that what the decision in *Upsolve* enables is not, by any means, a fully egalitarian market in legal services. They are also almost certainly correct that the inequalities will continue to be manifested along racial as well as class lines. And they are also likely correct that, in some cases, the advice a Justice Advocate provides a client may not only be unhelpful but may be wrong in a legally meaningful respect – that it will result in precisely the non-easily remediable kind of harm the licensing system is meant to prevent.

[103] Brief of Consumer Law Experts et al. as Amici Curiae Opposing Plaintiffs' Motion for a Preliminary Injunction, Upsolve, Inc. v. James, *supra* note 1, at 97 (No. 1:22-cv-00627).

[104] *Id.* at 8 (arguing that "the [Justice Advocates] Training Guide adopts a one-size-fits-all model of advice that ignores potential claims and defenses available to the consumer, including advising consumers who may not have been served yet to file an answer, at the risk of waiving jurisdiction defenses, and advis[es] consumers using oversimplified calculations of statutes of limitations, among other problems").

[105] *Id.*

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Nevertheless, given the seriousness of the crisis of legal representation in New York, the number of cases in which their advice will result in worse outcomes for defendants is apt to be low. After all, most of the clients that the Justice Advocates serve do not now have a choice to go to a licensed attorney. There are too few legal aid organizations in New York to provide services to the vast majority of unrepresented debtors. Therefore, most clients of the Justice Advocates face a choice not between advice from a licensed attorney or a minimally trained layperson, but between advice from a trained layperson or no advice whatsoever. It is hard to see how providing the option of advice from a Justice Advocate will result in a *more* inequitable system of justice than the system that currently exists in New York. The Justice Advocates may in a few cases give imperfect advice. But it is likely that in many more, they will help litigants navigate a confusing and complex legal terrain – and, at the bare minimum, lower the incredibly high number of default judgments that plague the system.[106]

Nevertheless, the fact that the decision in *Upsolve* blesses what is not only a significant but a controversial, and indeed bitterly contested, revision to the existing licensing system means that its holding will no doubt be challenged. The constitutional argument it relies upon is likely to come under pressure from two directions – both from those seeking to narrow its reach and those seeking to expand it.

First, and most obviously, the decision's rather expansive interpretation of *Holder* and *Becerra* can and likely will be contested, both on appeal and in other cases. Those who want to challenge the decision on these grounds will have plenty of fodder. As I noted in Section 14.1, many other courts have interpreted those decisions much more narrowly than the *Upsolve* court did.

For example, in *Capital Associated Industries, Inc. v. Stein*, the Fourth Circuit held that a ban on the practice of law by corporations "fit[] within NIFLA's exception for professional regulations that incidentally affect speech" because the ban didn't "target the communicative aspects of practicing law, such as the advice lawyers may give to clients" – that is to say, it didn't limit what specific advice lawyers could give clients – but merely "focus[ed] more broadly on the question of who may conduct themselves as a lawyer."[107] Because the ban did not discriminate on the basis of viewpoint, in other words, but merely imposed speaker-based restrictions on who could speak about certain topics, the Fourth Circuit found it to be an incidental regulation of speech, regardless of the holding in *Becerra*.

Similarly, in *Tingley v. Ferguson*, the Ninth Circuit interpreted *Becerra* to hold only that professional speech was not a historically established low-value category of expression, but to otherwise permit professional regulations to be characterized as incidental regulations of speech so long as they allow the professional to

[106] Estimates on default rates in New York consumer bankruptcy court range from 70 to 95 percent. Complaint, *supra* note 64, at 6.

[107] Cap. Associated Indus., Inc. v. Stein, *supra* note 35, at 208.

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communicate their personal opinions to clients in other contexts than the regulated one.[108]

These decisions illustrate how some courts can, have, and are domesticating *Becerra* by reading it to do little more than get rid of the newly invented low-value category of professional speech. In their rather unabashed effort to interpret *Becerra* as a decision that did not do much to alter the doctrinal status quo, these decisions are hard to square with the expansive and impassioned language of Justice Thomas's opinion. But they are not obviously inconsistent with its holding; and as the earlier discussion suggests, *Becerra* is by no means the clearest decision or a decision that reflects a court entirely certain about how far the First Amendment does or should extend into the broad terrain of professional regulation. On appeal, the Second Circuit could easily rely upon these decisions to reject the conclusion reached by the district court in *Upsolve* and reaffirm the constitutionality of UPL laws.

The decision could also be challenged from the opposite direction: Litigants could argue that the specific speech/conduct distinction *Upsolve* relies upon makes no sense as a doctrinal matter, and, on that basis, push for a broader constitutional ruling than the self-consciously "narrow" one that the *Upsolve* district court fashioned. Such a challenge would not be hard to mount. The district court did very little to explain, let alone justify, the distinction it drew between laws that regulate who can provide out-of-court-verbal advice (which it determined to be speech) and laws that regulate who can draft pleadings on behalf of clients, or argue cases in court (conduct). And it is not terribly easy to come up with a doctrinal justification for that distinction. As a matter of black letter law, all that is required for conduct to qualify as speech for First Amendment purposes is that it reflects "an intent to convey a particularized message . . . and . . . the likelihood was great that the message would be understood by those who viewed it."[109] These conditions are almost certainly going to be met virtually any time someone writes a brief for a client, or argues a case in court. The logic of *Holder* applies here too, "seamlessly."

Later courts, therefore, could quite easily interpret the content discrimination principle that the district court relied upon in *Upsolve* to reach a much more sweeping ruling. This does not mean that later courts will *have* to apply the content discrimination logic more broadly than the *Upsolve* court did. As Section 14.1 makes clear, the boundaries of the First Amendment have always been shaped by courts' conception of the ends the First Amendment is supposed to further. And the acts of filing a brief or making arguments in court are obviously much more complicated expressive acts than the act of giving a client verbal advice; to be successfully performed, they require much more nonverbal conduct. Their status as speech may therefore not be as intuitively obvious to courts as the simpler act of providing out-of-court legal advice may be.

[108] Tingley v. Ferguson, 47 F.4th 1055, 1073 (9th Cir. 2022).
[109] Texas v. Johnson, *supra* note 43, at 404.

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Nevertheless, there is no obvious doctrinal reason why a later court could not make the same argument that the *Upsolve* court did to conclude that the enforcement of UPL laws against nonlawyers who wish to draft pleadings or argue cases in court also triggers strict scrutiny. The result, obviously, would be a reading of the First Amendment that imposes far greater constraints on the power of state legislatures and judiciaries to license the practice of law than the *Upsolve* decision does.

The fact that the decision could be challenged from two different directions highlights the uncertain inflection point at which we stand. It reflects the deep uncertainty evident in the case law about precisely what the Supreme Court's recent cases mean for the regulation of the professions, including the regulation of the legal profession. Given this uncertainty, and the perhaps insoluble indeterminacy built into the speech/conduct distinction itself, it is hard to say what the consequences of the *Upsolve* decision will be. An opinion that was crafted self-consciously to impose a narrow constraint on New York's power to regulate the practice of law could be interpreted to stand for a much broader proposition than it intended to convey, or it could end up reversed by the Second Circuit.

This does not make the decision unimportant. To the contrary, the district court's opinion is a powerful illustration of how the Supreme Court's changing conception of the First Amendment's means and ends can and is being used to disrupt the regulatory status quo when it comes to the regulation of the professions. But the fact that the constitutional reasoning in the case has not yet gained a broader foothold in First Amendment cases, and that it remains vulnerable from multiple directions, means that access-to-justice advocates cannot take the decision, or its holding, for granted.

Instead, the lack of clarity that plagues the professional speech cases means that advocates have now both the opportunity and perhaps also the obligation to explain to courts why one interpretation of the decision is preferable to others – to help courts, in other words, theorize the (currently quite unclear) relationship that does and should exist between the First Amendment and the licensing of legal services. As the discussion in Section 14.2 suggests, this explanation may have to be made in the rather formalist language employed in the *Holder* and *Becerra* decisions, and in *Upsolve* itself. It may have to rely on arguments about what properly counts as speech or conduct for First Amendment purposes, and what counts as a direct or incidental regulation of speech. But it need not be insensitive to the democratic interests and concerns that have long motivated both the access-to-justice movement *and* many of the First Amendment cases.

To put it another way: Given the lack of consensus about precisely what *Holder* and *Becerra* mean, there is an opportunity for advocates and litigants to push the courts to craft a First Amendment jurisprudence that, even if not self-consciously grounded in the democratic interests and values that played such an obvious role in the *Button* line of cases, advance them nonetheless. Yet, engaging with courts about

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the proper meaning and wider implications of the *Upsolve* decision will require advocates to come up with answers to some difficult questions.

First, it will require advocates to decide whether they want to pursue a constitutional path of legal reform. The generally forbidding nature of the First Amendment terrain, up until very recently, has meant that the access-to-justice movement has not expended a great deal of effort on constitutional argument. Most of the reform efforts have focused on convincing state courts – the institutions that have traditionally been tasked with the responsibility of defining and enforcing UPL rules – to change their rules and regulations. Turning to the First Amendment as a mechanism of regulatory change will require the movement to shift both its language and strategy and to devote far more energy to arguing how ensuring better access to the courts advances other, democratic aims.

Yet, if advocates decide to pick up the arguments relied upon by the district court in the *Upsolve* case, they will have to decide how broadly they want those arguments to apply. Most importantly, perhaps, they will have to decide whether these arguments should be extended to for-profit actors like LegalZoom, which like Upsolve helps legal consumers complete important legal filings.[110] As Section 14.2 suggests, for-profit actors could easily argue that they have the same First Amendment right to content-neutral regulation as nonprofits like Upsolve do. Were they to succeed in convincing courts of this argument, the result would be very likely a significant expansion in the reach of nonlawyer service providers, given the scale of businesses like LegalZoom and the upside potential of the market in general.

Affirmatively making this argument would require, however, dispensing with the assumption that has underpinned the access-to-justice cases for seventy years: namely, that the First Amendment only really protects the associational rights of political, that is, nonprofit, legal advocacy organizations. Advocates, and courts also, will need to decide whether they are willing to move so far away from the traditional understanding of what kinds of collective associations possess significant democratic importance and pose sufficiently little threat to the welfare of legal consumers to be entitled to the assiduous constitutional protections against professional regulations that nonprofits like the NAACP and the ACLU traditionally received. This will require evaluating whether the benefits to access to justice in terms of scale and efficiency outweigh the obvious risk to consumer welfare that the introduction of a profit motive introduces. This chapter is obviously not the place to answer this question. But it is a question that *Upsolve* clearly poses – and that, it strongly suggests, both courts and access-to-justice advocates will have to confront sooner or later.

Similarly, advocates and courts will have to decide whether the logic relied upon by the *Upsolve* court should be extended to other acts of legal representation. Should nonlawyers like the Justice Advocates be able to not only advise clients about how to

[110] Hadfield, *supra* note 99, at 1301.

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fill out legal forms but make arguments on their behalf, either in pleadings, or in court? In reality this question is twofold: Is activity of this sort the kind of expressive conduct that the First Amendment protects? And if so, do state governments possess a compelling reason to nevertheless limit who can engage in these expressive tasks? The broad but uncertain language employed by the court in both *Holder* and *Becerra* leaves both of these questions open.

As this discussion suggests, rather than revealing anything definitive about the meaning of the Lochnerized First Amendment, what the decision in *Upsolve* instead does is put on the table a number of important questions that it was impossible, or at least unimportant, to ask before. Perhaps the most important takeaway of this chapter, then, is that the meaning of how the First Amendment applies to the regulation of the legal profession is not fixed. Perhaps more than at any time in recent history, it is up for grabs. This is an opportunity for access-to-justice advocates, even if it is one that comes with some amount of peril.

14.4 CONCLUSION

A common criticism of the Lochnerian turn in First Amendment jurisprudence is that it produces a free speech jurisprudence that protects interests – economic efficiency, consumer choice – far removed from the democratic interests that the Speech Clause was enacted to protect. As this chapter suggests, the story is somewhat more complicated. The constitutionalized deregulation that the Supreme Court's recent First Amendment cases authorize and enable has obviously economically liberalizing effects. But it also can and has been wielded to advance democratic interests that were poorly served by a body of law that distinguished categorically between the commercial and the political spheres. How useful the new Lochnerian First Amendment will in the end be to the access-to-justice movement and its democratic aspirations remains to be seen. But the decision in *Upsolve* suggests its potential as a spur to reform.

For academics, as well as access-to-justice advocates, the possibilities opened up by the more "imperial" First Amendment are important to keep in mind when assessing its costs and benefits. Instead of surrendering the Lochnerized First Amendment to those who wish to wield it for purely economically deregulatory ends, they may be able to seize it, in this context at least, to further some of the most fundamental of democratic interests the First Amendment cases recognize. But doing so will require coming up with a theory of what the First Amendment should mean in this context, and to whom it should apply. These are arguments that access-to-justice advocates have little experience or history making. There is good reason to think that that should now change.

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