# Marketplace of Malpractice

## The Supreme Court Upends the Regulation of Professions

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Every day we depend upon the counsel of our doctors, lawyers, engineers, accountants, architects, and pharmacists. Yet, in a startling decision, the Supreme Court recently struck down Colorado's ban on "conversion therapy" for minors in an opinion that threatens to undermine the professional advice on which we all constantly rely. In a world in which it is increasingly difficult to discern what's true and what's false, what's beneficial and what's harmful, professionals have on the whole remained dependable sources of good information. The law encourages and safeguards our reliance on professional advice. But, thanks to the Court's unusually obtuse decision, that may now change.

The case before the Court involved a Colorado law prohibiting licensed counselors from attempting to change the sexual orientation or gender identity of a minor. Counselors could, however, assist minors who were undergoing gender transition. A licensed mental-health counselor, Kaley Chiles, challenged Colorado's law because it permitted her to encourage gender transitions but not to oppose them. She contended that the law discriminated on the basis of viewpoint and thus violated her First Amendment right of freedom of speech.

The Court uncritically endorsed Chiles' argument. It reasoned that "as a talk therapist, all Ms. Chiles does is speak with clients." The Court condemned Colorado because it sought to regulate Chiles's speech because of what she said. It did not matter that Chiles was a licensed professional doing her job. The First Amendment, said the Court, "protects the right of all" to speak as they will, including professionals. Colorado could not "suppress views Ms. Chiles wishes to express"; it could only regulate speech that was incidental to conduct, as for example by requiring informed consent before medical procedures. But here Colorado was simply regulating "speech as speech."

Pulling out large rhetorical guns, the Court insisted that the First Amendment means "that every American possesses an inalienable right to think and speak freely" and that "the free marketplace of ideas" is "the best means for discovering truth." "However well-intentioned," the Court said, "any law that suppresses speech based on viewpoint represents an 'egregious' assault on both of those commitments."

This reasoning is simply nonsense in the context of the professional speech that all of us rely on all the time. We extend extraordinary protections to political speech, but not to the ordinary communications of professionals, which are routinely regulated. Take the case of lawyers. Lawyers do nothing but talk. They give advice; they advise clients on how to draw up wills, contracts, and other legal documents; they offer opinions on the legality of transactions; and so on. On the Court's reasoning, to regulate these communications is to regulate "speech as speech." Lawyers possess an inalienable constitutional right to communicate as they please because the marketplace of ideas will ensure that in the end truth will emerge. Hogwash.

At present, the speech of lawyers is governed by a framework of legal guardrails to ensure that their clients receive comprehensive, competent, and trustworthy advice. Lawyers are subject to licensing, discipline, malpractice liability, and fiduciary duties. These are all viewpoint-based limits on speech. The state distinguishes competent from incompetent speech, subjecting the latter to the penalties of malpractice.

The state makes these viewpoint distinctions so that clients can rely on the advice of their lawyers. There is no marketplace of ideas between clients and lawyers. If Justice Gorsuch, who wrote the Court's

opinion, were to consult his lawyer to draft a will, and if (God forbid) his lawyer were to commit professional malpractice by drawing up an invalid will, and if Justice Gorsuch were to sue his lawyer, the incompetent lawyer could not defend by invoking the marketplace of ideas.

Gorsuch's lawyer could not claim, as Justice Holmes asserted in defining the marketplace of ideas, that the proposed will was "an experiment, as all life is an experiment." Gorsuch did not visit his lawyer to engage in abstract debate. He did not care about the eventual emergence of truth. He had important business to transact, the crafting of a workable will.

The law currently protects Gorsuch's expectations. But now, after his ill-considered opinion in the Colorado case, all that is open to question. We doubt whether the Court would make such an obvious error were it not so anxious to strike yet another blow in its ongoing war against protections for LGBTQ lives. The Court has increasingly conscripted the First Amendment into that assault, without apparent consideration of the consequences.

Like lawyers, the professional life of accountants, engineers, and architects transpires through speech. Much of what doctors do also occurs through the medium of speech. States require licensing and pervasively regulate professionals because society cares that their speech be competent. Clients and patients ought to be able to rely on the speech of professionals. They should be able to expect more than just speculation. They should receive reliable advice grounded in competent expertise. And, if things go wrong, they ought to be able to hold professionals accountable.

This is what the entire framework of professional regulation exists to guarantee. This is what the Court has just thrown into doubt.

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