

# PUBLIC CHOICE THEORY AND OCCUPATIONAL LICENSING

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## INTRODUCTION

Ask someone to identify the principal growth industries in America, and you are likely to hear responses such as software development, cybersecurity, the home health care industry, government contracts consulting, and political campaign management. What you may not expect to hear is that lines of work requiring an occupational license are among the fastest growing types of employment in the United States.<sup>1</sup>

Licensing is one of three basic forms of occupational regulation.<sup>2</sup> *Registration* obliges an individual to file his or her name, address, line of work, and qualifications with a relevant state or local agency, and perhaps also to pay a fee or post a bond. *Certification*, an intermediate form of regulation, permits anyone to practice in a particular field, but the government or a private association identifies an applicant's educational or skill level, typically based on an examination, and issues a certificate to that effect. *Licensing* is the most rigorous form of occupational regulation. A license is a grant of permission to enter a particular line of work. Licensing laws make it unlawful, and sometimes illegal, to practice in a particular field without first re-

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1. See MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 24 (2015) [hereinafter HAMILTON DISCUSSION PAPER].

2. See, e.g., Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676–77 (2010).

ceiving the government's approval.<sup>3</sup> A state adopts registration, certification, and license requirements under its "police power," the inherent sovereign authority to regulate private conduct for the purpose of protecting the health, safety, and welfare of its residents.<sup>4</sup>

The public is familiar with the concept of occupational licensing but likely is unaware of its extent. When most people think of that term, the images that come to mind likely involve healthcare (physicians and dentists), law (attorneys and judges), or finance (stock brokers and accountants). But the world has changed markedly since *The Adventures of Ozzie and Harriet* was a staple on television. In the 1950s, the American economy rested on manufacturing, and only an estimated four to five percent of employees worked in an occupation requiring a license.<sup>5</sup> But the economy today is service-oriented, and the number of licensed positions has skyrocketed.<sup>6</sup> According to a July 2015 White House report, since 1950 the percentage of the domestic workforce in positions requiring licenses has multiplied five-fold to approximately twenty-five percent.<sup>7</sup> Part of that increase is

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3. States (and municipalities) use various mechanisms to limit the number of practitioners in various fields. For example, states may cap the number of parties that can enter a particular occupation each year, require an applicant to pass a test requiring knowledge of esoterica having little to do with the occupation, manipulate the passing rate in order to keep the number of passing grades low, limit the dates on which a licensing examination is offered, set examination fees in a manner that makes it difficult for some applicants, hold examinations in a small number of perhaps difficult-to-reach locations to discourage parties from taking the exam, and the like. See Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399, 400 n.1, 412 (1974); Simon Rottenberg, *The Economics of Occupational Licensing*, in NAT'L BUREAU OF ECON. RES., ASPECTS OF LABOR ECONOMICS, at 18 (1962). At some point, extremely burdensome licensing requirements have the practical effect of excluding most or all potential entrants and should be treated as strict legal barriers to entry.

4. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (discussing the state's police power); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 523–25 (1847) (surveying the state's right to regulate internal commerce).

5. Morris M. Kleiner, *A License for Protection*, 29 REGULATION 17, 17 (2006).

6. Occupational licensing is also widespread in the European Union (EU). Information gathered in 2012 from the then twenty-seven members of the EU revealed that 19,000,000–51,000,000 EU workers, or 9–24% of the relevant population, were subject to occupational licensing requirements. HAMILTON DISCUSSION PAPER, *supra* note 1, at 14.

7. THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY-MAKERS 17 (2015) [hereinafter WH FRAMEWORK]; see also Kleiner & Krueger, *supra* note 2, at 684; Alan B. Krueger, *Do You Need a License to Earn a Living? You Might Be Surprised at the Answer*, N.Y. TIMES (Mar. 2, 2006),

attributable to the increase in the number of employees in the service economy, because workers who offer services are more likely to be subject to licensing than employees who manufacture widgets.<sup>8</sup> But two-thirds of that expansion is due to an increase in the number of occupations subject to a licensing requirement, particularly in nontraditional lines of work.<sup>9</sup> Occupational licensing is now one of the nation's most widespread and fastest growing forms of labor market regulation.<sup>10</sup>

Contemporary occupational licensing schemes have ancient roots.<sup>11</sup> Rudimentary forms of medical licensing existed in Germany, Naples, Sicily, and Spain in the thirteenth and fourteenth centuries.<sup>12</sup> Medieval guilds limited entry into various occupations.<sup>13</sup> The American Colonies subjected bakers, ferry workers, innkeepers, lawyers, leather merchants, and peddlers

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[http://www.nytimes.com/2006/03/02/business/yourmoney/02scene.html?\\_r=0](http://www.nytimes.com/2006/03/02/business/yourmoney/02scene.html?_r=0) [<http://perma.cc/R2WQ-LL6L>]. Compare that rather sizeable increase with a comparable drop in the number of union members. The latter amount is now roughly one-third what it was sixty years ago. See Kleiner, *supra* note 5, at 17.

8. See WH FRAMEWORK, *supra* note 7, at 19–20.

9. *Id.* at 20–21 (“[O]nly a little more than one-third of the increase in the percentage of workers licensed at the State level from the 1960s to the 2008 estimate is explained by the changing composition of the workforce. This means that the remaining two-thirds of the growth in licensing comes from an increase in the number of licensed professions. The importance of an increase in the number of licensed occupations—not just the number of licensed workers—suggests that licensing has expanded considerably into sectors that were not historically associated with it . . . [A]mong licensed workers today, fewer than half are in health care, education, and law—traditionally very highly licensed occupations. Instead, large shares of licensed workers today are in sales, management and even craft sectors like construction and repair.”).

10. Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 1, 6 (2011); see HAMILTON DISCUSSION PAPER, *supra* note 1, at 5 (“[D]uring the 2012–13 legislative sessions at least seven occupations were newly licensed in at least one state, ranging from scrap metal recyclers in Louisiana to body artists in the District of Columbia.”) (citation omitted).

11. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 20–22 (3d ed. 2008); MORRIS M. KLEINER, *LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION?*, at xiii (2006); S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* 9–14 (1987); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 494 (1965); Rottenberg, *supra* note 3, at 4.

12. See YOUNG, *supra* note 11, at 9.

13. They did so much to the dismay of Adam Smith, who opposed such restrictions. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 118–29 (Edwin Cannan ed. 1937).

to early forms of regulation.<sup>14</sup> In nineteenth-century America, states and localities licensed barbers, embalmers, horseshoers, boarding house operators, insurance agents, midwives, pawn-brokers, physicians, real estate brokers, steamboat operators, undertakers, and veterinarians.<sup>15</sup> But the present occupational licensing system began in the last quarter of the nineteenth century. By that point more than half of the states required licenses to practice as a physician, dentist, pharmacist, or lawyer.<sup>16</sup>

States have developed a common licensing apparatus. Ordinarily, legislatures create licensing boards, and governors frequently appoint members to those boards from within the profession itself.<sup>17</sup> The legislature defines occupational qualifications or empowers the board to do so. The most common requirements involve formal education, prior experience in the form of apprenticeships or internships, examinations, and good character.<sup>18</sup> The board prepares qualifying exams, sets the pass rate, reviews applicants, adjudicates complaints against practitioners, and performs other ancillary tasks.<sup>19</sup> The process has operated in a consistent manner for more than a century.

Occupational licensing, however, has had its critics. A large number of federal government officials,<sup>20</sup> scholars,<sup>21</sup> and other

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14. See, e.g., ELY, *supra* note 11, at 20–22; Friedman, *supra* note 11, at 494–96. There were, however, no guilds, corporations, or exclusive professional associations.

15. See KLEINER, *supra* note 11, at 20; Friedman, *supra* note 11, at 494–501.

16. See Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93, 103 (1961). By 1935, twelve additional occupations were licensed in more than half of the states. *Id.* (architects, barbers, beauticians, chiropractors, civil engineers, embalmers, registered nurses, optometrists, osteopaths, real estate brokers and sale personnel, surveyors, and veterinarians).

17. See, e.g., YOUNG, *supra* note 11, at 29; Rottenberg, *supra* note 3, at 14.

18. See Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 410 (1996).

19. See KLEINER, *supra* note 11, at 29; Rottenberg, *supra* note 3, at 17–18.

20. See, e.g., WH FRAMEWORK, *supra* note 7, at 3; WILLIAM BLUMENTHAL, FED. TRADE COMM'N, BACKGROUND MATERIALS: A PRIMER ON THE APPLICATION OF ANTITRUST LAWS TO THE PROFESSIONS IN THE UNITED STATES (Sept. 29, 2006) (background materials accompanying remarks before the Canadian Bar Ass'n), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/primer-application-antitrust-law-professions-united-states/20060929cbablumenthalmaterials\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/primer-application-antitrust-law-professions-united-states/20060929cbablumenthalmaterials_0.pdf) [<http://perma.cc/GV9M-SASB>]; CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990), available at [https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox\\_foster\\_-\\_occupational\\_licensing.pdf](https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf) [<http://perma.cc/M24D-T9QX>]; Prepared Statement of the Federal Trade Commission on Competition and the Po-

commentators<sup>22</sup> have criticized the widespread use of occupational licensing requirements. In their view, the great majority of

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tential Costs and Benefits of Professional Licensure Before the Committee on Small Business, U.S. House of Representatives (2014), available at [http://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](http://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf) [<http://perma.cc/N7Y8-8WV2>]. Cf. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005) (“Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take.”) (Muris was the Chairman of the Federal Trade Commission (FTC) from 2001 to 2004). In its proposed budget for Fiscal Year 2016, the Obama Administration proposed increasing grant funding to states and their partners (inter alia) by \$15 million “to identify, explore, and address areas where occupational licensing requirements create an unnecessary barrier to labor market entry or labor mobility.” U.S. DEP’T OF LABOR, FY 2016 DEPARTMENT OF LABOR BUDGET IN BRIEF 28 (2015).

21. See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137–160 (1962); Clark M. Neily III, *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*, in ECONOMIC LIBERTY AND THE CONSTITUTION: AN INTRODUCTION, THE HERITAGE FOUNDATION SPECIAL REPORT No. 157 25, at 27–31 (Paul J. Larkin, Jr. ed., 2014); YOUNG, *supra* note 11, at 14, 29–30; Sidney L. Carroll & Robert J. Gaston, *Occupational Licensing and the Quality of Service*, 7 L. & HUMAN BEHAV. 139, 139–40 (1983); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1093 (2014); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976); Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191–92 (2000); HAMILTON DISCUSSION PAPER, *supra* note 1, at 5; Dick Carpenter & Lisa Knepper, Op-Ed., *Do Barbers Really Need a License?*, WALL ST. J. (May 10, 2012), <http://www.wsj.com/articles/SB10001424052702304451104577389691765508790> [<http://perma.cc/BH6V-WPLY>].

22. See, e.g., Clark Neily, Op-Ed., *Watch Out for that Pillow*, WALL ST. J. (Apr. 1, 2008), <http://www.wsj.com/articles/SB120701341410579079> [<http://perma.cc/8XY7-8LGB>]; Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> [<http://perma.cc/Z25N-PA5D>]; George Will, *Opinion, Supreme Court has a chance to bring liberty to teeth whitening*, WASH. POST (Oct. 10, 2014), [http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a\\_story.html?hpid=z7](http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html?hpid=z7) [<https://perma.cc/JE2T-GQ2Z>] (“Come [October 14, 2014], the national pastime will be the subject of oral arguments in a portentous Supreme Court case. This pastime is not baseball but rent-seeking—the unseemly yet uninhibited scramble of private interests to bend government power for their benefit. . . . [F]actions enrich themselves through occupational licensure laws unrelated to public safety. Such laws are growth-inhibiting and job-limiting, injuring the economy while corrupting politics. They are residues of the mercantilist mentality, which was a residue of the feudal guild system, which was crony capitalism before there was capitalism. Then as now, commercial interests collaborated with governments that protected them against competition.”). For an excellent summary of the flaws in related statutes imposing “certificate of need” requirements and laws that

such programs hurt rather than help consumers. Indeed, some scholars have found that many occupational licensing schemes are the product of practitioners' self-serving political efforts, rather than a considered attempt to improve the public welfare.<sup>23</sup>

To know which of those two sides has the better argument, it is necessary to answer several questions: What occupations are subject to licensing requirements? Why do legislatures impose licensing requirements on those occupations? More generally, why do legislatures adopt regulatory programs, of which occupational licensing schemes are but one example, for particular fields? This Article will examine the prevalence of occupational licensing, the rationale for that form of regulation, and its costs and benefits.

The result is not uplifting. Far too many legislatures have restricted entry into far too many professions for reasons that are far too weak to justify those requirements. Legislators have often used occupational licensing programs for reasons that have too little to do with public health and safety to believe that those licensing programs serve the public. Licensing requirements have become vehicles for cronyism at the public's expense. So far, the Supreme Court has refused to squelch that enterprise, in part because ever since the New Deal, the Court has been quite reluctant to second-guess social and economic tradeoffs made by the political branches. Indeed, the Court has declined several opportunities to do just that. This Article, however, offers two new challenges that critics can raise. These claims do not require the courts to second-guess the political tradeoffs that legislatures make.

Section I addresses the extent of occupational licensing. Section II discusses the rationales offered in support of occupational licensing and the criticisms advanced against those defenses. Section III discusses the Supreme Court's 1905 ruling in *Lochner v. New York*,<sup>24</sup> the decision that has come to epitomize (rightly or wrongly) the Supreme Court's early twentieth century willingness to second-guess legislative social and economic judgments, an inclination that most academics today find

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require a potential entrant to prove that the relevant industry has an unmet demand, see Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL'Y 1009 (2015).

23. See, e.g., FRIEDMAN, *supra* note 21, at 142–43; YOUNG, *supra* note 11, at 29–30.

24. 198 U.S. 45 (1905).

misguided, if not illegitimate. Section IV then identifies and discusses several legal challenges that could be raised against occupational licensing requirements, evaluates the likelihood of their success, and outlines what steps can be taken to preserve the benefits of occupational licensing schemes while eliminating or reducing their social costs. In particular, that Section uses Public Choice Theory to examine the justifications for licensing regimes and finds those defenses quite porous.

### I. THE PREVALENCE OF OCCUPATIONAL LICENSING

Occupational licensing requirements are widespread throughout our economy.<sup>25</sup> The core group of licensed occupations includes architecture, engineering, law, real estate, and various health-related positions.<sup>26</sup> But that is not all. A July 2015 White House report estimated that states regulate more than 1,100 occupations, but fewer than sixty are licensed in all fifty states.<sup>27</sup> A 2012 nationwide study of state occupational licensing requirements examined 102 different occupations in diverse fields.<sup>28</sup> Some occupations, such as ones in health care, are directly related to protection of the public health and safety. Many occupations, however, bear no credible relationship to those needs. Among them are the following: “animal breeders,”<sup>29</sup> auctioneers,

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25. See HAMILTON DISCUSSION PAPER, *supra* note 1, at 9 (table listing the share of the workforce licensed or certified in each state).

26. See COX & FOSTER, *supra* note 20, at 3.

27. WH FRAMEWORK, *supra* note 7, at 4. According to Professor Morris Kleiner, an occupational licensing expert, in 2006 states licensed more than eight hundred occupations, fifty of which were licensed in every state. KLEINER, *supra* note 11, at 5. Generally speaking, the presence of licensing requirements is directly related to the size, urbanization, and wealth of each state. *Id.* at 105.

28. See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 10–11 (2012) (table listing 102 occupations requiring a license); *id.* at 36–136 (listing the states and the District of Columbia and their licensing requirements); *id.* at 137–88 (listing each licensed occupation and the states requiring licensure). In terms of the number of licensing requirements, Louisiana leads the pack (71), followed closely by Arizona (64), California (62), and Oregon (59). *Id.* The Reason Foundation also issued a similar report in 2007, which also noted the large number of licensed occupations and also was very critical of this practice. See ADAM B. SUMMERS, REASON FOUND., OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES (2007).

29. CARPENTER, *supra* note 28, at 138 (“Animal breeders select and breed animals including cattle, goats, horses, sheep, swine, poultry, dogs, cats or pet birds according to their genealogy, characteristics and offspring. It may require knowledge of



ballroom dance instructors,<sup>30</sup> barbers,<sup>31</sup> bartenders, cosmetologists, court clerks, door repair contractors, “fishers,”<sup>32</sup> florists, funeral attendants, interior designers,<sup>33</sup> landscape workers, manicurists and pedicurists,<sup>34</sup> “milk samplers,”<sup>35</sup> “packagers,”<sup>36</sup> painting contractors, plumbers, “skin care specialists,”<sup>37</sup> taxi

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artificial insemination techniques and equipment use and involve keeping records on heats, birth intervals or pedigree.”). Twenty-six states require animal breeders to be licensed. *Id.*

30. See HAMILTON DISCUSSION PAPER, *supra* note 1, at 21.

31. Simon, *supra* note 22 (“California requires barbers to study full-time for nearly a year, a curriculum that costs \$12,000 at Arthur Borner’s Barber College in Los Angeles. Mr. Borner says his graduates earn more than enough to recoup their tuition, though he questions the need for such a lengthy program. ‘Barbering is not rocket science,’ he said. ‘I don’t think it takes 1,500 hours to learn. But that’s what the state says.’”).

32. CARPENTER, *supra* note 28, at 154 (“Fishers, also known as captains, deckhands and crew members, use nets, fishing rods, traps or other equipment to catch and gather fish or other aquatic animals from rivers, lakes or oceans, for human consumption or other uses and may haul game onto ship.”). Forty-one states require fishers to be licensed. *Id.*

33. See Neily, *supra* note 22 (“So what is really behind [the American Society of Interior Designers’] relentless push for more regulation? Simple: naked economic protectionism. It is no accident that the credentials required for licensure in ASID-backed occupational licensing bills are the same credentials required for membership in ASID itself. This includes a four-year degree from an accredited interior design college, a two-year apprenticeship, and a two-day, thousand-dollar licensing exam so irrelevant to the actual practice of interior design that many ASID members have never bothered to pass it themselves and simply get a waiver instead.”).

34. CARPENTER, *supra* note 28, at 166 (“Manicurists and pedicurists, also known as nail technicians, clean and shape customers’ fingernails and toenails and may polish or decorate nails.”). “Forty-nine states and the District of Columbia require a license to work as a manicurist; only Connecticut does not.” *Id.* Some states are quite strict about the matter. See Simon, *supra* note 22 (“Alabama has perhaps the strictest licensing requirements in the nation: 750 hours of schooling and a written and practical exam. The state gets, on average, four public complaints a year about poor service, according to the Alabama Board of Cosmetology.”).

35. CARPENTER, *supra* note 28, at 168 (“Milk samplers collect milk samples from farms, dairy plants and tank cars and trucks for laboratory analysis. They remove samples from bulk tanks, tankers or milking machines, using dipper or pipette, and pour samples into sterile bottles. Workers weigh samples, label bottles with origin of sample and pack samples in dry ice. Milk samplers transport samples to laboratory for bacteriological and butterfat content analysis, contact potential customers to explain benefits of testing program to sell milk testing service and may assist customers in interpreting sample test results to maximize benefits to customers. Samplers may also maintain individual milk production records for each cow in a customer’s herd.”). Thirty-four states require milk samplers to be licensed. *Id.*

36. *Id.* at 170 (“Packagers pack or package by hand a wide variety of products and materials.”). Seven states require packagers to be licensed. *Id.*

37. *Id.* at 179 (“Skin care specialists, also known as estheticians, aestheticians, spa technicians and facialists, among other titles, provide skin care treatments to face

drivers, taxidermists, tour or travel guides, tree trimmers, and upholsterers.<sup>38</sup> Other observers have found additional occupations subject to licensing requirements, such as beekeepers,<sup>39</sup> “burial societies,” cat groomers,<sup>40</sup> chimney sweeps, elevator operators, fortune tellers,<sup>41</sup> frog farmers,<sup>42</sup> “home entertainment installers,”<sup>43</sup> horseshoeing personnel, jai alai “participants,” junkyard dealers, locksmiths,<sup>44</sup> lobster sellers, makeup artists,<sup>45</sup> manure applicators, maple dealers, motion picture projectionists, mussels dealers, photographers, private detectives, real estate brokers and sales personnel, quilted clothing manufacturers, rainmakers, reptile catchers, shampooers,<sup>46</sup> sheep dealers, stallion breeders, surveyors, ticket brokers, turtle farmers, and whitewater rafting guides or operators.<sup>47</sup>

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and body to enhance an individual’s appearance.”). The District of Columbia and all states except Connecticut require skin care specialists to be licensed. *Id.*

38. *Id.* at 181, 185–87. See also SUMMERS, *supra* note 28, at 2 (“[D]id you know that you need the government’s permission to work as a rainmaker in Arizona, a fortune teller in Maryland, or a reptile catcher in Michigan?”); *id.* at 3 (“Children even need the government’s permission to run makeshift lemonade stands during their summer vacations.”) (citation omitted); *id.* at 24 (noting that, until recent adverse litigation, Mississippi required parties to complete 3,200 hours of courses to be allowed to teach the art of African hairbraiding).

39. Edlin & Haw, *supra* note 21, at 1096.

40. Simon, *supra* note 22.

41. KLEINER, *supra* note 11, at 14 n.1; Edlin & Haw, *supra* note 21, at 1096; Emily Sweeney, *Town Rebuffs Fortune Teller, Citing Residency Law; Gypsy Disputes One-Year Requirement*, BOSTON GLOBE (May 9, 2004), [http://www.boston.com/news/local/articles/2004/05/09/gypsy\\_disputes\\_one\\_year\\_requirement/](http://www.boston.com/news/local/articles/2004/05/09/gypsy_disputes_one_year_requirement/) [<http://perma.cc/K72W-6DM2>].

42. KLEINER, *supra* note 11, at 14 n.1.

43. CARPENTER, *supra* note 28, at 159 (“Home entertainment installers repair, adjust or install audio or television receivers, stereo systems, camcorders, video systems or other electronic home entertainment equipment.”). Three states require home entertainment installers to be licensed. *Id.*

44. Edlin & Haw, *supra* note 21, at 1096.

45. CARPENTER, *supra* note 28, at 165 (“Makeup artists apply makeup to performers to reflect period, setting and situation of their roles.”). Thirty-six states require makeup artists to be licensed. *Id.*

46. Simon, *supra* note 22 (“Texas, for instance, requires hair-salon ‘shampoo specialists’ to take 150 hours of classes, 100 of them on the ‘theory and practice’ of shampooing, before they can sit for a licensing exam. That consists of a written test and a 45-minute demonstration of skills such as draping the client with a clean cape and evenly distributing conditioner.”).

47. See SUMMERS, *supra* note 28, at 43–44 (App. C); Moore, *supra* note 16, at 96–98. See generally Leonard W. Levy, *Property as a Human Right*, 5 CONST. COMMENT. 169, 171 (1988) (“About the only people who are unlicensed in California are clergymen

Some of the occupations found on that list are odd, to say the least.<sup>48</sup> Are the health, welfare, and safety of the community really put at risk if society allows unlicensed florists, interior designers, and frog farmers to ply their trades?<sup>49</sup> Is anyone's life cheapened if he or she hires an unlicensed cat groomer, home entertainment installer, or makeup artist? Why do we need to license bartenders? To ensure that they know a grasshopper from a Manhattan? To guarantee that they are good listeners? And how would anyone even go about deciding whether a fortuneteller is qualified? Do you ask, "Who will win the next Super Bowl?" "How many fingers am I holding up?" Besides, what is the passing rate? Is two-for-three good enough? And is it an automatic disqualification if the fortuneteller is not richer than Croesus?

There also appears to be no rational relationship between the stringency of the licensing requirements and the demands placed on practitioners.<sup>50</sup> Consider barbering, one of the first occupations

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and university professors, apparently because no one takes them seriously.") (citation omitted).

48. I will spare the reader any discussion of what the qualifications might be for manure applicators. (But, if the reader just cannot bear not knowing, see *THE JERK* (Universal Pictures 1979), available at <https://www.youtube.com/watch?v=8Bfe6CgYbH8> [<http://perma.cc/WH44-U2UJ>].)

49. Well, maybe frog farming is different. See *Exodus* 8:1-5 (describing the second plague, frogs).

50. See *WH FRAMEWORK*, *supra* note 7, at 6 ("One study found that for a subset of low- and medium-skilled jobs, the average license required around 9 months of education and training.") (citation omitted). There also is no rational explanation for the wide geographic licensing requirements disparities seen across the nation. *SUMMERS*, *supra* note 28, at Executive Summary, \*2 ("[O]ccupational licensing laws are very arbitrary, as evidenced by the disparity in which occupations are licensed and how burdensome the licensing regulations are from one state to the next. For example, there were several cases in which neighboring states had significant differences in the number of licensed job categories: California (177) and Arizona (72), Arkansas (128) and both Missouri (41) and Mississippi (68), New Jersey (114) and Pennsylvania (62), North Carolina (107) and South Carolina (60), Tennessee (110) and Alabama (70), and Florida (104) and Alabama (70). If some places work just fine with minimal or no regulations, why must others be plagued with so many restrictive laws? Are things so drastically different just across state lines that this disparity could be justified? Not likely. While occupational licensing laws are billed as a means of protecting the public from negligent, unqualified, or otherwise substandard practitioners, in reality they are simply a means of utilizing government regulation to serve narrow economic interests. Such special-interest legislation is designed not to protect consumers, but rather to protect existing business interests from competition.").

to be licensed.<sup>51</sup> Barbering involves “cutting, trimming, shampooing and styling hair, trimming beards or giving shaves,”<sup>52</sup> activities that any adult could perform successfully without endangering anyone. Yet, barbering is heavily regulated. Forty-nine states and the District of Columbia license barbers and require a considerable amount of education or experience to earn a license, ranging from 175 to 890 days, with an average of 415.<sup>53</sup> Entrants also must pass between one to four qualifying tests, with an average of two.<sup>54</sup> Yet, in the twenty-first century, barbers perform few services other than cutting hair,<sup>55</sup> so it is difficult to understand why such a lengthy period of education and training is necessary for future tonsorial specialists. As a White House report recently noted, current licensing requirements can impose “burdens on workers, employers, and consumers, and too often are inconsistent, inefficient, and arbitrary.”<sup>56</sup>

Compare the licensing requirements in two different fields: Emergency Medical Services and Cosmetology. Emergency Medical Technicians (EMTs) are persons who “assess injuries, administer emergency medical care, extricate trapped individuals and transport injured or sick persons to medical facilities.”<sup>57</sup> By contrast, cosmetologists “provide beauty services, such as shampooing, cutting, coloring and styling hair and massaging and treating the scalp and may also apply makeup, dress wigs, perform hair removal and provide nail and skin care services.”<sup>58</sup> The skills demanded by the two occupations, and the importance of those professions to the health and safety of the community are obviously quite different. Because they

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51. Robert J. Thornton & Andrew R. Weintraub, *Licensing in the Barbering Profession*, 32 INDUS. & LAB. REL. REV. 242, 243 (1979). Minnesota passed the first licensing requirement for barbering in 1897. *Id.* By 1928, half of the states had that requirement. Moore, *supra* note 16, at 103 (Table 3). Perhaps they regulated barbering because they read the Bible too literally. See *Judges* 16:17–31.

52. CARPENTER, *supra* note 28, at 141.

53. *Id.* at 12, 93, 136, 141. Alabama is the only state that does not license barbers. Wyoming requires 175 days of education and training; Nevada, 890.

54. *Id.* at 12, 48, 62, 72, 82, 93, 141. Connecticut, Illinois, and Louisiana require passing only one exam. Minnesota and Nevada require four.

55. As Woody Allen is alleged to have complained, “The world is in bad shape. Not only is God dead, but just try to find a barbershop where you can still get a shave and a shoeshine.” Thornton & Weintraub, *supra* note 51, at 243 n.8.

56. WH FRAMEWORK, *supra* note 7, at 7.

57. CARPENTER, *supra* note 28, at 152.

58. *Id.* at 146.

are the first medically trained parties to reach a patient, EMTs are not only an integral part of the medical system but also are the tip of the spear. Cosmetologists are not even part of the shaft. Accordingly, the average person might assume that the education and training requirements to become an EMT would be far more rigorous than the ones necessary to become a cosmetologist. If so, that person would be wrong.

According to the Institute for Justice, all states and the District of Columbia require EMTs to be licensed.<sup>59</sup> The number of days of required education and training varies from zero (District of Columbia) to 140 (Alaska), with most states requiring between twenty-six and thirty-nine days, for an average of thirty-three days.<sup>60</sup> All fifty-one jurisdictions also require cosmetologists to be licensed,<sup>61</sup> but the education and training necessary is vastly different. The states demand various periods of education and training for cosmetology licensing, ranging from 233 days (Massachusetts and New York) to 490 days (South Dakota), with an average of 372 days.<sup>62</sup> In other words, a budding cosmetologist on average needs to complete *more than eleven times* the education and training necessary to serve as an EMT.<sup>63</sup>

That difference is stunning. We should expect to see differences among the states regarding the occupations requiring li-

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59. *Id.* at 152.

60. *Id.* at 16–17, 38, 52, 152.

61. *Id.* at 146.

62. *Id.* at 16, 78, 100, 118, 146; *see also* Carpenter & Knepper, *supra* note 21 (“66 occupations face greater average licensing burdens than EMTs.”); Edlin & Haw, *supra* note 21, at 1096–97 (“Cosmetologists . . . are required, on average, to have ten times as many days of training as Emergency Medical Technicians (EMT) must have.” (footnote omitted)).

63. *See* HAMILTON DISCUSSION PAPER, *supra* note 1, at 11 (noting that Michigan requires 1,460 days of education and training to become an athletic trainer but only 26 to become an EMT); *see also, e.g.,* WH FRAMEWORK, *supra* note 7, at 25 (“Though it is difficult to obtain comprehensive data on licensing burden, information collected by the Institute for Justice on 102 low- and medium-wage occupations provides a sense of the range of licensing burden across occupations and across States, in terms of education and experience prerequisites, licensure fees, examinations, and minimum age requirements. States range from Pennsylvania, where it takes an estimated average of 113 days (about four months) to fulfill the educational and experience requirements for the average licensed occupation examined, to Hawaii, where it takes 724 days (about two years).”); Morris M. Kleiner, Op-Ed., *Why License a Florist?*, N.Y. TIMES (May 28, 2014), <http://www.nytimes.com/2014/05/29/opinion/why-license-a-florist.html> [<http://perma.cc/9EFP-ND5U>] (“In Minnesota, more classroom time is required to become a cosmetologist than to become a lawyer. Becoming a manicurist takes double the number of hours of instruction as a paramedic.”).

censes and the type of requirements that entrants must satisfy. One of the benefits of a federal system is that states can explore different regulatory regimes.<sup>64</sup> Yet some differences are inexplicable. It is difficult to imagine a legitimate justification for caring more about whether someone's hair looks "marvelous" than whether his heart can be restarted.<sup>65</sup> Any state that makes it more difficult to become a cosmetologist than an EMT has clearly acted with something other than the public welfare in mind.

## II. A PUBLIC POLICY ANALYSIS OF OCCUPATIONAL LICENSING

### A. *The Justifications for Occupational Licensing*

Occupational licensing requirements are justified on several grounds.<sup>66</sup> The classic justification is information asymmetry.<sup>67</sup> Consumers lack the knowledge and expertise required to judge the qualifications of different service-providers and lack the time necessary to acquire such knowledge and expertise. Licensing requirements compensate for that shortcoming by setting a minimum qualifications floor below which no one may pursue a particular occupation.

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64. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

65. See Simon, *supra* note 22 ("[I]n many service trades, licensure 'is totally out of control,' says Charles Wheelan, a lecturer in public policy at the University of Chicago. He says the marketplace might be a better judge than the government of whether a barber or a yoga instructor is competent. 'It's fairly easy for you to tell whether you've gotten a bad haircut or not, and if quality turns out to be bad, it's not a big social problem,' says Mr. Wheelan.").

66. See, e.g., WH FRAMEWORK, *supra* note 7, at 11; DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 443–52 (4th ed. 2004); COX & FOSTER, *supra* note 20, at 4–16; FRIEDMAN, *supra* note 21, at 143; KLEINER, *supra* note 11; Carroll & Gaston, *supra* note 21; Gellhorn, *supra* note 21; Kleiner, *supra* note 21, at 191–92; Moore, *supra* note 16, at 101–10.

67. See, e.g., COX & FOSTER, *supra* note 20, at 5; KLEINER, *supra* note 11, at 1, 7–9; George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 946, 966 (1963) ("When there is uncertainty, information or knowledge becomes a commodity. Like other commodities, it has a cost of production and a cost of transmission. . . . The general uncertainty about the prospects of medical treatment is socially handled by rigid entry requirements. These are designed to reduce the uncertainty in the mind of the consumer as to the quality of product insofar as this is possible") (citation omitted); *id.* at 951–52; Carroll & Gaston, *supra* note 21, at 139; Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 I. POL. ECON. 1328, 1329–30, 1342 (1979); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 843 (1986).

There are additional justifications for imposing occupational licensing requirements. One is paternalism. Society's collective knowledge—the so-called “wisdom of the crowd”—exceeds the knowledge of any one individual,<sup>68</sup> so society is in a superior position to judge qualifications. Another justification is the need to generate positive externalities and avoid negative ones. Because consumers are generally risk averse,<sup>69</sup> licensing requirements may reduce consumer fear of being dissatisfied or injured by a particular service, which would enhance consumer demand, thereby benefitting an entire community as consumers purchase additional local services. Also, a licensing requirement could encourage service-providers to invest in their human capital through, for instance, additional education or training, because they will not fear being underpriced by less qualified rivals.<sup>70</sup> Atop of that, the exclusion of quacks, crooks, and charlatans from a particular line of work enhances its professionalism and reputation, which, in turn, increases its attractiveness not only to consumers but also to future members of that trade. Over time, therefore, licensing requirements can perhaps elevate the average skill of members.<sup>71</sup> Finally, licensing requirements raise revenue,<sup>72</sup> which the government can use to offset the cost of oversight.<sup>73</sup>

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68. See, e.g., JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

69. See, e.g., KLEINER, *supra* note 11, at 142.

70. That rationale is similar to one offered in defense of resale price maintenance. In that context, economists have explained that vertical price restraints are sometimes necessary to enhance *interbrand* competition by preventing *intra*brand competition. Minimum resale prices achieve that goal by prohibiting discounters from free riding on the investment of those retailers who furnish desirable point-of-sale services, such as product demonstrations or knowledgeable sales staff. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–91 (2007); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54–57 (1977).

71. See, e.g., Leland, *supra* note 67, at 1339–41 (quality standards may alleviate market failure due to information uncertainty and may be desirable when a higher price attracts lower- rather than higher-quality suppliers).

72. See Moore, *supra* note 16, at 96.

73. To be sure, the state has means other than licensing requirements to police the competence of service providers. For example, the state could use the civil justice system as an alternative to regulation with caveat emptor or caveat venditor serving as the default rule. See, e.g., Leland, *supra* note 67, at 1330. In some instances, however, it might be inefficient to make tort law remedies the exclusive regulatory medium. See Reuben A. Kessel, *Price Discrimination in Medicine*, 1 J.L. & ECON. 20, 44 (1958). Operating a civil justice system is costly; some parties may be judgment-proof, and risk-averse consumers may forgo purchasing a valuable service because they fear the consequences of selecting the wrong provider. If those costs are suffi-

The original justification for regulation, known as the Public Interest or Market Failure Theory,<sup>74</sup> posited that government regulates in situations in which the market cannot adequately perform its allocative responsibilities due to structural imperfections such as natural monopolies, externalities, transaction costs, and collective action problems.<sup>75</sup> That justification was born amidst the 1930s welfare economic theory<sup>76</sup> and was the

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ciently large, it may be more efficient for society to exclude unqualified service-providers at the outset through a licensing requirement than to compensate injured parties afterwards for the mistakes that incompetent providers will commit. Public enforcement of a licensing program, however, is not cost-free. The investigation and adjudication of potential violations uses resources that could be put to other, more productive uses. See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 225 (1967) (discussing the costs of enforcing a tariff regime). Moreover, parties seeking to obtain or prevent a licensing regime will spend resources organizing and lobbying legislators themselves or will retain a lobbying firm for that purpose. Those expenses, too, are not devoted to production that would increase society's overall wealth. See *id.* at 228. Finally, just as successful thieves provide others with an incentive to pursue that trade, success in securing an occupational licensing scheme in one occupation will encourage other trades to seek economic rents of their own. See *id.* at 231. Accordingly, it is not clear ex ante which approach is more efficient.

74. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 383 (1983); JAMES M. BUCHANAN, *POLITICS WITHOUT ROMANCE: A SKETCH OF POSITIVE PUBLIC CHOICE THEORY AND ITS NORMATIVE IMPLICATIONS*, in *THE THEORY OF PUBLIC CHOICE—II*, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984).

75. See, e.g., STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 15–28 (1982). Consider manufacturing. If one company can meet the entire market demand for a product at a lower cost than two or more companies, the market is a natural monopoly. The traditional response has been to have one firm supply all market demand, but to regulate the prices it may charge consumers in order to avoid the undesirable features of monopoly pricing. Yet, problems can arise even if the market for widgets is fully competitive. Unless factory owners are required by law to “internalize” the full public costs of their widgets, they will find it profitable to ignore externalities such as pollution or cut corners by not inspecting widgets for safety. The result is that they will befoul the air, water, and land while also distributing products that could maim or kill consumers. See, e.g., CARLTON & PERLOFF, *supra* note 66, at 82–84. Regulation is also defended on the ground that agency personnel can become subject matter experts free from partisan politics. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 94–96, 124–25 (2d ed. 2009).

76. See, e.g., ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932). That theory is similar to the modern theory known as “Republicanism”—a latter-day version of the “civic virtue” that the Roman political class (supposedly) held dear—which maintains that government officials should and will act for the public good, rather than their individual self-interest. See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).



orthodoxy as late as the 1970s.<sup>77</sup> Since then, however, it has come under withering criticism.<sup>78</sup>

Public Interest Theory suffers from three major flaws. The first one is that it justifies government intervention on the ground that markets are imperfect without recognizing that governments also are flawed. Remedies chosen by the political process to fix market problems may be wide of the target and create more problems than they resolve. That was the reason several market sectors such as airline pricing were deregulated in the 1980s.<sup>79</sup> Moreover, mistaken government interventions can be more difficult to remedy than market imperfections. The Constitution makes the passage of legislation difficult, so, once enacted, laws do not fade away. Absent an expiration date, laws remain in effect until they are repealed or held unconstitutional,<sup>80</sup> giving rise to what has been called “the tyranny of the status quo.”<sup>81</sup> Problems may be transient, but the statutes passed to remedy them may last forever.

Public Interest Theory also mistakenly idealizes the motives of public officials. The theory asserts that public officials always act in the nation’s interest even when the evidence is to the contrary.<sup>82</sup> Experience demonstrates that this assumption represents “normative wishings, rather than explanations of

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77. See, e.g., STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); Moore, *supra* note 16, at 113–14.

78. See, e.g., Douglas Ginsberg, *A New Economic Theory of Regulation: Rent Extraction Rather Than Rent Creation*, 97 MICH. L. REV. 1771, 1771 (1997) (“Once upon a time, people believed that the government regulated various industries in ‘the public interest.’”).

79. See, e.g., ALFRED E. KAHN, *LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH* (2003); *DEREGULATION OF NETWORK INDUSTRIES: WHAT’S NEXT?* (Sam Peltzman & Clifford Winston eds., 2000); MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985).

80. See *District of Columbia v. John R. Thompson, Co.*, 346 U.S. 100, 113–14 (1953); Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTS. 1, 8 (2014). The only exception is appropriations for federal military land forces—“Armies”—which can last for only two years. See U.S. CONST. art. I, § 8, cl. 12.

81. Becker, *supra* note 74, at 382.

82. See ELY, *supra* note 11, at 124 (“[T]he Progressives proceeded on the questionable assumption that all social legislation benefitted the public. Reformers rarely acknowledged that much economic legislation, although couched in terms of general benefits, served selfish special interests.”).

real world phenomena.”<sup>83</sup> Society might profit if policymakers were motivated by classical notions of civic virtue, but individual policymakers might not, and almost no one is willing to make the heroic—or Pollyannaish—assumption today that political officials always act against their self-interest. Far more likely is the risk that regulated companies will “capture” elected officials through campaign contributions and career civil servants through cajolery, offers of lucrative future employment, or bribery.<sup>84</sup> Moreover, only the hopelessly naïve would believe that elected or appointed officials are above trading benefits to private parties for political success in “the Darwinian world of politics,” a practice known as “rent creation.”<sup>85</sup> As Professor Peter Schuck has recently noted, Public Interest Theory stands as a “vacuous and dangerously naïve” account of public policymaking, both as to how public policy is adopted and how it is implemented.<sup>86</sup> As he puts it, “rational self-interest (as the actor perceives it) unquestionably drives most political behavior most of the time.”<sup>87</sup>

Finally, Public Interest Theory does not explain a curious and stubborn fact: Private individuals rarely urge governments to adopt licensing regimes, but private firms often do—conduct that is the exact opposite of what Public Interest Theory predicts. That phenomenon is not an aberration caused by unique modern developments. After analyzing the history of occupational licensing, Professor Lawrence Friedman pointed out that the existence of “[f]riendly licensing”

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83. Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 75 AM. ECON. REV. 279, 279 (1984).

84. See, e.g., CARLTON & PERLOFF, *supra* note 66, at 687–88.

85. See Jonathan R. Macey, Book Review, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1079 (1998); see also, e.g., FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997) [hereinafter *MONEY FOR NOTHING*]; Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

86. PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* 132 (2014).

87. *Id.* at 133. He also argues that we should neither deny that obvious fact nor deem it a vice. “Only the cloistered idealist will regard this as altogether pernicious. Self-interest, after all, is among the most powerful motors of human action and thus of the civic conduct and participation on which a vigorous democracy depend.” *Id.*

was “almost invariably suggested and drafted by groups within the affected occupation.”<sup>88</sup>

It was economist and Nobel laureate George Stigler who first explained why that scenario was so widespread. Stigler developed a simple explanation for companies’ otherwise irrational conduct: Incumbent businesses support licensing requirements because licensing protects incumbents against competition.<sup>89</sup> Licensing requirements thereby enable incumbents to receive “economic rents”—that is, supracompetitive profits made available by laws limiting rivalry. Any benefit that the public receives is unintended and incidental.<sup>90</sup>

Stigler was not the only scholar to apply economic analysis to politics. Fellow Nobel laureates Kenneth Arrow<sup>91</sup> and James Buchanan,<sup>92</sup> and scholars like Duncan Black,<sup>93</sup> Anthony Downs,<sup>94</sup> William Niskanen,<sup>95</sup> Mancur Olson,<sup>96</sup> and William

88. Friedman, *supra* note 11, at 497, 503 (“It has been sufficiently demonstrated how much the licensing urge flowed from the needs of the licensed occupations. The state did not impose ‘friendly’ licensing; rather, this licensing was actively sought by the regulated.”); *see also, e.g.*, Gellhorn, *supra* note 21, at 11 (“[L]icensing has only infrequently been imposed upon an occupation against its wishes.”).

89. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); *see also, e.g.*, COX & FOSTER, *supra* note 20, at 17–18; WALTER GELLHORN, INDIVIDUAL FREEDOM AND ECONOMIC RESTRAINTS 114 (1956) (“The thrust of occupational licensing, like that of the guilds, is toward decreasing competition by restricting access to the profession; toward a definition of occupational prerogatives that will debar others from sharing in them; toward attaching legal consequences to essentially private determinations of what are ethically or economically permissible practices.”); Friedman, *supra* note 11, at 497; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 337 (1974); Rottenberg, *supra* note 3, at 6. Adam Smith criticized guilds’ restrictions for limiting the supply of tradesmen and raising prices, but he did not draw the connection to politics that Stiglitz did. *See* SMITH, *supra* note 13, at 118–29.

90. Individuals find it too costly to become involved in the political process, especially if they spend little income on a particular service or use it infrequently. Consumers also believe that other parties will make the effort instead of them. Consumer groups may urge legislators to adopt such programs or task an existing agency to create one in order to establish their bona fides as important players in policymaking.

91. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

92. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

93. *See* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958).

94. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

95. *See* WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

96. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

Riker<sup>97</sup> contributed to the new policymaking paradigm now known as Public Choice Theory.<sup>98</sup> By applying principles of microeconomics and game theory to politics, Public Choice Theory explains why regulated businesses, not consumers, prefer and seek out licensing requirements.<sup>99</sup>

Public Choice Theory teaches that elected officials do not fundamentally change their character and abandon the rational, self-interested nature they display as individual participants in a free market when assuming public office. The person that is “an egoistic, rational, utility maximizer” in the market also has that nature in the halls of government.<sup>100</sup> *Homo economicus* and *homo politicus* are one and the same. The difference is in the goods that private parties desire and government officials dispense—statutes, regulations, funding, licenses, and so forth, rather than consumer goods or widgets. Their motivation, however, is parallel in each setting. Producers, consumers, and voters seek to maximize their own welfare; politicians, to attain or remain in office; and bureaucrats, to expand their authority.<sup>101</sup> The result is

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97. See WILLIAM RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

98. The literature discussing and applying the precepts of Public Choice Theory is large and continues to grow. See, e.g., ALBERT BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* (2007); DANIEL FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); ROBERT MCCORMICK & ROBERT TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981); GUIDO PINCIONE & FERNANDO R. TESON, *RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCOURSE FAILURE* (2006); *DEMOCRACY AND PUBLIC CHOICE* (Charles K. Rowley ed., 1987); GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER ON PUBLIC CHOICE* 27 (2002); Morris P. Fiorina & Roger G. Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV. 256, 256 (1978); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988); John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195 (1997).

99. See, e.g., BUCHANAN, *supra* note 74, at 13; Dennis C. Mueller, *Public Choice: A Survey*, in *THE THEORY OF PUBLIC CHOICE—II*, *supra* note 74, at 23.

100. Mueller, *supra* note 99, at 23; Robert D. Tollison, *Public Choice and Antitrust*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 290–91 (James A. Dorn & Henry G. Manne eds., 1987).

101. See, e.g., TERRY L. ANDERSON & GARY D. LIBECAP, *ENVIRONMENTAL MARKETS: A PROPERTY RIGHTS APPROACH* 11 (2014) (“Because regulation maintains the author-

trade in a political market. Interest groups will trade political rents in the form of votes, campaign contributions, paid speaking engagements, book purchases, and get-out-the-vote efforts in return for the economic rents that cartel-creating or -reinforcing regulations, such as occupational licensing, can provide. Government officials are aware of interest groups' motivations and use those groups to their own political advantage. Lobbyists and associations serve as the brokers.<sup>102</sup>

Those officials have an additional strategy they can employ. Rather than engage in "rent creation," politicians can pursue the complementary strategy of "rent extraction." Legislators can obtain the continued support of regulated entities by threatening them with new legislation that would reduce the rents that they garner from the existing scheme.<sup>103</sup> This new

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ity of politicians and agency officials over the resource, how it is designed and put into practice can have enormous competitive and welfare implications for firms, regional political representatives, consumers, and other interests. As a result, crafting regulation is subject to political maneuvering, coalition building, and log-rolling. Accordingly, there is considerable rent-seeking in the regulatory process. Regulation invites investments by interest groups in lobby expertise and investigation into the levers through which politicians and agencies can reward favored constituents.") (citation omitted); Fiorina & Noll, *supra* note 98, at 256 ("We assume that in choosing among alternative political actions, voters, bureaucrats, and politicians pursue their self-interests. For voters, this means casting votes in a manner that maximizes expected utility, given the platforms of competing candidates. For bureaucrats, this means maximizing some measure of the size of bureaucracy. For politicians, this means maximizing the probability of election.").

102. See JONATHAN RAUCH, GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING 21 (1999) ("[Democracy's vulnerability lies] in the democratic public's tendency to form ever more groups clamoring for ever more goodies and perks and then defending them to the death."); Stigler, *supra* note 89, at 13 ("The industry which seeks regulation must be prepared to pay with the two things a [political] party needs: votes and resources. The resources may be provided by campaign contributions, contributed services (the businessman heads a fund-raising committee), and more indirect methods such as the employment of party workers."); see also MONEY FOR NOTHING, *supra* note 85, at 13 ("Reduced to its essentials, then, the economic theory of regulation is the study of government creation of rents through the mechanism of law (including bureaucratic administration of law)."); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 341-44 (1988). For an early twentieth-century example of rent creation, see PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 33-35 (1998).

103. See, e.g., MONEY FOR NOTHING, *supra* note 85, at 155; SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 129 n.1 (1999); PETER SCHWEIZER, EXTORTION: HOW POLITICIANS EXTRACT YOUR MONEY, BUY VOTES, AND LINE THEIR OWN POCKETS (2013); Fred S. McChesney, *Purchasing Political Inaction: How Regulators Use the Threat of Legal "Reform" to Extort Payoffs*, 21 HARV. J.L. & PUB. POL'Y 211 (1997). In technical terms, regulation occurs only when the "public market" fails to achieve one of its preferred goals: namely, the extraction

legislation could lower a firm's profits or increase its costs by eliminating a benefit it presently enjoys—for example, occupational licensing requirements—or by imposing new, additional regulatory burdens—for example, environmental regulations. Either way, whether via rent creation or rent extraction, politicians benefit, and the public loses.

Keep in mind that a legislator does not need to pass a bill, to move it forward, or even to introduce one to gain political rents. He can merely threaten to introduce legislation or circulate a draft bill to advise the interested parties that their rents are at stake. Known in different states as “cash cows,” “milker bills,” “juice bills,” or “fetchers,” bills whose sole purpose is to extract rents from one side or the other or both of a controversy, even if rudimentary, can start the auction going.<sup>104</sup> Given a legislator's minatory presence, the mere threat to introduce a bill can be quite effective.<sup>105</sup>

Moreover, rent creation and rent extraction can be done repeatedly. Temporary tax credits, for instance, must be reauthorized or they will expire.<sup>106</sup> Bills that threaten to take away a program, a benefit, or a perk may not carry over from one session of the legislature to another; if so, a legislator must reintroduce the bill for it to be considered in the next legislative term.<sup>107</sup> Legislators therefore have the opportunity to introduce the same “cash cow” each time that a new Congress is sworn in. Private parties would prefer a long-term deal to a shorter one because it allows them to engage in long-term investment strategies.<sup>108</sup> But every representative must stand for reelection every two years, with every senator running for reelection at six-year intervals. Some also retire or lose their races. That

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of political rents from regulated parties, private organizations, or the electorate. Reallocation of resources happens when the current owner of a resource fails to obtain it in a future market. “To say that regulation occurred is to say that someone who valued the resource more—their owner in the current period—failed to acquire them for the subsequent period.” MONEY FOR NOTHING, *supra* note 85, at 155. Regulation is proof of failure in the market for political deals, not in the market for private trades. *Id.*

104. MONEY FOR NOTHING, *supra* note 85, at 155; SCHWEIZER, *supra* note 103, at 13.

105. MONEY FOR NOTHING, *supra* note 85, at 26–34.

106. RAUCH, *supra* note 102, at 94–95.

107. This is the practice in Congress. See *Frequently Asked Questions*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/faqlist.html> [<http://perma.cc/TBB9-6T9J>] (last visited Nov. 11, 2015).

108. MONEY FOR NOTHING, *supra* note 85, at 88.

turnover makes enforcement of long-term agreements politically impossible.<sup>109</sup> Even if it were possible to work out such a deal with an important member—such as the chairman of the House Ways and Means Committee from a safe district—such agreements are not binding legally enforceable contracts. “In other words, rent-extraction contracts are extralegal, outside the judicial system governing most other contracts.”<sup>110</sup> No statute and no deal lasts forever, and no ally or opponent is ever permanent. For politicians, rent extraction is a gift that keeps on giving. A politician may be able to bestow a privilege on a favored group only once, but he can threaten to limit it or take it away over and over and over again.

If you find yourself wondering whether rent creation and extraction sound like crimes, you would not be the first. Professor Fred McChesney, among others, has made that point explicitly.<sup>111</sup> “In the economic theory of regulation, rent creation is to rent extraction as, more generally, bribery is to extortion,” Professor McChesney argues.<sup>112</sup> “With the former (rent creation/bribery), the beneficiaries of political action compensate the politician for increasing their welfare. With the latter (rent extraction/extortion), persons whose welfare would otherwise be diminished by political action compensate the politician for not effectuating that diminution.”<sup>113</sup> Also, as if to rub it in, in the rent extraction model politicians are “paid not to legislate,” earning them, in Professor McChesney’s biting words, “money for nothing.”<sup>114</sup> Mark Knopfler could not have said it better.<sup>115</sup>

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109. *Id.* at 89.

110. *Id.* at 88.

111. *Id.* at 31–32; see also, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 8 (2011); Joseph R. Weeks, *Bribes, Gratuities and Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach It, and a Proposal for Change*, 13 J. LEGIS. 123, 126–27 (1986) (“In the case of incumbent candidates seeking reelection, money is being solicited and accepted from PACs and individuals with a particular interest in the legislation that the candidate is or will be considering and voting upon, in exchange for the officeholder being influenced to favor the donor in the performance of his duties.”).

112. *MONEY FOR NOTHING*, *supra* note 85, at 31.

113. *Id.*

114. *Id.* at 41. The importance of the rent creation/bribery and rent extraction/extortion parallels is discussed below. See *infra* Section IV.A.

115. See *DIRE STRAITS*, *Money for Nothing*, on *BROTHERS IN ARMS* (Warner Bros. Records 1985), available at <https://www.youtube.com/watch?v=qVRcjmgxJEQ> [http://perma.cc/5AHS-JULD].

Public Choice Theory is controversial. Critics say that it oversimplifies the actions of politicians and has not been empirically verified.<sup>116</sup> Legislators may cast votes based on individual ideology, party loyalty, personal sympathy or animus, and a host of other considerations, perhaps even the futility of opposing a law supported by overwhelming public opinion. Finally, claiming that elected officials never act for betterment of the public or to help the disadvantaged ignores the reality that the government often helps the disadvantaged, such as the victims of natural disasters, without regard to whether doing so betters their chances for reelection.

Defenders of Public Choice Theory would reply that, although the interest in being reelected is ordinarily the predominant one motivating politicians,<sup>117</sup> self-interest is not limited to any particular form.<sup>118</sup> Public Choice Theory also does not teach that individuals always are the “villainous brigands that

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116. See, e.g., JEFFREY FRIEDMAN, *Introduction to THE RATIONAL CHOICE CONTROVERSY* 1–2 (Jeffrey Friedman ed., 1996); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE*, at ix–x (1994); LEIF LEWIN, *SELF INTEREST AND PUBLIC INTEREST IN WESTERN POLITICS* 22 (1991); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 44 (1997); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 878–79 (1987); Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199, 204–06 (1988); Moore, *supra* note 16, at 113–14.

117. For proof from the horse’s mouth, consider this remark by Senator Russell Long: “A U.S. Senator is primarily interested in two things: one, to be elected, and the other, to be reelected.” *MONEY FOR NOTHING*, *supra* note 85, at 47.

118. Self-interest is not limited to any particular type of benefit, such as financial benefits. See BUCHANAN & TULLOCK, *supra* note 92, at 21–22 (“[The Apostle] Paul may be acting out of love of God, the provincial church, friends, or self without affecting the operational validity of the theory of markets . . . . Reduced to its barest essentials, the economic assumption is simply that the representative or the average individual, when confronted with a real choice in an exchange, will choose ‘more’ rather than ‘less.’”) (citation omitted). Moreover, electoral competition limits the extent to which a legislator can pursue his self-interest at the expense of his constituents. Legislators cannot enrich themselves and be reelected if they lose the support of the median voter in their states or districts. See BUCHANAN, *supra* note 74, at 19 (describing the “median voter” theory). But if a vote is on a matter of no importance to his constituents or if there is “slack in the principal-agent relationship,” a representative has the opportunity to cast his vote as part of “log-rolling” to earn a favor from a colleague, for the support of a personally favored nonconstituent group, or for personal ideological reasons. See FARBER & FRICKEY, *supra* note 98, at 26–33; Kalt & Zupan, *supra* note 83, at 282.



Thomas Hobbes envisions in the state of nature,<sup>119</sup> nor that they always promote their self-interest. Individuals and government officials do sometimes act altruistically; Public Choice Theory just puts that practice in perspective. Many Americans contribute to eleemosynary organizations, but few are like Andrew Carnegie, who gave away all of his wealth by the time of his death.<sup>120</sup> Similarly, many elected officials occasionally act in the public interest, but some may never do so. Recognition of that fact is not a nihilistic policy choice but only “a sad recognition of reality.”<sup>121</sup> Supporters also point out that the theory does account for those factors and would also argue that substantial real world experience supports its claims.<sup>122</sup> Moreover, certainty is too demanding a standard for any economic or political theory. Proof can be sought in mathematics, but not in the social

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119. JAY COST, *A REPUBLIC NO MORE: BIG GOVERNMENT AND THE RISE OF AMERICAN POLITICAL CORRUPTION* 26 (2015).

120. People generally contribute no more than five percent of their wealth to charity. See TULLOCK, *supra* note 98, at 27.

121. COST, *supra* note 119, at 26–27 (so describing the state of politics late in the 1780s); see also, e.g., Weeks, *supra* note 111, at 142–43 (“So long as [a candidate can use campaign contributions for office-related purposes], and ‘legitimate campaign contributions’ constitute a shield against prosecution under [18 U.S.C. §] 201, even the most honest member of Congress is practically required to participate in the corruption just to compete effectively with challengers who have no similar scruples. It is simply a fact of political life. If a congressman will not accept the PAC and other special interest contributions and support their agendas in return, they will find someone else who will, and this person might well be the congressman’s next opponent.”).

122. There may not be double-blind studies establishing the validity of Public Choice Theory, but there clearly is proof that politicians seek reelection assistance, that private factions are willing to offer it in return for beneficial legislative action, and that the two groups participate in a choreographed dance. See, e.g., ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 4 (1983) (“The candidates’ desperation for money and the interests’ desire to affect public policy provide a mutual opportunity.”); KENS, *supra* note 102, at 64 (identifying an example at the time of *Lochner*); YOUNG, *supra* note 11, at 33 (explaining that Oregon increased the number of training hours required to become a cosmetologist at the behest of that industry); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398–99 (“The statute upheld in the case was an utterly unprincipled example of special interest legislation. The purported ‘public interest’ justifications so credulously reported by Justice Stone were patently bogus.”). The literature discussing the need for campaign finance reform discusses at length the institutional relationship between campaign contributions and political favors. See, e.g., DAN CLAWSON ET AL., *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 61 (1998); ROBERT G. KAISER, *SO DAMN MUCH MONEY* (2010) (describing that practice); LESSIG, *supra* note 111, at 11–171 (describing the influence of money on current politics); SCHWEIZER, *supra* note 103, *passim* (describing how members of Congress extort contributions from companies).

sciences. The question there is whether a theory has more predictive power than alternatives, not whether it proves correct in every case. Public Choice Theory readily passes that test. Indeed, the theory's principal strength is that it recognizes what everyone observes in today's policymaking arena: namely, individuals are primarily motivated by self-interest, rather than the public interest.<sup>123</sup>

It would also be a mistake to deem Public Choice Theory as little more than a dangerous, nihilistic view of policymaking that will ultimately undermine the democratic process by generating disrespect for how and why the democratic process is undertaken.<sup>124</sup> Public Choice Theory does not indict the political process for the mere purpose of tarring political transactions as morally impoverished. It uses economics to analyze policymaking for the same reason that a physician uses a microscope to study pathogens—as a tool to analyze a problem accurately in the hope of remedying it. As one of the originators of the theory has noted, “[P]ublic choice—the hardheaded, realistic, even cynical model of political behavior—can be properly defended on moral grounds if we adopt a ‘constitutional perspective’—that is, if the purpose of the exercise is to be institutional reform, improvements in the *rules* under which nations operate.”<sup>125</sup> The ultimate goal of Public Choice Theory is to describe how and why policymaking is conducted in order to improve it. Some remedies may require reform of the political process, others a change in the law governing judicial review.<sup>126</sup> But the goal is not just to identify the problem but also to try to fix it.

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123. See, e.g., Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 191 (1988). As Professor Buchanan put it, “[P]ublic choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us.” BUCHANAN, *supra* note 74, at 11; see also SCHUCK, *supra* note 86, at 132–33.

124. See, e.g., Farber & Frickey, *supra* note 116, at 907.

125. Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the “Nobel” Lie*, 74 VA. L. REV. 179, 187 (1988); see also, e.g., Michael D. Debow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 1012 (1988).

126. See, e.g., Farber & Frickey, *supra* note 116, at 908–24; Debow & Lee, *supra* note 125, at 1007–11. Compare, e.g., Antonin Scalia, *Economic Affairs as Human Affairs*, in

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Where does that leave us? With this delightful irony—the justification for regulation has come full circle. Originally, the rationale was that government intervention would remedy economic market failures in furtherance of the public interest. Today, we see that government intervention causes political market failures in furtherance of private interests without remedying market failures. Government has become the problem, not the solution.

With that proposition in mind, it is time to re-examine the justifications for occupational licensing.

### B. *The Criticisms of Those Justifications*

Occupational licensing requirements have been criticized on several grounds.<sup>127</sup> The most common has been that they hijack state power for the benefit of a few.<sup>128</sup> They limit the number of service providers, thereby allowing the members of a given trade to avoid competition and raise prices,<sup>129</sup> without supplying the

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ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 100, at 33–37, *with, e.g.*, Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 100, at 39–46.

127. *See, e.g.*, WH FRAMEWORK, *supra* note 7, at 12–16; KLEINER, *supra* note 11, at 7–8, 44–59, 63–64 (summarizing criticisms and collecting authorities); D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 124 (2009) (arguing that government-created barriers to entry reduce competition, shelter inefficient businesses, raise prices, hinder productivity, and reduce “market dynamism”).

128. *See* WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 88 (1883) (“The history of the human race is one long story of attempts by certain persons and classes to obtain control of the power of the State, so as to win earthly gratifications at the expense of others.”).

129. *See, e.g.*, WH FRAMEWORK, *supra* note 7, at 4, 12; CARLTON & PERLOFF, *supra* note 66, at 687–88 (“A prime example of this self-interest theory is occupational licensing. Here, the regulated occupations—such as plumbers, electricians, doctors, lawyers, and beauticians—lobby for licensing laws and set the rules themselves . . . . Not surprisingly, the regulations typically make entry into those occupations difficult, thereby raising the wages of regulated occupations.”); *id.* at 698 (Ex. 20.3); COX & FOSTER, *supra* note 20, at v–vii, 20–21; KLEINER, *supra* note 11, at 59; SUMMERS, *supra* note 28, at 15–21 & Tbl. 3; Arrow, *supra* note 67, at 952–53; Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547, 575–76 (2000); Moore, *supra* note 16, at 111–13; Timothy R. Muzondo & Bohumir Pazderka, *Occupational Licensing and Professional Incomes in Canada*, 13 CANADIAN J. ECON. 659, 660, 666 (1980); Rottenberg, *supra* note 3, at 5;

corresponding service quality improvement promised to consumers.<sup>130</sup> The risk that licensing will generate monopoly profits for industry members is aggravated when incumbent parties can define the conditions of entry by rivals.<sup>131</sup> The effect of licensing is to create a cartel that supplies its members with economic rents on an ongoing basis because entry restrictions operate like a “hidden subsidy” to licensees.<sup>132</sup> Industries particularly benefit from licens-

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William D. White, *The Impact of Occupational Licensure of Clinical Laboratory Personnel*, 13 J. HUMAN RES. 91, 101–02 (1978). The only true difference of opinion is over the amount of the price increase. See, e.g., Timothy R. Muzondo & Bohumir Pazderka, *Income-enhancing effects of professional licensing restrictions: a cross-section study of Canadian data*, 28 ANTITRUST BULL. 397, 412 (1983) (finding that licensing restrictions increased the average earnings of professional in Canada by nearly twenty-seven percent); Simon, *supra* note 22, at 4 (“Licensed workers earn, on average, 15% more than their unlicensed counterparts in other states—a premium that may be reflected in their prices, according to a study published by the National Bureau of Economic Research and conducted by Mr. Kleiner and Alan Krueger, an economist at Princeton University.”).

130. See, e.g., KLEINER, *supra* note 11, at 56 (“Overall, few of these studies of demand and quality show significant benefits of occupational regulation.”) (citations omitted); SUMMERS, *supra* note 28, at 9–14 & Tbl. 2. There also is the risk that unduly restrictive licensing requirements will deter qualified parties from entering a line of work, leaving only those applicants who have no other job opportunities to fill the available positions. KLEINER, *supra* note 11, at 44, 146–47.

131. See *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of both the development of the common law of restraint of trade and our antitrust jurisprudence . . . . [P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.”); see also Gellhorn, *supra* note 21, at 11–12.

132. Becker, *supra* note 74, at 372. Some members of a trade protected by a licensing requirement are so bold as to treat that purpose as a virtue. Read what a vice president of a barber’s union wrote in the union journal:

While the barber boards, barber schools and the International Union are separate organizations, there is much in common between them. We are particularly pleased to see the Barber Boards of 47 States giving heed to the law of supply and demand. Good schools and well-trained students are necessary for future progress of the barber profession, but too many schools and too many students . . . can stop progress and shatter the hopes of the future . . . . Operators of schools and colleges should put teaching and sufficient training ahead of accumulating dollars . . . . This cannot be done if students do not have sufficient practice on the chair. Too many students mean too many poorly trained students and too many poorly trained students mean too many cut-rate barbers. The law of supply and demand must be heeded if we are to continue to hold our present price structure and go forward to make our profession what it should be.

ing when the consumer demand for the service is inelastic (for example, oncology),<sup>133</sup> when there are few if any alternatives (for example, surgery),<sup>134</sup> or when the industry can define qualifications (for example, hair-cutting).<sup>135</sup> That expense can be considerable for individual consumers and the nation as a whole. Licensing requirements give licensees a “premium” of four to thirty-five percent above the competitive price.<sup>136</sup>

The combined effect of a series of local occupational licensing requirements also can be substantial. Occupational licensing restrictions can result in more than two million fewer jobs nationwide, with an annual cost to consumers of more than \$100 billion.<sup>137</sup> Moreover, government regulators or law enforcement officials enforce licensing rules, sometimes through the criminal

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Rottenberg, *supra* note 3, at 15 (citation omitted). Or, consider what the union president wrote:

Certain manufacturing interests and supply dealers . . . have aided and abetted the so-called “Do-It-Yourself” slogan. They have advertised and sold to the general public hair cutting sets, cosmetics and other supplies used in barber and beauty shops. The International Union [is] . . . opposed to the “Do-It-Yourself” program. We believe that the manufacturers of products used in barber and beauty shops should sell directly to those shops—not disperse [sic] to drug and department stores for over-the-counter sales . . . . When manufacturers advertise . . . that the general public can perform these services, they are in competition with our people.

*Id.* at 16 (first alteration in original) (citation omitted).

133. See, e.g., KLEINER, *supra* note 11, at 45 (noting financial benefits to a regulated industry are directly related to the inelasticity of consumer demand for the service); Rottenberg, *supra* note 3, at 6–7.

134. KLEINER, *supra* note 11, at 45 (alternatives limit benefit of regulating profession).

135. See, e.g., Leland, *supra* note 67, at 1342 (concluding that, on balance, allowing a professional group or industry to set minimum quality standards is likely to result in standards that are too high).

136. See KLEINER, *supra* note 11, at 59, 112–15. Parties who have direct contact with consumers (for instance, physicians) or who work independently of others (for example, dentists as opposed to nurses or teachers) benefit the most from licensing. See *id.* at 74–75.

137. See WH FRAMEWORK, *supra* note 7, at 7; HAMILTON DISCUSSION PAPER, *supra* note 1, at 6 (citation omitted); see also *id.* at 13 (“[R]esearch findings suggest that states that license a certain occupation experience slower employment growth in that occupation relative to the same occupation in states that do not require a license[.]”). Elsewhere, Professor Kleiner has noted that, using year-2000 dollars, occupational licenses transferred between \$116 and \$139 billion from consumers to service providers, with a deadweight loss to society of between \$34.8 and \$41.7 billion. See KLEINER, *supra* note 11, at 59, 115.

law,<sup>138</sup> and tax dollars fund the salaries and expenses of those officials. The result is that consumers lose twice from licensing requirements—through higher prices and higher tax bills—and the beneficiaries do not incur the transaction costs of enforcement.

Licensing programs also do not provide guaranteed improvements in service quality.<sup>139</sup> Studies show the difficulty of proving that quality enhancements offset price increases from licensing.<sup>140</sup> One explanation is that many factors affect the quality of a service-provider's work (such as the amount of time a professional spends with a client), and the service provider is free to adjust the inputs not controlled by licensing (by reducing that time, for example).<sup>141</sup> Consequently, even "a mandated increase in one or several inputs" (satisfying fixed educational or training requirements is one example) "does not necessarily imply that quality will increase."<sup>142</sup> Competition, by contrast, spurs quality improvements in order to retain existing customers and attract new ones. The higher prices resulting from licensing requirements also may persuade consumers to attempt "do-it-yourself" projects, a practice that can prove dangerous for the consumer as well as third parties when, for example, an untrained individual attempts to perform electrical work.<sup>143</sup>

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138. See, e.g., FLA. STAT. § 476.194 (2015) (unlicensed practice of barbering is a misdemeanor); 26 KY. REV. STAT. § 317A.990 (2015) (unlicensed practice of cosmetology is punishable by a fine or incarceration); 63 PA. CONS. STAT. § 565 (2015) (unlicensed practice of barbering on the first offense is punishable by a \$300 fine or 90 days' incarceration); 62 TENN. CODE §§ 4-108, 4-129 (2015) (unlicensed practice of "cosmetology, manicuring or aesthetics" is a misdemeanor). Enforcing occupational licensing schemes through the criminal law creates unique problems, such as the use of SWAT teams to investigate licensing code violations. See *Berry v. Leslie*, 767 F.3d 1144, 1149 (11th Cir. 2014), *reh'g en banc granted*, 771 F.3d 1316.

139. See, e.g., WH FRAMEWORK, *supra* note 7, at 13 ("[M]ost research does not find that licensing improves quality or public health and safety . . ."); COX & FOSTER, *supra* note 20, at v ("[M]any occupational licensing schemes do not appear to realize their goal of increasing the quality of professionals' services."); KLEINER, *supra* note 11, at 48–52, 56 ("Overall, few of these studies of demand and quality show significant benefits of occupational regulation."); Kleiner & Kudrle, *supra* note 129, at 575; White, *supra* note 129, at 102. There also is some evidence that licensing requirements may reduce service quality. See Carroll & Gaston, *supra* note 21, at 145.

140. KLEINER, *supra* note 11, at 59, 63–64.

141. COX & FOSTER, *supra* note 20, at 22.

142. *Id.*

143. See YOUNG, *supra* note 11, at 80; Carroll & Gaston, *supra* note 21, at 143.

What is more, microeconomic theory suggests that licensing requirements benefit higher-income parties willing to pay for increased service quality, while injuring other groups, such as lower-income parties and the young. They do so in two ways: they deny those groups the opportunity to choose an unlicensed, lower-priced service provider; and they bar them from offering services themselves as means to work themselves out of poverty.<sup>144</sup> Sometimes these requirements are a wise form of paternalism, as in the case of physicians. But not always. Some occupations—think barbers, cosmetologists, and the like—place very few at risk, not even the purchaser, if unlicensed individuals are free to offer their services.

Occupational licensing also injures other subgroups in the nation, such as people who migrate from one state to another to find work.<sup>145</sup> States do not regularly recognize a license issued in the state of origin, forcing an individual to begin anew the oftentimes lengthy and costly education and training process, to

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144. See WH FRAMEWORK, *supra* note 7, at 12 (“[T]he quality, health and safety benefits of licensing do not always materialize. When they do, they come at a cost that is easy to overlook because it is borne by many different people and is difficult to observe in day-to-day experience. First, by imposing requirements on people seeking to enter licensed professions—such as additional training and education, fees, exams, and paperwork—licensing reduces employment in the licensed occupation and hence competition, driving up the price of goods and services for consumers. This could benefit licensed practitioners, who might earn more than they would in an unlicensed market, or the financial benefits could flow elsewhere, such as to educational institutions or other licensing entities. But the wages of workers who are excluded from the occupation are reduced in two ways. First, those who would otherwise have worked in a more highly paid occupation may enter a less well-paid occupation. Second, wages in less well-paid, unlicensed occupations may fall even lower due to the increased number of workers entering them. Lower wages in turn discourage labor force participation among the excluded, lowering their employment rate. Through both of these channels, licensing can shift resources from workers with lower-income and fewer skills to those with higher income and skills. Data show that 52 percent of licensed workers hold a Bachelor’s degree, compared to 38 percent of unlicensed workers. Lower-income workers are less likely to be able to afford the tuition and lost wages associated with licensing’s educational requirements, closing the door to many licensed jobs for them. It is also lower-income workers who are hurt if wages fall in unlicensed jobs, since on average, unlicensed workers earn 28 percent less than licensed workers.”) (citations omitted).

145. See WH FRAMEWORK, *supra* note 7, at 4, 13. Many states exclude individuals with a criminal record from certain occupations, making it difficult for offenders to find work after release from prison. See *id.* at 8, 35–36. Licensing requirements can force lawful resident aliens to spend time in school or in supervised practice before using skills they already have. *Id.* at 38–39.

abandon a profitable occupation, or to practice it illegally.<sup>146</sup> States' refusal to credit licenses earned elsewhere in the nation as a teacher, a nurse, a dental assistant, a paramedic, and the like denies the affected parties legitimate work opportunities in their new domiciles and those who might otherwise migrate from state to state to secure more profitable work. Their refusal directly injures the affected parties and indirectly renders the national economy less efficient. This problem is particularly acute for servicemembers and their spouses.<sup>147</sup> Many states make it difficult for former servicemembers to find work in the private sector in fields such as nursing and truck driving even though the military fully trained them in those occupations.<sup>148</sup> The problem is even worse for military spouses. Thirty-five percent of military spouses work in licensed fields, and they are ten times more likely than civilians to relocate interstate.<sup>149</sup>

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146. *Id.* at 38–39; see also Morris M. Kleiner, Robert S. Gay & Karen Greene, *Barriers to Labor Migration: The Case of Occupational Licensing*, 21 INDUS. RELATIONS 383 (1982).

147. See WH FRAMEWORK, *supra* note 7, at 10; NELSON LIM ET AL., RAND NAT'L DEF. RES. INST., "WORKING AROUND THE MILITARY" REVISITED: SPOUSE EMPLOYMENT IN THE 2000 CENSUS DATA 3 (2007), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND\\_MG566.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG566.pdf) [<http://perma.cc/FF9C-K5F7>]; EXECUTIVE OFFICE OF THE PRESIDENT, THE FAST TRACK TO CIVILIAN EMPLOYMENT: STREAMLINING CREDENTIALING AND LICENSING FOR SERVICE MEMBERS, VETERANS, AND THEIR SPOUSES 3–4 (2013) [hereinafter STREAMLINING CREDENTIALING], available at [https://www.whitehouse.gov/sites/default/files/docs/military\\_credentialing\\_and\\_licensing\\_report\\_2-24-2013\\_final.pdf](https://www.whitehouse.gov/sites/default/files/docs/military_credentialing_and_licensing_report_2-24-2013_final.pdf) [<http://perma.cc/5JJG-AWNS>]; U.S. DEP'TS OF THE TREASURY AND DEFENSE, SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES 3–7 (2012) [hereinafter STREAMLINING OCCUPATIONAL LICENSING], [http://www.archive.defense.gov/home/pdf/Occupational\\_Licensing\\_and\\_Military\\_Spouses\\_Report\\_vFINAL.PDF](http://www.archive.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF) [<http://perma.cc/D5FP-VPNP>]; IRAQ AND AFGHANISTAN VETERANS OF AMERICA & PRUDENTIAL FINANCIAL, INC., VETERANS' EMPLOYMENT CHALLENGES: PERCEPTIONS AND EXPERIENCES OF TRANSITIONING FROM MILITARY TO CIVILIAN LIFE 5, 7 (2012), available at <http://www.prudential.com/documents/public/VeteransEmploymentChallenges.pdf> [<http://perma.cc/4MZM-NKXX>]; U.S. Dep't of Defense, Issue 2: *Removing licensure impediments for transitioning military spouses*, USA4MILITARYFAMILIES.DOD.MIL, [http://www.usa4militaryfamilies.dod.mil/MOS/f?p=USA4:ISSUE:0:::P2\\_ISSUE:2](http://www.usa4militaryfamilies.dod.mil/MOS/f?p=USA4:ISSUE:0:::P2_ISSUE:2) [<http://perma.cc/9WCE-3QET>] (a tool for military families to explore license portability across states). Some states have sought to ameliorate this problem by granting temporary licenses or expediting the licensing process. STREAMLINING CREDENTIALING, *supra*, at 3–4. Those efforts, however, do not fully solve the problem.

148. See STREAMLINING CREDENTIALING, *supra* note 147, at 12, 14 (describing how some states are beginning to allow military experience to count as experience requirements and allow applicants to take final licensure exam).

149. *Id.* at 3.



Another criticism is that cartels created by licensing requirements are far more durable than cartels born of private agreements.<sup>150</sup> When there are no legal barriers to entering a market, new parties can make a purely economic decision whether to compete against incumbent firms by offering a lower-priced service. If that occurs, the actual entry of new competitors would weaken the cartel's ability to charge supracompetitive prices and perhaps eventually force the cartel to disband. Either result benefits consumers. Witness the effect that the transportation companies Uber, Lyft, and Sidecar have had on local taxi services.<sup>151</sup> Even if no one enters a trade at a specific time, the risk of potential entry could restrain the cartel's ability to raise prices, which also benefits consumers. Occupational restrictions, however, prevent qualified but unlicensed parties from competing against high-priced service providers, perhaps by limiting the number of new entrants who can pass a licensing exam or by imposing onerous and expensive entrance requirements.<sup>152</sup> As noted previously, it may be far more difficult for a party to obtain the repeal or revision of a law limiting competition than it would be to enter a line of business.<sup>153</sup> Finally, every member of a cartel has an incentive to "cheat" by lowering prices in order to capture a larger number of buyers. A statute making it a crime to practice an occupation without a license, however, will have a considerable deterrent effect,<sup>154</sup> and it will shift enforcement costs from the cartel members to the government and ultimately to the public.

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150. Edlin & Haw, *supra* note 21, at 1133.

151. See, e.g., DIANE FURCHTGOTT-ROTH & JARED MEYER, DISINHERITED: HOW WASHINGTON IS BETRAYING AMERICA'S YOUNG 91 (2015); Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 25 (Jan. 22, 2015), <https://irs.princeton.edu/sites/irs/files/An%20Analysis%20of%20the%20Labor%20Market%20for%20Uber%E2%80%99s%20Driver-Partners%20in%20the%20United%20States%20587.pdf> [<https://perma.cc/7V5R-JKU2>] ("[T]he availability of modern technology, like the Uber app, provides many advantages and lower prices for consumers compared with the traditional taxi cab dispatch system . . ."); Josh A. Barro, *Under Pressure From Uber, Taxi Medallion Prices are Plummeting*, N.Y. TIMES (Nov. 27, 2014), <http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html?abt=0002&abg=1> [<http://perma.cc/N5DA-ZLSU>].

152. See Edlin & Haw, *supra* note 21, at 1133.

153. See *id.*

154. See *id.*

The information asymmetry problem justifying occupational licensing is not nearly as large a concern today as it was years ago. Consumers can obtain the necessary service quality information for large-scale service providers (for example, H&R Block) from private entities, such as Underwriters' Laboratories, or *Consumer Reports*, and the necessary information for local services (for example, plumbers) from the website *Angie's List*.<sup>155</sup> Licensing therefore is no longer necessary to offset the information advantage that service providers enjoy.<sup>156</sup> Companies also spend considerable amounts of capital to advertise the superior quality of their services and establish a brand name, money that firms will not spend if they cannot obtain a competitive advantage from the investment by allowing lower-quality service providers to claim that they, too, are licensed.

A certification process provides the informational benefits of licensing without its costs.<sup>157</sup> The government itself can reward superior quality service providers with the government's version of the "Good Housekeeping Seal of Approval," or, even better, the government can allow private organizations such as Underwriters Laboratories to provide that service. Producers can use a certification to inform consumers about their qualifications and credentials, allowing individuals to select for themselves the degree of competence that they are willing to buy in the market. The government also can sanction any party who falsely claims to have been certified using civil laws to fine any such service provider and to bar that party from further participation in that field. If civil remedies are inadequate in a particular case, the government can criminally prosecute a provider for fraud.<sup>158</sup>

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155. See, e.g., YOUNG, *supra* note 11, at 17–18 (describing alternative sources of information for consumers).

156. See KLEINER, *supra* note 11, at 156. Paternalism also is not a justification for occupational licensing. Even if the crowd has a superior amount of information than any one individual, there is no reason to attribute that superior knowledge to a *legislature or its members*. Licensing also does not address the "do-it-yourself" problem. Consumers will forego a costly service (for example, electrical work by an electrician) when their demand is elastic even if the potential downside could be even more costly than purchasing the service (for instance, electrocution). See, e.g., Moore, *supra* note 16, at 110 n.21, 112.

157. See, e.g., FRIEDMAN, *supra* note 21, at 148–149; YOUNG, *supra* note 11, at 18.

158. See, e.g., 18 U.S.C. §§ 1341, 1343. Defenders of occupational licensing would respond by arguing that up-front licensing is less expensive than after-the-fact sanctioning. The combination of required disclosure of a party's certification status en-

Finally, licensing schemes are a classic vehicle for cronyism.<sup>159</sup> Only the law can create a licensing requirement, and elected officials control the gateway to the lawmaking process. Members of a trade have an incentive to create well-funded and well-run lobbying organizations to persuade politicians to adopt such restrictions, whatever their merits may be.<sup>160</sup> “Licensing usually emerges from occupational associations, like the American Bar Association, when they have the political clout and the organizational skills to lobby a state legislature and present a strong enough case for regulation.”<sup>161</sup> The interests of parties seeking a licensing regime nicely complement the interests of elected officials seeking reelection support. Because the principal concern of elected officials is to be reelected, they will use whatever government power they have to assist whoever can best help them achieve that goal.<sup>162</sup> Accordingly, politicians can, and often do, use licensing requirements to reward favored individuals or groups and punish others. Indeed, one scholar has suggested that more often than not occupational licensing requirements serve only to exclude qualified parties, not flim-flam artists, from a particular line of business.<sup>163</sup>

Plumbing and barbering are classic examples of that phenomenon.<sup>164</sup> Plumbers do not repair broken limbs. They fix

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forced by the threat of criminal prosecution for fraud, however, may deter a sufficient number of violations to make a certification program cost-effective. See GELLHORN, *supra* note 89, at 148–51.

159. See, e.g., Adam Thierer & Brent Skorup, *A History of Cronyism and Capture in the Information Technology Sector*, 18 J. TECH. L. & POL’Y 131, 162 (2013).

160. KLEINER, *supra* note 11, at 31 (“In Minnesota as in many other states that regulate occupations through the legislative process, licensing appears to be responsive to political pressure from occupational associations seeking to become regulated. Occupations that are well-organized and have well-funded campaigns with no organized opposition are more likely to find themselves at the top of the agenda before occupational regulatory commissions.”).

161. *Id.* at 147.

162. See *supra* notes 100–10 and accompanying text.

163. See Gellhorn, *supra* note 21, at 12, 14; see also Eduardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. TIMES (Jan. 27, 2015), [http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html?emc=edit\\_th\\_20150128&nl=todaysheadlines&nlid=69361534](http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html?emc=edit_th_20150128&nl=todaysheadlines&nlid=69361534) [<http://perma.cc/K9CE-86E3>] (“[S]tate licenses required to practice all sorts of jobs often serve merely to cordon off occupations for the benefit of licensed workers and their lobbying groups, protecting them from legitimate competition.”).

164. See, e.g., Patrick A. McLaughlin et al., *Regulatory Reform in Florida: An Opportunity for Greater Competitiveness and Economic Efficiency*, 13 FLA. ST. U. BUS. REV. 95,

pipes, a valuable function to be sure, but not one that is comparable to fixing broken hearts. Barbers do not perform surgery. They cut hair, an activity that parents have performed for years without education, without training, and without threatening public safety or their children's health. Plus, how far can a consumer go wrong if he or she picks the wrong plumber or barber? After all, "[t]he difference between a good and bad haircut is two days."<sup>165</sup> Being wet or bald is not the same as being broken or diseased. Accordingly, it is not credible to defend the licensing of plumbers and barbers on the ground that licensure is necessary to protect public health and safety. Any licensing scheme that makes it more difficult to become a plumber or barber than a member of the American College of Surgeons is utterly irrational, even ridiculous.<sup>166</sup>

### III. THE TRADITIONAL CONSTITUTIONAL ANALYSIS OF SOCIAL AND ECONOMIC LEGISLATION: LOOKING BACK AT *LOCHNER V. NEW YORK*

#### A. *The Police Power Before Lochner*

Academic discussions of judicial review of economic legislation (such as occupational licensing) ordinarily proceed as follows: an analysis of the Supreme Court's 1905 decision in *Lochner v. New York*,<sup>167</sup> which held unconstitutional a cap on the hours that bakers could work; progression through a series of later Supreme Court decisions in the 1920s and most of the 1930s in which the Court held unconstitutional a variety of federal and state laws governing social welfare policy;<sup>168</sup> and then a discussion of the Supreme Court's New Deal era decisions

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108 (2013–14); see also Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 137 (2011–12).

165. KLEINER, *supra* note 11, at 98.

166. At one time, it was more difficult to become a "master plumber" in Illinois than it was to become a Fellow in the American College of Surgeons. See Gellhorn, *supra* note 21, at 13–14.

167. 198 U.S. 45 (1905).

168. See, e.g., *Morehead v. Tiplado*, 298 U.S. 587 (1936) (holding unconstitutional a state minimum wage law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (holding unconstitutional a state law barring employers to forbid employees from joining labor unions); *Adair v. United States*, 208 U.S. 161 (1908) (holding unconstitutional a federal statute forbidding employers to discharge employees who joined labor unions).

repudiating *Lochner* and its offspring.<sup>169</sup> A common riff is that *Lochner* created an unprecedented and unjustifiable “liberty of contract” doctrine in order to shelter an anachronistic view of property and economic liberty that the Industrial Revolution had rendered obsolete, a proposition that the Supreme Court ultimately—and properly—jettisoned as unprincipled and illegitimate.<sup>170</sup> The Court’s frolic and detour in the *Lochner* era is over, and the law applicable today is what the Framers intended it to be, the argument goes.

Yet, that proposition ignores the pre-*Lochner* law defining the “police power.” By the time that the Supreme Court decided *Lochner*, it had been settled law that the police power—the government’s authority to adopt reasonable regulations of life, liberty, and property “as will protect the public health and the public safety”<sup>171</sup>—could not be used as a tool for cronyism.<sup>172</sup> It was widely accepted that legislation must advance the public interest, rather than the interests of a “special” class of citi-

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169. See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003).

170. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 1176 (1996) (Souter, J., dissenting) (“It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect.”); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 280 (1998).

171. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

172. See, e.g., *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) (“There are limitations on such [governmental] power which grow out of the essential nature of all free governments.”); *Hanson v. Vernon*, 27 Iowa 28, 73 (1869) (Beck, J., concurring) (“There is, as it were, back of the written Constitution, an *unwritten Constitution* . . . which guarantees and well protects all the absolute rights of the people.”); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 9–11 (2012); THOMAS M. COOLEY, *A TREATISE UPON THE CONSTITUTIONAL LIMITATIONS WHICH REST ON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION*, at iii (1868) (“[T]here are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions.”); MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 190 (2005); JAMES L. HUFFMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 7–44 (2013). Indeed, some would argue that the republican government created in Philadelphia was designed to reflect the principle of limited government. See COST, *supra* note 119, at 1.

zens.<sup>173</sup> “The idea that laws should be general rather than special, and oriented toward public rather than private interests, was central to the eighteenth-century Founders’ conception of valid laws as equal laws.”<sup>174</sup> Thomas Cooley, one of the nineteenth century’s best known authorities on constitutional law, made that point quite simply, saying “[e]very legislative body is to make laws for the public good, and not for the benefit of

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173. The classic statement can be seen in President Andrew Jackson’s message to the Congress explaining his veto of the reauthorization of the Second Bank of the United States:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Andrew Jackson, President Jackson’s Veto Message Regarding the Bank of the United States (July 10, 1832), available at [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp) [<http://perma.cc/KY94-GBHW>] (last visited Nov. 14, 2015).

174. Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL’Y 181, 182 (1997); see also, e.g., THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 57–60, 97–98, 300 (1880); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 33–45 (1993); WILLIAM SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 732–33 (1904) (“The exercise of the police power . . . must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the oppression of a particular class[.]”). Professor Rosen adds that “Congress and the States have the power to regulate economic liberties in the public interest, but regulations that benefit private interests are *ultra vires* and unconstitutional. This suspicion of economic ‘class legislation’ was of such pressing concern to the Framers and ratifiers of the original Constitution and the Civil War amendments that it is reflected throughout the text, in power-granting provisions as well as rights-reserving ones, including the Taxation Clause of Article I, Section 8; the Contracts Clause of Article I, Section 10; the Due Process and Just Compensation Clauses of the Fifth Amendment; and the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment.” Rosen, *supra* at 181.

individuals.”<sup>175</sup> By the time of the Civil War, the principle that the legislature could adopt “regulations that were arguably neutral with respect to struggles going on among interests in society”<sup>176</sup> had “not only become a mainstay of constitutional jurisprudence but had also been incorporated into the constitution in virtually every state.”<sup>177</sup> After the Civil War, Cooley reiterated that point in his treatise on the Constitution that, because “[t]he dimensions of the government’s police power are identical with the dimensions of the government’s duty to protect and promote the public welfare,” a law adopted pursuant to the police power “cannot be purely arbitrary nor purely for the promotion of private interests. It must appear that the general welfare is to be in some degree promoted.”<sup>178</sup>

Accordingly, there is considerable force to the argument that the Supreme Court was right to hold the New York statute considered in *Lochner* unconstitutional because it exceeded the police power by favoring large over small bakeries.<sup>179</sup> There are also recent indications that the Court is willing to call a halt to what had seemingly become the relentless growth of the government’s delegated constitutional authori-

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175. COOLEY, *supra* note 172, at 112. For that reason, it was settled law that the government could not take property from *A* for its or the public’s use without paying *A* compensation for his loss, *see* ROSEN, *supra* note 169, at 184–85, and no government could take property from *A* and give it to *B* regardless of whether *B* was compensated for the loss. *See, e.g.,* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (“An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean . . . [A] law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from *A*, and gives it to *B*: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”); *see also* JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITICAL LAW* 45–47 (5th ed. T. Nugent trans., 1807); HUGO GROTIUS, *DE JURE BELLI AC PACIS* 385 (F. Kelsey trans., 1925); SAMUEL VON PUFENDORF, *ON THE LAWS OF NATURE AND NATIONS* 1070 (Oldfather & Oldfather trans., 1964); THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 399, 453–54 (2d Amer. ed., 1832); EMER DE Vattel, *THE LAW OF NATIONS* 19 (C. Fenwick trans., 1916).

176. GILLMAN, *supra* note 174, at 55.

177. *Id.*

178. *Id.* at 57.

179. *See supra* note 168.

ty. In three decisions—*United States v. Lopez*,<sup>180</sup> *United States v. Morrison*,<sup>181</sup> and *NFIB v. Sebelius*<sup>182</sup>—the Court ruled that Congress lacked authority under the Commerce Clause<sup>183</sup> to regulate different types of conduct. Those decisions doubtless represent a new willingness to consider inherent restraints on the extent of Congress's powers, including the power to regulate interstate commerce.<sup>184</sup>

By and large, however, the Court's focus for most of the last seventy years has been on construing the external limitations on Congress's power, such as the ones found in the Bill of Rights, rather than analyzing whether there are internal limitations governing how far a particular grant of authority may reach.<sup>185</sup> In addition, the Court's decisions in *Lopez*, *Morrison*, and *NFIB* did not define a limitation on a state's police power. That fact is important because states (or localities) impose far more occupational licensing requirements than the federal government does. The result is that *Lochner* may continue to serve as the starting point for analysis for the near future.

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180. 514 U.S. 549 (1995) (holding unconstitutional a federal law making it a crime to possess a firearm in the vicinity of a school).

181. 529 U.S. 598 (2000) (holding unconstitutional a federal law creating a civil remedy for rape).

182. 132 S. Ct. 2566 (2012) (holding that Congress lacks power under the Commerce Clause to require people to purchase health insurance).

183. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]").

184. For discussions of that prospect, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31 (1998).

185. The Court has not completely abandoned an inquiry into whether the constitution's text contains inherent limitations on congressional authority. In addition to the *Lopez*, *Morrison*, and *NFIB* cases discussed above, see *Ry. Labor Excs. Ass'n v. Gibbons*, 455 U.S. 457 (1982) ("Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause."). Most of the Court's jurisprudence, however, focuses on external restraints. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (the Free Speech Clause). See generally Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 337–38 (2013) (discussing recent Supreme Court decisions interpreting the Commerce Clause).



### B. *The Lochner Decision*

The controversy in *Lochner* involved the constitutionality of the New York Bakeshop Act of 1895.<sup>186</sup> The act sought to redress the oftentimes-squalid conditions of the highly decentralized baking industry in New York City, where new immigrants frequently ran bakeries out of tenement basements.<sup>187</sup>

To improve the health and welfare of members of that industry, the Act, among other things, limited the number of hours that a baker could ply his trade to sixty hours per week and ten hours per day.<sup>188</sup> The Supreme Court held the act unconstitutional.

Writing for a five-to-four majority, Justice Rufus Peckham started from the premise that “the right to purchase or to sell labor” is a form of “liberty” protected by the Due Process Clause.<sup>189</sup> The government therefore could not arbitrarily deprive someone of liberty but had to justify the statutory re-

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186. 1 N.Y. Laws 1895, ch. 518, at 305, as amended by 1 N.Y. Laws 1897, ch. 415, at 461. The statute followed upon an investigation, conducted by New York state officials in conjunction with the Bakers and Confectioners International Union, which found that bakers’ working conditions were unsanitary, unhealthy, and brutal. See KENS, *supra* note 102, at 54–66; Friedman, *supra* note 11, at 490. For detailed discussions of *Lochner*, see BERNSTEIN, *supra* note 172; KENS, *supra* note 102; MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY* 147–50 (2001).

187. See Thomas A. Bowden, *Repairing Lochner’s Reputation: An Adventure in Historical Revisionism*, 19 GEO. MASON L. REV. 197, 197 (2011) (reviewing BERNSTEIN, *supra* note 172); James W. Ely, Jr., Book Review, *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 215–16 (1991) (reviewing PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990)). Ironically, the *Lochner* case arose out of the application of the statute, not to a New York City bakery, but to one run by Joseph Lochner in Utica, New York. Lochner was convicted at trial of violating the act by allowing an employee to work during one week more than the sixty hours permitted by the statute. He argued on appeal that the statute unconstitutionally interfered with his right to enter into contracts. See Friedman, *supra* note 11, at 490.

188. Bakery unions and large industrial bakers supported the hour cap because they benefitted from it. Union bakers worked in two shifts with each one ordinarily less than ten hours, while the primarily immigrant, non-union bakers worked in a single shift often of twelve to twenty-two hours per day and slept on the premises. Small bakeries were also more reliant on labor than larger bakeries, which made greater use of machinery. See Friedman, *supra* note 11, at 490; Timothy Sandefur, *The Right to Earn a Living*, 6 CHAPMAN L. REV. 207, 238 (2003); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1373 n.78 (1990). The act also imposed sanitary conditions on the premises, but those provisions were not before the Supreme Court. See Friedman, *supra* note 11, at 490.

189. *Lochner*, 198 U.S. at 53. Justice Peckham relied on *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), for that proposition, a decision in which the Supreme Court had described the concept of “liberty” in expansive and glowing terms, see *id.* at 589–90.

restrictions imposed on *Lochner* as a proper exercise of the “police power”—that is, a state’s inherent power to regulate as necessary to protect the lives, health, and welfare of the community.<sup>190</sup> Justice Peckham then examined the health and safety rationale offered for the statute.<sup>191</sup> In so doing, he declined to accept the state legislature’s defense of the statute that tighter regulation of working conditions was necessary for the benefit of bakers and the public.<sup>192</sup> He undertook a *de novo* review of the relationship between the hour limitation and its potential benefits for bakers.<sup>193</sup> Finding no benefits unique to the baking industry, Justice Peckham concluded that the real purpose of the law was to protect labor unions against competition.<sup>194</sup> Such protection was an impermissible application of the police power, Justice Peckham argued, because it unreasonably favored one group (bakery unions, their members, and large, unionized baking companies) over another (nonunion bakers and small, nonunionized baking companies).<sup>195</sup> Accordingly, the Court found that the New York statute unconstitutionally deprived *Lochner* of the liberty to enter into a contract as he and his workers saw in their own interests.<sup>196</sup>

### C. *The Backlash Against Lochner*

The *Lochner* decision aroused little interest, let alone condemnation, when it was decided.<sup>197</sup> But times change. Since then, *Lochner* has become one of the Supreme Court’s most highly vilified decisions. *Lochner* effectively has a black cloud enveloping it like the one that followed Joe Btfsplk of *Li'l Abner* fame. The academy traditionally has characterized *Lochner*, at best, as the nadir of the Supreme Court’s mistaken decision to second-guess economic judgments made by the political

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190. See *supra* note 4.

191. *Lochner*, 198 U.S. at 57–58.

192. *Id.*

193. *Id.* at 59–60.

194. *Id.* at 62–64.

195. *Id.*

196. *Id.* at 64.

197. See KENS, *supra* note 102, at 154. It took a few years for outrage to set in. See, e.g., Learned Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). See generally David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 4 n.14 (2003) (collecting contemporary authorities).

branches and, at worst, as an illegitimate attempt to impose laissez-faire economics and a social Darwinian creed on the nation as a matter of constitutional law.<sup>198</sup> For the three decades following *Lochner*, the Court continued to hold unconstitutional different federal and state examples of social and economic legislation, but *Lochner* has always been treated as the poster boy of the Court's willingness to engage in a vigorous judicial review of the policymaking process.

The Supreme Court ceased its aggressive judicial review of economic legislation during the New Deal. A doctrinal explanation why the Court did an about face is that the Court finally realized that its decisions had created a Bermuda Triangle-like body of case law where federal and state legislative efforts to combat the Great Depression went to die.<sup>199</sup> The federal government could not regulate wages, prices, and working conditions because the Commerce Clause did not permit Congress to regulate such inherently local subjects.<sup>200</sup> The states also could

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198. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 266 (1977); BERNSTEIN, *supra* note 172, at 1; ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 33–34 (1976); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 47–50 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14–15 (1980); KURT LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 4–9 (2009) (“[T]o accuse the [Supreme] Court of *Lochnerizing* is to level the foulest insult in constitutional law.”); KENS, *supra* at 152–53; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 *STAN. L. REV.* 379, 381–93 (1988). See generally DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* 2–3, 120 n.9 (2011) (collecting authorities criticizing *Lochner*). Not everyone, however, sees *Lochner* as the Snidely Whiplash of American constitutional law or believes that it unleashed a judicial reign of terror on social and economic legislation. See, e.g., BERNSTEIN, *supra* note 172, at 49–50; ELY, *supra* note 11, at 104 (“[I]t would be misleading to understand the Supreme Court as motivated simply by a desire to promote the interests of business and property owners. In fact, the Court was ambivalent toward economic regulations and used judicial review selectively. The justices tended to strike down redistributive or class legislation but found that most exercises of the police power passed muster. The Court never sought to impose a strict laissez-faire ideology.”); PHILLIPS, *supra* note 186, at 3 (“The old *Lochner*-era Supreme Court rejected far more substantive due process challenges than it granted, it used due process to strike down government action much less often than is commonly believed, it was more justified than many would allow when it did strike down federal or state laws, and it almost certainly did not act as the witting agent of business in those decisions.”); Hovenkamp, *supra*, at 418 (“There is painfully little evidence that any members of the Supreme Court were Social Darwinists, or for that matter even Darwinian. Even Holmes’ credentials are in dispute.”).

199. See Levy, *supra* note 47, at 178.

200. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

not regulate them because they could not interfere with the liberty employers and employees enjoyed to define the terms of employment.<sup>201</sup> Frustrated reformers trying to fight the nation's greatest economic challenge found themselves without anywhere to turn for help.

Eventually, however, the Court changed its mind about each doctrine.<sup>202</sup> Three decisions sent the law in a different direction. *Nebbia v. New York*<sup>203</sup> upheld a state law setting minimum and maximum milk prices. *West Coast Hotel Co. v. Parrish*<sup>204</sup> sustained a state minimum wage law and overturned a decade-old ruling in *Adkins v. Children's Hospital*,<sup>205</sup> which had held unconstitutional a different state minimum wage law. Finally, *United States v. Carolene Products Co.*<sup>206</sup> upheld a federal statute prohibiting the shipment of "filled milk" (that is, skimmed milk) in interstate commerce and announced three principles to guide future analyses. First, legislation is generally entitled to a presumption of constitutionality.<sup>207</sup> Second, by contrast, legislation that trespasses on a specific constitutional guarantee receives less deference.<sup>208</sup> Third, the Court left open the issue whether laws that hamper the ability of politically powerless, "discrete and insular minorities," also may be entitled to heightened judicial protection.<sup>209</sup> Over time, the result has been the devel-

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201. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

202. Of course, the Court may have had an incentive. See Levy, *supra* note 47, at 178 ("Franklin Roosevelt blundered by attempting to pack the Court by statute, but his assault on the Court prompted the scales to drop from the eyes of Justice Owen Roberts. He simply changed his mind—the switch in time that saved nine.").

203. 291 U.S. 502 (1934).

204. 300 U.S. 379 (1937).

205. 261 U.S. 525 (1923).

206. 304 U.S. 144 (1938).

207. *Id.* at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.") (footnote omitted).

208. *Id.* at 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

209. *Id.* ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of

opment of a two-tiered standard of review. The courts strictly scrutinize the rationale offered to justify laws that fit into the last two categories, while engaging in a far more lenient standard of review for ordinary social and economic legislation.<sup>210</sup> In fact, some argue that the latter tier of scrutiny, the so-called “rational basis” review, amounts to no scrutiny at all.<sup>211</sup> Since those decisions, the Supreme Court has generally taken a “hands off” approach to judicial review of federal and state economic legislation.<sup>212</sup>

Commentators have consistently acknowledged that, since the New Deal, the Supreme Court has shied away from citing *Lochner* approvingly, and from treating the decision as if it were still good law. Some commentators have noted that proposition gladly; others, fatalistically.<sup>213</sup> Not every member of the academy, however, has thrown in the towel. In fact, a growing number of scholars has decided that *Lochner* is worth a second look.

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legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . [and] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) (citations omitted).

210. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996). Eventually, the Court adopted a third tier of review, so-called intermediate scrutiny, which fit between “strict scrutiny” and “rational basis” review. Alexandra L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. (forthcoming 2016) (manuscript at 53–60).

211. See, e.g., CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* (2013).

212. A classic illustration is the Court’s statement in *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) (“We refuse to sit as a superlegislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”) (citation and internal punctuation omitted).

213. See, e.g., Levy, *supra* note 47, at 170 (“Like the corpse of John Randolph’s mackerel, shining and stinking in the moonlight, economic due process of law, the old substantive due process, is dead even as to personal rights in property. The Court has abdicated the responsibility of judicial review in such cases, although it has not in any other Bill of Rights cases.”) (citation omitted); see also, e.g., Frank Easterbrook, *The Constitution of Business*, 11 GEO. MASON U. L. REV. 53, 53 (1988); Macey, *supra* note 85, at 1084–85; Strauss, *supra* note 169, at 373.

D. *The Backlash Against the Backlash Against Lochner*

1. *The Rehabilitation of Lochner*

Some contemporary scholars have urged the Supreme Court to reconsider its New Deal era precedents, including ones upholding occupational licensing restrictions, on the ground that “property” rights are no less important than “liberty” rights.<sup>214</sup> In their opinion, the prevailing view of *Lochner* grossly overstates the adverse effect of that decision. Progressives won the battle over intrusive judicial review of social and economic legislation, those academics concede,<sup>215</sup> and the victors always write the history. But the story they tell is inaccurate because *Lochner* was hardly the legislative kryptonite it has been made out to be. The Supreme Court of that era upheld more laws than it struck down, and some of those that the Court held unconstitutional were classic examples of special interest legisla-

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214. See, e.g., ELY, *supra* note 11; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 25–31 (1985); Neily, *supra* note 211; PHILLIPS, *supra* note 186, at 173; TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006); Marc P. Florman, Note, *The Harmless Pursuit of Happiness: Why “Rational Basis With Bite” Review Makes Sense for Challenges to Occupational Licensing*, 58 LOY. L. REV. 721 (2012); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627 (1988); Klein, *supra* note 210; Macey, *supra* note 85, at 1085 (labeling as “deplorable” the courts’ current attitude toward judicial review of economic legislation); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065 (2013); Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983); Note, *Due Process Limits on Occupational Licensing*, 59 VA. L. REV. 1097 (1973). See generally MAYER, *supra* note 198, at 5–6, 121–23 nn.25–32 (collecting authorities). Even some scholars who would not be seen as classical liberals or libertarians have argued that property rights deserve more respect than they receive today. See Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–04 CATO SUP. CT. REV. 9, 10 (2004) (“The Constitution—both written and unwritten—protects both economic and non-economic liberty. Both are essential, and each supports the other.”). In 2015, the Texas Supreme Court agreed with those commentators that some licensing requirements can be unconstitutional. In *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), that court, relying on the state constitution, held that the licensing regime for “eyebrow threaders”—a grooming practice involving the use of thread to remove eyebrow hair—was unconstitutional because “the licensing requirements as a whole are so burdensome as to be oppressive to the Threaders.” *Id.* at 90. It remains to be seen whether other state courts will follow the *Patel* decision.

215. See, e.g., GILLMAN, *supra* note 174, at 208–09 n.10 (collecting Supreme Court decisions upholding social and economic legislation).

tion.<sup>216</sup> The Court also did not throw in with the interests of large businesses. For example, the poor were the principal beneficiaries of decisions that held entry restrictions invalid.<sup>217</sup>

These scholars maintain that the Supreme Court mistakenly abandoned the field of economic regulation to the political process in the 1930s while strictly scrutinizing any government effort to restrict civil or political liberties. "While few Americans will discount the importance of the so-called civil liberties, the reality is that economic liberties are the lubricant of a market economy."<sup>218</sup> Each category of liberties should receive the same respect as the other. In fact, the current state of the law is not only mistaken, but also undeniably elitist, because the "average person," the people who form the majority of the nation, would enthusiastically trade off some personal freedoms for greater economic opportunity.<sup>219</sup>

So far, the Supreme Court has been unwilling to fundamentally re-examine its New Deal era economic regulation precedents and apply the same degree of scrutiny to economic legislation that it has used to assess restrictions on certain personal freedoms. Litigants, of course, could try to resurrect substantive due process principles. If they do, they likely would argue along the following lines.

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216. See PHILLIPS, *supra* note 186, at ix, 105–06.

217. See, e.g., *id.* at 99; Hovenkamp, *supra* note 198, at 390 ("These [entry restriction] decisions simply cannot be characterized as a judicial choice to side with business against labor, immigrants, and the poor. On the contrary, they permitted such groups increased entry into established markets in the face of protectionist legislation designed either to exclude newcomers directly or to give established firms a cost advantage over prospective entrants.").

218. HUFFMAN, *supra* note 172, at 5.

219. See, e.g., PHILLIPS, *supra* note 186, at 177, 190; Alex Kozinski, *Foreword: The Judiciary and the Constitution*, in ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 100, at xvii (noting that some people would prefer to operate a business than to wear "a jacket with obscene words on it"); Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46 (1962) ("[M]ost men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds."); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 298–99 ("The right to purchase and use contraceptives, for example, is probably less central to many lives than the right to pursue a chosen business, profession, or occupation. Since the choice of occupation may affect personal capacities, values, style of life, social status, and general life prospects in innumerable ways, this freedom is arguably more central to the individual than the rights already classed as fundamental.").

## 2. A New Old Fundamental Right to Property

*A changed economic theory.* Critics of New Deal jurisprudence would start out by noting that the economic background to the New Deal era decisions has changed, justifying a re-examination of those rulings. The argument would be that the nation has witnessed a fundamental shift in how economic policy and law should treat competition. The Depression caused a lack of public confidence in the efficacy of free markets and a desire for government intervention.<sup>220</sup> New Deal economics sought to protect rivals against the “brutal ethos” and “anarchical” effects of “excess” or “ruinous competition” through government regulation of price, output, and factors of production.<sup>221</sup> Part of the rationale for government intervention was the fear that price wars would add to the greatest unemployment rate in American history, but another component was the belief that central planning could rationally avoid the faults of a laissez-faire free market economic system.<sup>222</sup>

The demise of Marxist economies beginning in 1989 shows that central planning cannot produce economic growth.<sup>223</sup> “Today, claims of ruinous competition usually are met with a snicker and the observation that ruinous competition is nothing more than competition.”<sup>224</sup> Contemporary national competition policy has changed direction by one hundred-eighty degrees. American law now strongly demands that competition between rivals be robust and, with limited exceptions, prohibits state actions that would foreclose rivalry or lead to the cartelization of an industry.<sup>225</sup> The difference in how the law treats

220. See, e.g., RICHARD VIETOR, *CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA* 5–9 (1994).

221. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 292 (1932) (Brandeis, J., dissenting); PHILLIPS, *supra* note 186, at 103; WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* 9–26, 32–42 (2002); YOUNG, *supra* note 11, at 65 (“The notion of destructive competition was the dominant rationale for much of the economic regulation of the New Deal.”).

222. See, e.g., VIETOR, *supra* note 159, at 28; WELLS, *supra* note 221, at 9, 32, 35–37 (“The New Deal actually saw the acme of cartels in the United States.”).

223. For some, the collapse was inevitable. See, e.g., LUDWIG VON MISES, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* (1922).

224. PHILLIPS, *supra* note 186, at 103.

225. The exception is due to a New Deal-era Supreme Court decision. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that the Sherman Act, 15 U.S.C. § 1 *et seq.*, does not prohibit a state from authorizing private parties under state law to fix prices or limit entry, which effectively gave states immunity to authorize private cartels.



competition is due to a fundamental shift, universally acknowledged, in the focus of the federal antitrust laws away from protecting the interests of rivals to advancing the interests of consumers.<sup>226</sup> Those changes, the argument concludes, justify reconsideration of precedents grounded in an economic policy that has since been abandoned as flawed and ineffective.

*A changed approach to judicial review.* In 1908 Learned Hand wrote an article in the Harvard Law Review advancing the two standard criticisms of the *Lochner* decision. The first one was that a legislature should decide what rules of law advance the public “welfare” because the courts cannot make that decision except by defining that term “arbitrarily and unreasonably.”<sup>227</sup> Hand’s other argument was that “there is an obvious and insuperable impropriety” in “question[ing] the integrity of a coordinate branch of the government” regarding what is in the public interest and whether particular legislation promotes that goal.<sup>228</sup> Those arguments seem quaint today.

Start with the First Amendment commercial speech doctrine. In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>229</sup> the Supreme Court overruled its 1942 ruling in *Valentine v. Chrestensen*<sup>230</sup> that purely commercial

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Over the last three decades, however, the Supreme Court has greatly cut back on the *Parker* doctrine by limiting that immunity to only those instances in which a state clearly expresses a preference for and actively supervises the conduct of participants in connection with otherwise anticompetitive activity. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632–40 (1992); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 719–23 (1986). *See generally* Edlin & Haw, *supra* note 21; David Hyman & Shirley Svorny, Response, *If Professions Are Just “Cartels by Another Name,” What Should We Do About It?*, 163 U. PA. L. REV. ONLINE 101 (2014). The Supreme Court recently applied that principle to occupational licensing industry regulatory bodies, ruling that the state must actively supervise those agencies for them to be sheltered by the *Parker* exemption. *See* N.C. St. Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015).

226. *See, e.g.*, *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (citation and internal punctuation omitted) (“It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.”) (citation omitted); *Grappone, Inc. v. Subaru of New England*, 858 F.2d 792, 794 (1st Cir. 1988); Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 244 (1967); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 1 (2005); RICHARD A POSNER, *ANTITRUST LAW*, at ix (2d ed. 2001).

227. Hand, *supra* note 197, at 498.

228. *Id.* at 499.

229. 425 U.S. 748 (1976).

230. 316 U.S. 52 (1942).

speech is not entitled to First Amendment protection. Since then, the Supreme Court has regularly analyzed whether state legislation advances the public welfare or is designed to benefit only a certain segment of the public. For example, the Court has repeatedly second-guessed the legislative decision that the public is better off by remaining ignorant of information, such as lower prices offered by competitors, because “[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”<sup>231</sup> Generally speaking, a court must determine whether a statute directly and reasonably advances a substantial governmental interest and whether the law is drafted to achieve that interest, which demands that the legislative ends and means “fit” together, a burden that the government must carry.<sup>232</sup>

As for alleged “impropriety” of questioning a legislature’s motives: That concern went out the window in 1976 when the Supreme Court held in *Washington v. Davis*<sup>233</sup> that a court must find that a legislature was motivated by racial bias before the court could hold a facially neutral law a violation of equal protection.<sup>234</sup> It is now settled law that a court not simply *may*, but *must* inquire into a legislature’s intent in a host of circumstances: whether a state law discriminates against interstate commerce or out-of-state economic participants, in violation of the Dormant Commerce Clause;<sup>235</sup> whether a statutory penalty imposes a punishment without a trial, in violation of the Due Process Clause;<sup>236</sup> whether a legislature was motivated by race- or sex-based discrimination, in violation of the Fourteenth Amendment Equal Protection Clause<sup>237</sup> or the Fifteenth Amendment;<sup>238</sup>

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231. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496–508 (1996) (plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (alcohol content of beer); *Va. State Bd. of Pharmacy*, 425 U.S. at 766–70 (pharmaceutical prices).

232. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999); *Bd. of Trustees v. Fox*, 492 U.S. 469, 480–81 (1989); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

233. 426 U.S. 229 (1976).

234. *Id.* at 239–48.

235. *See, e.g., Or. Waste Sys., Inc. v. Or. Dep’t of Env’l Quality*, 511 U.S. 93, 99 (1994).

236. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92–105 (2003).

237. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (race); *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (sex).

whether a state tax is motivated by an improper censorial purpose, in violation of the Free Speech Clause;<sup>239</sup> whether a state law challenged under the Establishment Clause has a secular purpose for its enactment;<sup>240</sup> and whether a facially neutral state law is in fact a thinly veiled assault on a disfavored sectarian creed, in violation of the Free Exercise Clause.<sup>241</sup>

*The common law and property.* The best way to start any re-examination of the value of property rights under our Constitution is to begin with the English common law.<sup>242</sup> For example, given that thirty-eight of the sixty-three articles in Magna Carta protected feudal property rights, it can safely be said that the Great Charter was an important recognition of the need to protect those interests. One scholar has surmised that, given the “overwhelming number” of articles protecting feudal property rights, “the protection of property is probably the outstanding feature of Magna Carta”<sup>243</sup> and could be said to be “the *raison d’être* for the establishment of the rule of law in the Great Charter.”<sup>244</sup> If “[t]he charter of ‘liberties’ is thus in large measure a charter of ‘properties,’”<sup>245</sup> it is fair to say that “property

238. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 61–64 (1980) (plurality opinion).

239. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 444–47 (1991).

240. See, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

241. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

242. See generally Sandefur, *supra* note 188, at 209–17. The common law protection for property reaches back at least as far as the Coronation Charter. Issued by Henry II to satisfy a “campaign promise” to the barons for their support in a dispute over the crown, the Charter sought to resurrect English law from the time of Edward the Confessor, in part to protect the barons’ feudal property rights. GOTTFRIED DIETZE, *MAGNA CARTA AND PROPERTY* 14 (1965). The Coronation Charter is significant here for several reasons. It was “primarily concerned with the protection of property rights and consider[ed] such protection a prerequisite for the rule of law,” *id.* at 25; it demonstrated that “unwritten law periodically stands in need of being transmuted into written norms in order that the image of what is just may become a code of what shall be right,” *id.* at 12, and it “created awareness among subjects that claims against the Crown were sanctioned by a constitutional document which specifically spelt out their rights,” *id.* at 25–26. A similar concern was one of the causes of the revolt that led to the Magna Carta. “[W]hether or not the revolt of 1215 was prompted by a long chain of abuses or by the magnitude of John’s oppressions, there is not much doubt that in large measure the revolt occurred in defense of property rights.” *Id.* at 18; see also *id.* at 24 (“John’s infringements upon property were the chief reasons for considering his conduct tantamount to as replacement of the rule of law by the arbitrariness of one man.”).

243. DIETZE, *supra* note 242, at 33; see also *id.* at 33–38.

244. *Id.* at 43.

245. *Id.* at 38 (citation omitted).

rights constitute the better part of freedom as an end of the rule of law."<sup>246</sup>

Common law scholars supported that conclusion. Coke believed that the grant of a monopoly to a business was contrary to "the law of the land" and void because the monopoly denied a person the opportunity to pursue a profession as part of his life.<sup>247</sup> Blackstone found that, under English law and custom, "every man might use what trade he pleased."<sup>248</sup> John Locke wrote that the men created civil society to protect "property" along with life and liberty.<sup>249</sup> Adam Smith believed that the right to pursue a lawful occupation was an essential element of the right to "property."<sup>250</sup> "The seventeenth-century English

246. *Id.* at 43–44 (citation omitted).

247. See *Allen v. Tooley*, (1614) 80 Eng. Rep. 1055; *Darcy v. Allen (The Case of Monopolies)* (1603) 77 Eng. Rep. 1260; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 608 (2009) ("Coke did not attack monopolies because of the manner in which they deprived individuals of their right to practice a trade or calling, but rather for the deprivation itself. In language foreshadowing the Fifth Amendment's Due Process Clause, Coke emphasized that a man's trade is his life, and 'therefore the monopolist that taketh away a mans trade, taketh away his life.' The violation of Chapter 29 lies not in the fact that monopolies deprive individuals of life or property without trial by jury or other legal process, but in the fact that monopolies effect such deprivations at all. Thus, Coke flatly declared, 'Generally all monopolies are against this great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the Land.'" (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 181 (Lawbook Exchange 2002) (1644) and EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1642)).

248. 1 WILLIAM BLACKSTONE, COMMENTARIES, \*34; see also JOHN LILBURNE ET AL., AN AGREEMENT OF THE FREE PEOPLE OF ENGLAND art. XVIII (May 1, 1649) ("That it shall not be in their power to continue to make any Laws to abridge or hinder any person or persons, from trading or merchandising into any place beyond the Seas, where any of this Nation are free to trade.").

249. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 87, at 43 (J.W. Gough ed. 1966) (1689).

250. See SMITH, *supra* note 13, bk. 1, ch. 10, pt. 2 ("The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of [his] most sacred property."); see also 2 CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 245 (6th ed. 1755) ("By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. The Fruits of a Man's honest Industry are the just Rewards of it, ascertained to him by natural and

constitutional maxim making liberty dependent on security in private rights to property may be the most familiar legal doctrine identified by historians of that period.<sup>251</sup> By the following century, in the “pantheon of British liberty there was no right more changeless and tireless than the right to property.”<sup>252</sup> Moreover, “property” included more than realty and personalty. “[P]roperty, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty.”<sup>253</sup> The result was that “liberty itself was property possessed.”<sup>254</sup>

*The early American common law.* The Colonists brought their common law rights and privileges with them to the New World. The colonial charters guaranteed settlers the benefits of the common law in the new land.<sup>255</sup> In America, the common law served as the default rule until an assembly revised it by statute.<sup>256</sup> Eleven of the thirteen colonies enacted so-called “receiving statutes,” which incorporated the English common law as state law. One state—New Jersey—adopted the common law

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eternal Equity, as is his Title to use them in the manner which he thinks fit: And thus, with the above Limitations, every Man is sole Lord and Arbiter of his own private Actions and Property.”).

251. JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: AUTHORITY OF RIGHTS* 31–32 (1986).

252. *Id.* at 27; *see also id.* at 33 (“The first and principal cause of making kings . . . was to maintain property and contracts, traffic and commerce among men.”) (footnote omitted) (quoting John Davies, Attorney General of Ireland).

253. REID, *supra* note 251, at 72 (footnotes omitted); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 13 (1985) (“The concepts of liberty and private property carried with them a large body of assumptions, customs, attitudes, regulations, both tacit and explicit. Thus neither liberty nor property was a right, in singular: each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state. Together, these constituted the historical ‘rights of Englishmen of which eighteenth century Americans were so proud—at least until 1776, when they abandoned their right to call themselves Englishmen.”); *see also id.* at 36–37.

254. REID, *supra* note 251, at 72.

255. JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 9 (2010).

256. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 8 (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 18–20 (1975); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *COLUM. L. REV.* 1, 29 (2009).

through its state constitution.<sup>257</sup> The last state—Connecticut—adopted the common law by judicial decision.<sup>258</sup> The Colonists’ ready acceptance of the common law demonstrates that they saw it as a benefit to be enjoyed, not a burden to be suffered, and valued the common law liberty guarantees more highly than the military or commercial power of the Mother Country.<sup>259</sup>

The American understanding of liberty was economic, political, and practical. In Europe, few individuals achieved economic or political independence because few owned land. America offered a potentially vast amount of fertile land for whoever was willing to till the soil.<sup>260</sup> The Colonists came to America seeking a better life, and most found it by working the land they owned.<sup>261</sup> It was evident from our nation’s earliest days that Americans shared the well-settled English understanding of the meaning and value of property.<sup>262</sup> To the Colonists, a “fun-

257. NJ. CONST. art. xxii (1776).

258. See Bellia & Clark, *supra* note 256, at 29; see also HORWITZ, *supra* note 256, at 8. The Framers were familiar with Coke. See, e.g., A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 22–23 (Rev. ed. 1998) (hereafter HOWARD, MAGNA CARTA). Coke had extolled the virtues of the charter in his *Institutes of the Lawes of England*, a highly influential four-volume common law treatise published between 1628 and 1644. See DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 270–71 (2003). The phrase “the law of the land” or “due process of law” appeared in statutes passed by colonial assemblies, in resolutions enacted by the Continental Congress, in the Declaration of Independence, and, later, in state constitutions. See, e.g., A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA xi, 15–16, 19, 211–15, app. B at 397 (1968) (hereinafter HOWARD, RUNNYMEDE) (listing charters); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705 (2012); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435–40, nn.106–30 (2010).

259. GREENE, *supra* note 255, at 7.

260. See *id.*, at 4.

261. See EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89, at 8 (4th ed. 2013) (“This widespread ownership of property is perhaps the most important fact about the Americans of the Revolutionary period.”).

262. See, e.g., VA. CONST. OF 1776, Bill of Rights § 1, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3812 (F. Thorpe ed. 1909) (“[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”) (emphasis added). (George Mason wrote the Virginia Declaration of Rights a month before Thomas Jefferson wrote the Declaration of Independence.) Members of the Framers’ generation saw “property” as a “natural right”—that is, a right that exists independently of government—and believed that its protection was critical to the success of civil society. See, e.g., ELY, *supra* note 11, at

damental principl[e]” of English and American law, “deeply rooted in the English common law” and “confirmed by Magna Carta,” was that “personal liberty and private rights to property were normally beyond the reach of the king and could be taken from the individual only as provided by the law of the land.”<sup>263</sup> As James Madison explained, the term “property” included more than realty and personalty, reaching anything of value to someone, including legal rights.<sup>264</sup> “For eighteenth-

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10–27; *id.* at 25 (“[T]he cry ‘Liberty and Property’ became the motto of the revolutionary movement.”); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 17 (2013) (“The classical liberal tradition of the founding generation prized the protection of liberty and private property under a system of limited government.”); 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 147 (Max Farrand ed., 1966) (hereinafter *FEDERAL CONVENTION*) (Statement of James Madison) (“The primary objects of civil society are the security of property and public safety.”); *id.* at 302 (Alexander Hamilton) (“[The] one great object of Gov[ernment] is personal protection and the security of Property.”); ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (1775) (“The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.”); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 87 (1997) (“By the late eighteenth century ‘Lockean’ ideas on government and revolution were accepted everywhere in America: they seemed, in fact, a statement of principles built into English constitutional tradition.”); ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 41 (Reprint 1999) (1803) (“The rights of property must be sacred, and must be protected; otherwise there could be no exertion of either ingenuity or industry, and consequently nothing but extreme poverty, misery, and brutal ignorance.”); Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 *HARV. J.L. & PUB. POL’Y* 38 (2012). See generally ELY, *supra* note 11, at 10–41; SIEGAN, *supra* note 209, at 1–80; James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 *SAN DIEGO L. REV.* 673 (2008); Sandefur, *supra* note 188, at 218–26 (all discussing the importance of property and economic liberty to English and early American law, politics, sociology, and life).

263. MCDONALD, *supra* note 253, at 12.

264. Madison explained his view of “property” in a 1792 essay published by the *National Gazette*:

This term [property] in its particular application means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.” In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right, and which leaves to every one else the like advantage. In the former sense, a man’s land, or his merchandise, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects

century Americans," Professor Edmund Morgan observed, "property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another."<sup>265</sup> As another scholar, Professor Phillip Reid, put it, "Americans did not have to be told that liberty and property were inseparable . . . . There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property."<sup>266</sup> "The conviction that private property was essential for self-government and political liberty," Professor James Ely has noted, "was long a central tenet of Anglo-American constitutionalism."<sup>267</sup> In sum, liberty and property were "a unitary concept."<sup>268</sup>

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on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 100, at 3; *see also, e.g.*, WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 193 (1980) (the Founding fathers saw "the acquisition of property" and "the pursuit of happiness" as synonyms); *id.* at 190 ("The twin themes of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776."); *id.* at 194 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property."); SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1785) ("property" means, *inter alia*, "3. Right of possession . . . 5. Thing possessed.").

265. EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 55 (1978).

266. REID, *supra* note 251, at 32–33; *see also, e.g.*, Loren A. Smith, *Life, Liberty, and Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056 (1996) ("While the word 'property' does not appear in the Preamble of the Constitution, the Federalist Papers make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property, the whole preamble is about protecting the citizen's rights in property and property in rights.") (citation omitted).

267. James W. Ely, Jr., "Poor Relation" *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 40; *see also, e.g.*, Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.").

268. *See* Daniel Hannan, *Magna Carta: Eight Centuries of Liberty*, WALL ST. J. (May 29, 2015), <http://www.wsj.com/articles/magna-carta-eight-centuries-of-liberty->



Liberty, property, security, and the rule of law—the Framers believed that all those concepts were intertwined.<sup>269</sup> “To be free, it was necessary to be secure, but you could not be free

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1432912022 [http://perma.cc/28H4-GMKL] (“Liberty and property: how naturally those words tripped, as a unitary concept, from the tongues of America’s Founders.”). Those concerns, by the way, were still vibrant when the Fourteenth Amendment was adopted. *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900) (“The liberty, of which the deprivation without due process of law is forbidden, means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned . . . .”) (internal quotation marks omitted); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (“The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Hovenkamp, supra* note 198, at 395–98 (“[I]n 1868, the concept of ‘civil rights’ of blacks—or, for that matter, of almost anyone—included two elements: (1) the right to equality of treatment in court trials and of access to the agencies of the state; and (2) a set of distinctly economic civil rights, namely, the right to make contracts and the right to own property. When the same Congress that drafted the amendment legislated under it, the legislation involved contract and property rights, not the rights of association or privacy or the freedoms of speech or religion. Among the rights not recognized was freedom from racial segregation. Congress did not have segregation in mind when it passed the Civil Rights Act of 1866, when it drafted the fourteenth amendment, or even a decade later when, contemplating the end of Reconstruction, it drafted the Civil Rights Act of 1875, which was subsequently struck down by the Supreme Court. Even Radical Republicans maintained a sharp distinction among ‘civil’ rights, ‘political’ rights, and ‘social’ rights. The fourteenth amendment and the Civil Rights Act of 1866 were designed to protect civil and political rights, but not social rights. And civil rights were fundamentally defined as economic rights. Thus the fourteenth amendment was economic by design. The freedmen did not need the freedoms of speech or religion or even the fair administration of the criminal process so much as they needed jobs and security . . . . [O]nce the problem of protecting black access to the economic system had been solved, the remaining purpose of the amendment was to enable the courts to define individual economic liberties against the states.”) (emphasis in original) (citations omitted). *Cf. United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 219 (1984) (“Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause.”); *Baldwin v. Mont. Fish & Game Comm’n*, 436 U.S. 371, 387 (1978).

269. REID, *supra* note 251, at 98. (“In the eighteenth century the concept of liberty was more than the sum of all its elements—the other sides of licentiousness and slavery, the rule of law, the security of property, and the principles of the constitution.”).

without property, and could not have property unless it was secure from arbitrary interference," Professor Reid has taught us.<sup>270</sup> As John Adams wrote, "[p]roperty must be secured, or liberty cannot exist."<sup>271</sup> James Madison emphasized in *The Federalist* that "the first object of government" is "[t]he protection of these faculties"—that is, "the faculties of men, from which the rights of property originate[.]"<sup>272</sup> Given that broad understanding of property, it was entirely logical that the Framers' generation treated economic opportunity—the ability to freely pursue a chosen profession—as a form of "property."<sup>273</sup> Other Founders such as Alexander Hamilton, Gouverneur Morris, John Rutledge, and Rufus King echoed the opinions of Adams and Madison.<sup>274</sup> As Professor Edmund Morgan has explained:

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270. *Id.* at 73.

271. 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851); *id.* at 8–9 ("Property is surely a right of mankind as really as liberty . . . . The moment the idea is admitted that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.").

272. THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

273. *See, e.g.*, *Barsky v. State Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, I., dissenting) ("The right to work, I had assumed, was the most precious liberty that man possesses."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . ."); *Allen v. Tooley* (1614) 80 Eng. Rep. 1055, 1055 (Coke, J.) (noting that the common law protects the right of "any man to use any trade thereby to maintain himself and his family"); LOCKE, *supra* note 249, at 111–12 ("[E]very man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."); Letter from Thomas Jefferson to John Adams (Mar. 4, 1801), in THE ADAMS-JEFFERSON LETTERS 391 (Lester J. Cappon ed., 1959) ("Here every one may have land to labor for himself if he chuses; or, preferring the exercise of any other industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age."); James Madison, *Property*, in 14 THE PAPERS OF JAMES MADISON 266, 267 (1983) ("[N]or is property secure under [a government], where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute property in the general sense of the word; but are the means of acquiring property."); TUCKER, *supra* note 257, at 40 ("[B]y the laws of nature and equality, every man has the right to use his faculties in an honest way, and the fruits of his labor, thus acquired are his own."); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 948 (1927) (noting the "common law right to carry on a business"). Closely related is the longstanding American distaste for class-based legislation and monopolies, which the colonists saw as reminiscent of the special privileges that feudalism afforded to the wealthy and powerful. *See, e.g.*, GILLMAN, *supra* note 174, at 33–37; PHILLIPS, *supra* note 186, at 106–14.

274. MCDONALD, *supra* note 253, at 3–4.

For the colonists, as for other Englishmen, property was not merely a possession to be hoarded and admired; it was rather the source of life and liberty. If a man had property, if he had land, he had his own source of food and could be independent of all other men, including kings and lords. Where property was concentrated in the hands of a king and aristocracy, only the king and aristocracy would be free, while the rest of the population would be little better than slaves, victims of the eternal efforts of rulers to exploit subjects. Without property, men could be starved into submission. Hence liberty rested on property, and whatever threatened the security of property threatened liberty.<sup>275</sup>

The Colonists widely shared those views. A majority of Colonists were landowners and made their living from the soil.<sup>276</sup> “This widespread ownership of property is perhaps the most important fact about the Americans of the Revolutionary period.”<sup>277</sup> As a consequence, most Americans enjoyed economic and political independence—economic independence because property ownership gave a landowner the opportunity to obtain food, clothing, and shelter without the sufferance of the government or landed gentry; political independence because property ownership was a criterion to vote or hold office in the colonies.<sup>278</sup> The desire to protect the freedom that property guaranteed to Americans became a leading cause of the Revolution. “The Revolution had begun as a dispute over the security of property, and had fed on the conviction that government existed for the protection of property.”<sup>279</sup> The result is this: The nation’s earliest history, legal traditions, and practices, demonstrate that the critical importance of private property and economic opportunity to the American way of life are interests deeply rooted and traditionally protected by American law. It would seem then that these interests fit within the bounds of

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275. MORGAN, *supra* note 261, at 17; *see also* REID, *supra* note 251, at 72 (“[P]roperty, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty. In fact, a point that should not be forgotten is that liberty itself was property possessed.”).

276. McDONALD, *supra* note 253, at 93 (the vast majority of Americans held “a comfortable amount of land”); MORGAN, *supra* note 261, at 6–7, 95. The Colonies regulated certain lines of work, but they did not replicate the medieval guild system.

277. MORGAN, *supra* note 261, at 73.

278. *Id.*

279. *Id.* at 93.

the Supreme Court's Due Process Clause analytical framework and may qualify for Constitutional protections.<sup>280</sup>

*The American adoption of written constitutions.* Turn now to the state and federal constitutions and their accompanying bills of rights. Every state adopted a written constitution after 1776, and they served as the first-line guarantees of liberty.<sup>281</sup> Britain had an unwritten constitution, and Englishmen saw it as a valuable means of cabining the Crown's tendency toward the arbitrary exercise of power. The new Americans, however, believed that a written charter, like the ones that governed the earliest settlements, was a more certain guarantee of liberty because it could more clearly define, apportion, and limit governmental power than an unwritten oral tradition could.<sup>282</sup>

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280. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion) ("In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental."); see also, e.g., James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917 (2006) (stating that early state constitutions protected property and economic freedom); McCormack, *supra* note 214, at 458–59; Sandefur, *supra* note 188, at 263–77, app. A–D. It is no argument to say that the Declaration of Independence reflected a different understanding of property, because it used the phrase "life, liberty, and the pursuit of happiness" in place of Locke's traditional formulation of "life, liberty, and property." In the eighteenth century, that distinction made no difference. See REID, *supra* note 251, at 119 ("It is simply wrong to think that the framers of the Declaration of Independence, when they altered the familiar common-law trilogy from 'life, liberty, and property' to 'life, liberty, and the pursuit of happiness' were turning American law away from the constitutional principle of security of property. That supposition became constitutionally defensible only after definitions changed and the concept of property, ceasing any longer to embrace liberty or rights, was relegated to the material. The basic premise that we may easily overlook, but which eighteenth-century people never forgot, is that liberty in the eighteenth century was personal property. Indeed, it was the concept of property that bestowed on liberty much of its substance as a constitutional entity and provided one of the enigmas of eighteenth-century constitutional thought—a puzzle for us, not for the eighteenth century. For, as everyone then appreciated, liberty existed through security of property and yet . . . liberty itself was the *only security* of property.").

281. See MORGAN, *supra* note 261, at 89.

282. See *id.* ("The most striking thing about these state governments is that they all had their wings clipped by written constitutions in which their powers were strictly limited and defined. In Rhode Island and Connecticut the old colonial charters continued to serve this purpose, but in each of the other states a special document was drafted. The British constitution was unwritten, and in the recent dispute each side had pelted the other with historical precedents. Though the colonists gave as good

The text of those documents provides other guarantees. For example, several different provisions of the U.S. Constitution, such as the Contracts, Takings, and Due Process Clauses,<sup>283</sup> expressly protect property rights.<sup>284</sup> Others, such as the Elections Clause, implicitly accomplish the same result.<sup>285</sup> The Framers presumably put “property” on a par with “life” and “liberty” in the Fifth Amendment because they believed that all three interests must be protected against arbitrary deprivation. The Founders gave Congress the authority to regulate interstate and foreign commerce,<sup>286</sup> but not local activities like farming or

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as they got in this fracas, they had had enough of it and were now unanimous in feeling that their new governments should have something more than tradition to limit and guide them. A written constitution, then, was their first line of defense against tyranny, and it generally contained a bill of rights defining certain liberties of the people which government must not invade under any pretext: general warrants and standing armies were forbidden; freedom of the press, the right to petition, trial by jury, habeas corpus, and other procedures that came to be known as ‘due process of law’ were guaranteed.”)

283. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”); *id.* amend. V, § 1 (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); *id.* amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”). Along with realty and personalty, the property so protected includes intellectual property. See *id.* art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

284. See EPSTEIN, *supra* note 214, at 29 (“It is very clear that the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.”).

285. See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); *id.* amend. XVII (adopting the same criterion for the election of Senators); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257–59 (2013) (noting that while Congress has the power to fix the “times, manners, and place” of federal elections, the states have the authority to define the qualifications to vote for federal office). That allocation of authority is important because, for a large part of our history, the colonies and states required property holding as a qualification for voting. See, e.g., *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting); 2 FEDERAL CONVENTION, *supra* note 262, at 203 (statement of James Madison) (“In several of the States a freehold was now the qualification [to vote]. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty.”).

286. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

blacksmithing; governance of those activities was left to the states.<sup>287</sup> The expansion of the Commerce Clause that Congress would invoke today to regulate those practices lay one hundred fifty years in the future.<sup>288</sup> That may explain why the Framers did not bar Congress from interfering in the operation of commercial contracts in the same way that they kept the states at bay.<sup>289</sup> The Constitution also did not corral the states' authority to regulate property, perhaps because the Framers saw no real threat to property from that direction. Eighteenth-century state constitutions protected property rights;<sup>290</sup> the states could establish the qualifications to hold state office;<sup>291</sup> and they could define the qualifications to vote in state (or federal<sup>292</sup>) elections, which often included property ownership.<sup>293</sup>

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287. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (finding that manufacturing is not part of interstate commerce), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

288. See *United States v. Darby*, 312 U.S. 100 (1941).

289. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]”).

290. See Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 6–7 (2012) (quoting property rights protections in late-eighteenth century constitutions in Massachusetts, New Hampshire, Pennsylvania, and Vermont).

291. The Constitution defines the criteria to hold federal, not state, office. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (ruling that the Constitution establishes the exclusive requirements to hold office as a Representative, a Senator, or a President).

292. See U.S. CONST. art. I, § 2, cl. 1 (requiring that electors in each state for the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* amend. XVII (adopting the same criterion for senatorial elections); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257–59 (2013); *cf.* U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct” presidential electors).

293. See *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) (“Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one . . . . Most of the early Colonies had [property qualifications for voting]; many of the States have had them during much of their histories . . . .”) (citations omitted); 2 FEDERAL CONVENTION, *supra* note 262, at 203 (statement of James Madison) (“Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty.”); MORGAN, *supra* note 261, at 7 (noting that the “widespread ownership of property is perhaps the single most important fact about the Americans of the Revolutionary period” because it gave Americans not only economic independence, but also political independence because property ownership was a requirement to vote

Aside from what is now the District of Columbia,<sup>294</sup> the Constitution did not put land aside in the states for use by the federal government, perhaps because they assumed that the federal government would purchase whatever land it needed.<sup>295</sup> Nonetheless, the Framers made sure that the new federal government could not take property from its owners unless they were paid and the property was put to a “public use,” however strict or loose a reading that term might receive.<sup>296</sup> Accordingly, insofar as its text is concerned, the Constitution affords far more protection to “property” than to the “privacy” interests that the Court has sheltered since the 1960s.<sup>297</sup>

*The Supreme Court’s early treatment of property.* Finally, the courts, including the Supreme Court, have also noted that the constitution protects economic liberties.<sup>298</sup> For example, Justice

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or hold office). The Framers’ assumption that that the states would continue to safeguard property rights also may have been one reason why they assigned the selection of U.S. Senators to the states, not the electorate, as they did for the House of Representatives. *See* U.S. CONST. art. I, § 3, cl. 1, (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”), *superseded by* U.S. CONST. amend. XVII (providing for the direct election of Senators).

294. *See id.* art. I, § 8, cl. 17 (the Seat of Government Clause) (“The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . .”).

295. *See id.* (“The Congress shall have Power . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .”).

296. *See* U.S. CONST. amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

297. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003) (in-home homosexual conduct); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptive use).

298. *See, e.g.,* *Truax v. Raich*, 239 U.S. 33, 41 (1915) (“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.”); *Murphy v. California*, 225 U.S. 623, 628 (1912) (“The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public.”); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.) (“That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of

Joseph Story believed that protection of property was necessary to prevent other rights from becoming “worthless.”<sup>299</sup> In *Truax v. Raich*<sup>300</sup> the Court noted that “[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.”<sup>301</sup> To be sure, over the course of the last seventy years the Supreme Court has walked away from its

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personal liberty and private property be held sacred.”); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50–51 (1815) (identifying “the right of the citizens to the free enjoyment of their property legally acquired” as “a great and fundamental principle of a republican government”); *Vanhorne’s Lessee v. Torrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (Paterson, J.) (“[I]t is evident . . . that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man . . . . The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.”); *see also* Stephen Field, Assoc. Justice, U.S. Supreme Court, Address at the Centennial Celebration of the Organization of the Federal Judiciary (Feb. 4, 1890), *reprinted in* 134 U.S. 729, 745 (1890) (“It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe.”); *Parham v. Justices of the Inferior Court of Decatur Cnty.*, 9 Ga. 341, 348, 355 (1851) (“The sacredness of private property ought not to be confided to the uncertain virtue of those who govern . . . . The right of accumulating, holding and transmitting property, lies at the foundation of civil liberty. Without it, man nowhere rises to the dignity of a freeman. It is the incentive to industry, and the means of independent action. It is in vain that life and liberty are protected—that we are entitled to trial by jury, and the freedom of the press, and the writ of habeas corpus—that we have unfettered entails, and have abolished primogeniture—that suffrage is free, and that all men stand equal under the law, if property be held at the will of the Legislature.”); *Crenshaw v. Slate River Co.*, 27 Va. 245, 276 (1828) (Green, J., concurring) (“Liberty itself . . . consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of Civil Government, which our ancestors’ in framing our Constitution, intended to secure to themselves and their posterity, effectually, and for ever.”); James W. Ely, Jr., “*The Sacredness of Private Property*”: *State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY (forthcoming 2015) (“[T]he Northwest Ordinance, taken together with the state constitutions of the Revolutionary period, demonstrate that the security of private property was a keystone of the political and social order in the newly independent United States.”) (manuscript at 5).

299. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833) (“[I]n a free government almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.”).

300. 239 U.S. 33 (1915).

301. *Id.* at 41.



earlier decisions and has largely left the protection of property rights to the political process.<sup>302</sup> But the Court has nevertheless acknowledged that the late twentieth-century divide between “personal” and “property” rights is an artificial one.<sup>303</sup> In sum, property rights advocates have a powerful argument that the modern-day Supreme Court has shortchanged the meaning of the “property” that the Framers sought to protect, a value that the Court must protect no less than the one underlying so-called “personal” rights.

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Nonetheless, the argument that substantive due process principles should provide the basis for constitutional protection of economic interests has few friends today.<sup>304</sup> Ironically, even conservative Supreme Court Justices such as the late William Rehnquist and conservative scholars such as the late Judge Robert Bork and sitting Judge Frank Easterbrook, find the concept misguided, oxymoronic, or illegitimate.<sup>305</sup> In their view, the Constitution does not contain an express liberty-of-contract provision necessary to sustain such an argument, and, in any event, elected officials occupy a better position than

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302. See *supra* text accompanying notes 189–205.

303. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (“[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, *Of Civil Government* 82–85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121–132 (1942); 1 W. Blackstone, *Commentaries*, \*138–140.”); see also FRIEDMAN, *supra* note 21, at 9 (stating that political and economic freedom are interdependent); LEARNED HAND, *THE BILL OF RIGHTS* 50–51 (1958) (criticizing that dichotomy); MAYER, *supra* note 198, at 115–17; McCloskey, *supra* note 219, at 45, 54 (criticizing the distinction between the protection afforded liberty and property rights); *supra* note 209 and accompanying text.

304. Some people even seem to go so far as to try to warn or scare off anyone who might say anything in *Lochner’s* defense. See Strauss, *supra* note 169, at 373 (noting that “*Lochner* does have capable defenders who make arguments that must be taken seriously,” but querying “[i]f a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?”).

305. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 48–49 (1997); WILLIAM REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 205 (1987); Easterbrook, *supra* note 213, at 54.

courts to make the necessary tradeoffs that economic regulation requires. Of course, the Supreme Court has been willing to apply substantive due process principles to contemporary legislation infringing on “privacy” or “autonomy” interests in subjects such as abortion.<sup>306</sup> The consequence is that substantive due process doctrine remains alive; it just has a different focus. Given the contentiousness of the Court’s modern privacy decisions, however, the Court may be unwilling to resurrect an old doctrine that the legal community has treated as dead and buried for quite some time.

*E. The Effort to Find a New Source for Property Rights Protection*

Searching for a different constitutional provision, some parties have argued that the Fourteenth Amendment Privileges or Immunities Clause<sup>307</sup> or the Ninth Amendment<sup>308</sup> could serve as a basis for persuading the Supreme Court to undertake a more rigorous review of economic regulation.<sup>309</sup> Neither provision,

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306. See *supra* note 292.

307. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”). For modern discussions of the meaning of the Privileges or Immunities Clause, see, for example, WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383 (2008). Most of the discussion addresses the issue of whether the clause incorporates the Bill of Rights against the states. See generally KURT LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICA CITIZENSHIP*, at viii nn.1-2 (2014) (collecting authorities).

308. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). For modern discussions of the meaning of the Ninth Amendment, see, for example, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 123-24 (1998); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000). Some commentators see the Ninth Amendment as a new source of substantive rights for individuals. See, e.g., DANIEL A. FARBER, *THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007). Others view it as a rule of construction, written to ensure that the enumeration of powers in Articles I, II, and III should not be expansively construed to infringe on the rights of the people—that is, the body politic, not individuals—where all legal and political authority ultimately resides. See, e.g., LASH, *supra* note 198, at 17-36.

309. For the argument that the Privileges or Immunities Clause or the Ninth Amendment can serve as a ground for protecting economic freedoms, see, for example, NELLY, *supra* note 206, at 88-91; SANDEFUR, *supra* note 219, at 287; Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 35 (1988) (arguing

however, looks particularly promising. In the Supreme Court's first interpretation of the Fourteenth Amendment, the *Slaughter-House Cases*,<sup>310</sup> the Court effectively eliminated the Privileges or Immunities Clause as a basis for challenging economic legislation. The Court interpreted the clause as applying only to the rights of national citizenship, such as the right to travel interstate, and upheld a Louisiana law authorizing New Orleans to give a single abattoir a monopoly over slaughtering for public health purposes.<sup>311</sup> In so doing, the Court also rejected arguments advanced in the three dissenting opinions that the state law interfered with "the sacred right of labor"—that is, "the right to pursue unmolested a lawful employment in a lawful manner."<sup>312</sup> Most academics have criticized the *Slaughter-House* decision for misinterpreting the Privileges or Immunities Clause,<sup>313</sup> but the Court has been unwilling to reconsider that ruling.<sup>314</sup>

The Ninth Amendment occupies a different—and potentially superior—position than the Privileges or Immunities Clause for two important reasons: First, its text contemplates that the Constitution protects rights atop the ones specified in the text

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the Ninth Amendment creates a "general constitutional presumption in favor of individual liberty"); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989).

310. 83 U.S. (16 Wall.) 36 (1873).

311. *Id.* at 77–79, 83.

312. *Id.* at 106, 109–10 (Field, J., dissenting) (citation omitted); *id.* at 113–16 (Bradley, J., dissenting); *id.* at 128 (Swayne, J., dissenting) (joining in the views of Justices Field and Bradley).

313. See *McDonald v. City of Chicago*, 561 U.S. 742, 756–57 (2010) (collecting authorities); *id.* at 859 n.2 (Stevens, J., dissenting) (same); *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (same).

314. Since the *Slaughter-House* decision, the Supreme Court has relied on the Privileges or Immunities Clause to hold a statute unconstitutional only once, when it invalidated a California statute limiting the welfare payments a recipient could receive during the first year of residency. See *Saenz*, 526 U.S. at 507. *Saenz* did not reconsider *Slaughter-House's* narrow interpretation of the Privileges or Immunities Clause. The Court also saw no need to revisit that issue eleven years later in *McDonald v. Chicago*, but it did not rule out such reconsideration in a future case. 561 U.S. at 758. Justice Thomas would have rejected the *Slaughter-House* construction and would have squarely relied on the Privileges or Immunities Clause to hold unconstitutional a Chicago ordinance prohibiting the private possession of firearms. See *id.* at 806 (Thomas, J., concurring).

and directs the reader to look elsewhere to find them.<sup>315</sup> Second, the Supreme Court did not strangle that provision in the cradle. The first time that the Ninth Amendment played any important role in the Court's decisions was in *Griswold v. Connecticut*,<sup>316</sup> where Justice Goldberg relied on it in his concurring opinion as the basis for concluding that the state contraceptive ban unconstitutionally interfered with "the right to privacy in marriage."<sup>317</sup> In theory, therefore, the Ninth Amendment could provide the long sought-after basis for challenging unreasonable restrictions on economic liberty.<sup>318</sup> On the other hand, after the *Griswold* case the Ninth Amendment has made only a few cameo appearances in Supreme Court decisions,<sup>319</sup> and the Court has never developed a body of precedent defining its metes and bounds. Today's Justices might find it odd to read the amendment as playing a vibrant role in contemporary constitutional law if none of their predecessors found it important for more than two centuries. After all, the best explanation why a ballplayer has been sitting on the bench for that long is that he is worth less than the players in the starting lineup. Moreover, because the text of the Ninth Amendment is open-ended,<sup>320</sup> the Court might fear that putting it into the starting lineup would invite judges to "free-lance" by reading into it their own views of constitutional law. In any event, the Court has given no recent indication that it is in a hurry to start developing Ninth Amendment law.

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315. See, e.g., Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 337, 338 (Randy Barnett ed., 1989) ("The Ninth Amendment seems to be guarding something; such bother is not likely to be taken if the question is thought to be quite at large whether there is anything out there to be guarded.").

316. 381 U.S. 479 (1965).

317. See *id.* at 488–99 (Goldberg, J., concurring).

318. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 237–54 (rev. ed. 2014).

319. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (joint opinion); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

320. See *supra* note 302. The history of its provenance is not very illuminating with regard to occupational licensing. See, e.g., LASH, *supra* note 198, at 17–36 (discussing history of the Ninth Amendment); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228–65 (1983) (same); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 307–11 (1987) (same). This is likely because occupational licensing was not widespread until late in the nineteenth century. See *supra* notes 15–16 and accompanying text.

Potentially worsening the prospects of persuading the Supreme Court to revisit this subject is the existence of pre- and post-*Lochner* Supreme Court precedents rejecting due process challenges to state licensing requirements.<sup>321</sup> Consider, for example, the decisions involving the medical profession.

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321. See, e.g., *Rice v. Norman Williams Co.*, 458 U.S. 654, 664–65 (1982) (rejecting due process and equal protection challenges to a state law requiring liquor importers to be licensed and to be approved by a distiller to import that distiller's products); *Kotch v. Bd. of River Port Pilots Comm'rs*, 330 U.S. 552, 564 (1947) (upholding a state law river pilot apprenticeship requirement even though the law empowered licensed pilots to select only their relatives for apprenticeships); *Graves v. Minnesota*, 272 U.S. 425, 429 (1926) (upholding state dentistry licensing requirement); *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 43 (1926) (rejecting equal protection challenge to state law regulating the practice of medicine); *Weller v. New York*, 268 U.S. 319, 325 (1925) (upholding state ticket reseller licensing requirement); *Lehmann v. State Bd. of Pub. Accountancy*, 263 U.S. 394, 398 (1923) (upholding state certificate requirement to practice as a certified public accountant); *Douglas v. Noble*, 261 U.S. 165, 170 (1923) (rejecting due process challenge to state licensing requirement for dentistry); *Bratton v. Chandler*, 260 U.S. 110, 115 (1922) (upholding real estate broker licensing requirement); *LaTourette v. McMaster*, 248 U.S. 465, 470 (1919) (upholding insurance broker residency requirement); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 586–87 (1917) (rejecting due process and equal protection challenges to state licensing requirement for securities dealers); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 552 (1917) (same); *McNaughton v. Johnson*, 242 U.S. 344, 349 (1917) (upholding state certification requirement for optometrists); *Crane v. Johnson*, 242 U.S. 339, 344 (1917) (upholding state licensing requirement for physicians as applied to "drugless" practitioners); *Lehon v. City of Atlanta*, 242 U.S. 53, 55 (1916) (rejecting Fourteenth Amendment challenge to municipal ordinance requiring private detectives to be licensed); *Brazee v. Michigan*, 241 U.S. 340, 343 (1916) (upholding state licensing requirement for employment agencies); *Collins v. Texas*, 223 U.S. 288, 296 (1912) (upholding state licensing requirement for physicians as applied to osteopaths); *Engel v. O'Malley*, 219 U.S. 128, 139 (1911) (upholding state licensing requirement for private bankers); *Watson v. Maryland*, 218 U.S. 173, 177–80 (1910) (rejecting equal protection challenge to state physician licensing requirement); *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 563 (1905) (rejecting due process and equal protection challenges to state licensing requirement to sell milk); *Gundling v. Chicago*, 177 U.S. 183, 186 (1900) (rejecting due process and equal protection challenges to municipal licensing requirement to sell cigarettes); *Wilson v. Eureka City*, 173 U.S. 32, 37 (1899) (upholding municipal permitting requirement to move a building on city streets); *Hawker v. New York*, 170 U.S. 189, 200 (1898) (upholding state law denying convicted offenders the right to practice medicine); *Gray v. Connecticut*, 159 U.S. 74, 77 (1895) (upholding state regulation of druggists); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (upholding state licensing requirement for physicians); *Smith v. Alabama*, 124 U.S. 465, 482 (1888) (upholding state licensing requirement for railroad engineers). Other decisions upheld state laws that went even further and prohibited certain occupations altogether. See *Murphy v. California*, 225 U.S. 623, 630 (1912) (upholding municipal ordinance outlawing billiard and pool halls); *Riphey v. Texas*, 193 U.S. 504, 510 (1904) (upholding state law prohibiting the sale of liquor in "dry" counties); *Booth v. Illinois*, 184 U.S. 425, 432 (1902) (rejecting due process challenge to state law forbidding futures contracts).

In *Dent v. West Virginia*,<sup>322</sup> the Court squarely held that a state can require physicians to be licensed. The Court recognized that every person has the right to pursue a lawful occupation<sup>323</sup> and cannot be arbitrarily deprived of that right by the legislature.<sup>324</sup> Nonetheless, the Court reasoned that the state has the authority to impose reasonable limitations on that choice in order to protect the public health and safety.<sup>325</sup> And the practice of medicine, the Court noted, is a subject particularly well fit for regulation.<sup>326</sup> Two decades later, the Court held in *Hawker v. New York*<sup>327</sup> that a state may disqualify felons from practicing medicine, reasoning that the state may use its police power to define both academic qualifications and character standards for the medical profession.<sup>328</sup> A prior conviction, the Court concluded, was a reasonable basis for the state's judgment that a person lacks the character necessary to be trusted to practice medicine responsibly.<sup>329</sup> Two years later in *Reetz v. Michigan*,<sup>330</sup> the Court summarized its decisions, stating that "[t]he power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and

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322. 129 U.S. 114 (1889). To qualify to practice medicine, the state law required a person to obtain a certificate of graduation from a reputable medical school and either to prove that he had practiced medicine in the state for ten years or to pass a qualifying examination. *Id.* at 115.

323. *Id.* at 121.

324. *Id.* at 123–24 (citations omitted).

325. *Id.* at 122.

326. *Id.* ("Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses.")

327. 170 U.S. 189 (1898).

328. "The physician is one whose relations to life and health are of the most intimate character," the Court explained, making it "fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies." *Id.* at 193. In the Court's words, "[c]haracter is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished." *Id.*

329. *Id.* at 196.

330. 188 U.S. 505 (1903).

punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question.”<sup>331</sup> The Court’s decisions in *Dent*, *Hawker*, and *Reetz* are still good law; recent decisions indicate that the Court remains willing to allow legislatures broad discretion to regulate the practice of the “healings arts.”<sup>332</sup>

One could try to distinguish those decisions by arguing that the practice of medicine is a unique profession and by pointing to some post-*Lochner* precedents holding unconstitutional restrictions on very different lines of work.<sup>333</sup> For example, in *New State Ice Co. v. Liebmann*<sup>334</sup> the Court held unconstitutional a state law requiring a license to sell ice. Those decisions, however, are likely no longer “good law.”<sup>335</sup> The Court has readily sustained licensing regimes in far more pedestrian occupations in several New Deal era and later decisions. In 1947, *Kotch v. Board of River Port Pilots Commissioners*<sup>336</sup> upheld a state law riv-

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331. *Id.* at 506.

332. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007) (upholding constitutionality of Partial Birth Abortion Act of 2003); *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (rejecting due process challenge to state law prohibiting physician-assisted suicide); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–85 (1992) (upholding written informed consent requirement for an abortion); *United States v. Moore*, 423 U.S. 122, 124 (1975) (ruling federal drug laws apply to a physician who sought to prescribe a controlled substance outside of his “professional practice”); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (*per curiam*) (upholding state law providing that only a physician may perform an abortion); *N.D. State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (upholding state law requiring that a majority of stockholders in a corporation applying for a license to operate a pharmacy be practicing pharmacists); *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 43 (1926) (rejecting equal protection challenge to state law regulating the practice of medicine); *Webb v. United States*, 249 U.S. 96, 99–100 (1919) (ruling the government may prohibit a physician from prescribing morphine for an addict for maintenance purposes).

333. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278–79 (1932) (holding unconstitutional a state law requiring a license to enter the ice business); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113 (1928) (holding unconstitutional a state law requiring that every owner of a pharmacy be a licensed pharmacist); *Adams v. Tanner*, 244 U.S. 590, 596–97 (1917) (holding unconstitutional a state law prohibiting employment agencies from conducting business); *Smith v. Texas*, 233 U.S. 630, 641 (1914) (holding unconstitutional a state law requiring two years’ experience as a brakeman to work as a conductor); *see also* *Hovenkamp*, *supra* note 198, at 389 (noting that state courts struck down licensing requirements for blacksmiths, undertakers, embalmers, ticket agents, druggists, and plumbers).

334. 285 U.S. at 262.

335. The *Liggett* decision quite clearly is not. *N.D. State Bd. of Pharmacy*, 414 U.S. at 167 (overruling *Liggett*).

336. 330 U.S. 552, 563–64 (1947).

er pilot apprenticeship requirement even though the law empowered licensed pilots to select only their relatives for apprenticeships. Years later in *Williamson v. Lee Optical Co.*,<sup>337</sup> the Court upheld a state law making it unlawful for anyone other than a licensed ophthalmologist or optometrist to fit glasses to someone's face. In 1963, *Ferguson v. Skrupa*<sup>338</sup> sustained a state law criminalizing the business of debt adjustment unless connected with the practice of law. In 1976, faced with a challenge to an exemption in a new municipal ordinance outlawing push cart vendors that grandfathered two existing merchants, the Court in *New Orleans v. Dukes*<sup>339</sup> gave the back of the hand to a claim that the ordinance was arbitrary. Other contemporary cases make the same point.<sup>340</sup>

Where does that leave us? Current Supreme Court doctrine does not look promising for anyone trying to challenge an occupational licensing law on federal constitutional grounds. The Supreme Court has not shown any interest in revisiting *Lochner* and similar precedents or in reaching out for alternative bases to reach the same results.<sup>341</sup> At the same time, the Court has oc-

337. 348 U.S. 483, 490–91 (1955).

338. 372 U.S. 726, 732–33 (1963).

339. 427 U.S. 297, 305 (1976).

340. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 664–65 (1982) (rejecting due process and equal protection challenges to a state law requiring liquor importers to be licensed and to be approved by a distiller to import that distiller's products); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106 (1978) (rejecting due process challenge to a state law prohibiting a motor vehicle manufacturer from opening a new dealership within the marketing area of an existing one without state approval); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 124–25 (1978) (same for state law prohibiting a petroleum producer or refiner from operating retail service stations within the state); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 225 (1949) (upholding state law prohibiting life insurance companies and employees from operating undertaking business, and undertakers from serving as agents for life insurance companies); cf. *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 532–37 (1949) (rejecting due process and equal protection challenges to a state "right to work" law).

341. The landscape may be desert-like, but may not be as barren as some people have lauded or lamented. For example, the Supreme Court has held that grossly excessive punitive damage awards violate the Due Process Clause. See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.") (emphasis added); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); PHILLIPS, *supra* note 186, at 41–44. Those recent decisions are consistent with older precedents placing substantive limits on the size of the financial penalty imposed on a defendant. See *Sw. Tel. &*



asionally reconsidered old rules if it concludes that two propositions are true: (1) the legislative, executive, or judicial process has broken down in a manner that leads to palpably unjust results in a large number of cases; and (2) a different doctrinal basis is available for consideration, one that the Court has not yet foreclosed in prior decisions. For example, in *Gannett Co. v. DePasquale*<sup>342</sup> the Court held that the Sixth Amendment Public Trial Clause does not entitle the press and the public to attend a criminal trial, but one year later decided in *Richmond Newspapers, Inc. v. Virginia*<sup>343</sup> that the First Amendment entitles the press and the public to do just that. Similarly, in 1971 in *McGautha v. California*<sup>344</sup> the Court rejected a challenge to purely discretionary capital sentencing schemes based on the Due Process Clause, yet the following year in *Furman v. Georgia*<sup>345</sup> the Court upheld a challenge to the identical sentencing laws, this time based on the Eighth Amendment Cruel and Unusual Punishments Clause. There are other examples as well.<sup>346</sup> At bottom, then, the final chapter may not yet have been written about the proper judicial approach to economic legislation, but

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Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (setting aside a “plainly arbitrary and oppressive” penalty); see also *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (stating a grossly excessive penalty would violate due process, but not finding the awards unconstitutional); *Standard Oil of Ind. v. Missouri*, 224 U.S. 270, 286 (1912) (same); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907) (same). Occupational licensing restrictions impose a barrier to entry, however, not a penalty for misconduct, so it may be difficult to persuade the Supreme Court to extend those decisions to this context. But those cases adopted a punitive damages limitation based on substantive due process principles—albeit without admitting that conclusion—so there is hope that the doctrine can also be applied elsewhere.

342. 443 U.S. 368, 391 (1979).

343. 448 U.S. 555, 581 (1980).

344. 402 U.S. 183, 185–86 (1971).

345. 408 U.S. 238, 238–39 (1972) (per curiam).

346. Compare, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 36 (refusing to read the Privileges and Immunities Clause broadly to incorporate fundamental rights), with *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (discussing cases using the Due Process Clause to incorporate provisions in the Bill of Rights); compare also *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding mandatory Federal Sentencing Guidelines over separation of powers–based challenges), with *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (holding that mandatory Federal Sentencing Guidelines violate the Sixth Amendment Jury Trial Clause); compare also *Bennis v. Michigan*, 516 U.S. 442, 443 (1996), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974) (rejecting Fifth Amendment Due Process and Takings Clause challenges to pretrial seizure and forfeiture laws), with *Austin v. United States*, 509 U.S. 602, 604 (1993) (holding that the Eighth Amendment Excessive Fines Clause prohibits excessive forfeitures).

the Court may not be willing to turn back to chapters it has already read.<sup>347</sup>

It turns out that there are a few Supreme Court decisions involving the Equal Protection Clause that could offer a basis for hope that this task might not be Sisyphean. The next Section addresses those decisions.

#### IV. AN ALTERNATIVE APPROACH TO JUDICIAL REVIEW OF SOCIAL AND ECONOMIC LEGISLATION

##### A. *Treating Political Corruption as an Illegitimate State Interest Under the Equal Protection Clause*

###### 1. *Identifying Illegitimate State Interests*

An alternative ground for challenging occupational licensing laws is the Fourteenth Amendment Equal Protection Clause.<sup>348</sup> The clause seeks to prevent the government from making irrational distinctions in the treatment of similarly situated parties. It forbids arbitrary discrimination regardless of how that occurs, whether through legislation that expressly treats people

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347. "Yesterday the active area in this field was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may again be 'property.'" Felix Frankfurter, *John Marshall & the Judicial Function*, in *OF LAW AND MEN: PAPERS & ADDRESSES OF FELIX FRANKFURTER, 1939–1956*, at 19 (Phillip Elman ed., 1956). Some lower court judges, frustrated by what they perceive to be jurisprudential defects in a rule of law relegating private parties to an unwinnable political battle, have criticized the current state of the law regarding economic liberties. See *Hettinga v. United States*, 677 F.3d 471, 482–83 (D.C. Cir. 2012) (Brown, J., concurring) ("The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions. The hope of correction at the ballot box is purely illusory. . . . The difficulty of assessing net benefits and burdens makes the idea of public choice oxymoronic. Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.") (internal citations omitted). So far, the Supreme Court has not taken up any such invitation to revisit this subject under the Due Process Clause.

348. See Roger V. Abbott, Note, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 *CATH. U. L. REV.* 475, 477–78 (2013). The Fourteenth Amendment Equal Protection Clause applies only to the states, not the federal government, but the Supreme Court has interpreted the Fifth Amendment Due Process Clause as containing antidiscrimination principles. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

differently or by the application of a facially neutral law in a discriminatory manner.<sup>349</sup>

Given its origin in the Reconstruction Era,<sup>350</sup> the clause has its most historic use when the government is alleged to have acted on an invidious basis such as race.<sup>351</sup> Although race is the classic example of an arbitrary basis, it is not the only one. The rule is broader; it compels government to treat identically situated people equally. In a small number of cases, the Supreme Court has held that the state's irrational application of social or economic legislation to similarly situated parties was so arbitrary as to violate the Equal Protection Clause.<sup>352</sup> The rule applied in those cases should bar a state from approving some, but not all, applicants for a license if the government used an arbitrary basis for making that distinction. To that extent, recent Supreme Court decisions holding legislative classifications unconstitu-

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349. See *infra* notes 351 & 394.

350. See *e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877*, at 342-43, 425-59 (1988); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241, 276-77 (2014).

351. A statute that expressly discriminates on the basis of race can be upheld only if it furthers a compelling interest in the least restrictive manner. See, *e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). A statute that uses social or economic criteria to draw lines, however, is generally valid if it can be said to rationally further a legitimate state interest. See, *e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). An executive official violates the clause if he or she applies a facially neutral law in a discriminatory manner. See, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

352. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam) (relying on the Equal Protection Clause, holding disparate tax treatment stated a claim for relief); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336, 343 (1989) (same, holding unconstitutional a county assessor's tax decision to treat differently properties of similar value); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (same, holding unconstitutional a zoning ordinance excluding group homes for the mentally handicapped); *Metro Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (same, holding unconstitutional a state law taxing in-state insurance companies at lower rates than out-of-state companies); *Twp. of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment."); *id.* (collecting precedents to that effect). Other decisions point the other way. See, *e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079-83 (2012) (collecting cases).

tional under the Equal Protection Clause serve a role similar to that played by the Court's older Due Process Clause decisions ruling that certain instances of legislative line-drawing were so arbitrary as to be unconstitutional.

In keeping with those precedents, some federal courts have relied on the Equal Protection (or Due Process) Clause to hold unconstitutional state laws that unreasonably restrict access into certain professions.<sup>353</sup> There currently is a conflict among the circuits on discrimination caused by one type of state occupational law: the sale of burial caskets by parties not licensed as funeral directors. The Fifth and Sixth Circuits have held those licensing restrictions unconstitutional, but the Tenth Circuit has upheld an Oklahoma law imposing the same ban.<sup>354</sup> The two former decisions show that those courts would certainly be willing to hold unconstitutional other types of occupational licensing statutes that also draw arbitrary distinctions.<sup>355</sup>

As explained above, the field of occupational licensing is rife with arbitrary distinctions. A clear example can be seen in state laws that impose more rigorous licensing requirements on budding cosmetologists than on EMTs.<sup>356</sup>

If the purpose of a licensing requirement is to protect the public, then government should be required to justify any such distinction. By demanding that the government persuasively justify such distinctions, the clause has the effect, in Professor John Hart Ely's felicitous phrase, of "'flushing out'" unconstitutional motivation.<sup>357</sup>

The Equal Protection Clause would make relevant several lines of inquiry. For example, the courts should force the states

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353. See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (holding unconstitutional a state law limiting casket sales to licensed funeral directors); *Merrifield v. Lockyer*, 547 F.3d 978, 980 (9th Cir. 2008) (holding unconstitutional a state law limiting entry into field of pest control); *Craigsmiles v. Gilles*, 312 F.3d 220, 220 (6th Cir. 2002) (same as *St. Joseph Abbey*).

354. Compare *St. Joseph Abbey* and *Craigsmiles* (both described *supra* note 353) with *Powers v. Harris*, 379 F.3d 1208, 1211 (10th Cir. 2004) (upholding constitutionality of state law limiting casket sales to licensed funeral directors).

355. The Fifth and Sixth Circuits discussed both the Due Process and Equal Protection Clauses without specifying which served as the basis for its decision. See *St. Joseph Abbey*, 712 F.3d at 227; *Craigsmiles*, 312 F.3d at 223. Both provisions forbid arbitrary government conduct, so both provisions could be used to challenge an occupational licensing requirement.

356. See *supra* notes 57–65 and accompanying text.

357. ELY, *supra* note 198, at 146.

to defend apparently arbitrary licensing schemes by proving that the risk of injury from unlicensed practitioners is sufficiently great to justify the burden of becoming licensed. That risk would be substantial in some cases (physicians), but trivial at best in others (interior designers). The courts also should be willing to expand their scrutiny beyond the requirements for a specific occupation. It would be important to know why, if public safety is the underlying rationale for licensing requirements, the state imposes burdensome licensing requirements on some occupations that seem to have no relationship to that purpose (cosmetologists), but relatively lax ones in others that are integral to that concern (EMTs). Moreover, the courts should ask why the state has used a licensing requirement when a certification requirement would serve the same purposes without also having an exclusionary, anticompetitive effect. Forcing the state to explain persuasively why it chose the former over the latter approach, and critically examining the state's justification, would go a long way toward exposing cronyism.

It is no response for a state to argue that every would-be barber, cosmetologist, or whatever must satisfy the same requirements that incumbents had to meet. That claim is risible in any case where a state has grandfathered existing practitioners, but the argument is also unpersuasive as a general matter. The state decides which occupations are subject to licensing requirements, and it decides what their justifications are. Internal inconsistencies eat away at the credibility of any public welfare defense and point toward cronyism as the true motivating purpose for occupational rules. A state whose licensing matrices—that is, the overall list of different licensing requirements for different occupations<sup>358</sup>—make little, if any, sense as a means of protecting the public safety or welfare has likely adopted that scheme for the very different purpose of protecting the financial welfare of a favored group. Favoring groups for reasons that are unrelated to, and do not advance, the overall public welfare should not be deemed “legitimate” in a system devoted to the even-handed application of the law. As one commentator has concluded, “Arbitrary and protectionist licensing laws deny equal protection because central to both the rule of law and to our own Constitution’s guarantee of equal protection is the principle that gov-

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358. See CARPENTER, *supra* note 28, at 10–11 table 1, 36–188.

ernment and each of its parts remain open on impartial terms to all who seek its assistance.”<sup>359</sup>

Two important points emerge from the Supreme Court’s post-New Deal decisions reviewing social and economic legislation. One is that those laws are constitutional if they “rationally further a legitimate governmental interest”;<sup>360</sup> the other point, however, is that not every asserted interest is “legitimate.” In particular, it is illegitimate for an assembly to legislate for the purpose of harming a “politically unpopular group,”<sup>361</sup> for government officers to treat identically situated parties differently,<sup>362</sup> or for public officials to “extort” concessions from private parties in exchange for doing their job.<sup>363</sup> Decisions such as *Moreno*<sup>364</sup> establish the first point; precedents like *Allegheny Pittsburgh Coal Co.*<sup>365</sup> exemplify the second; cases such as *Nollan*,<sup>366</sup> the third. Those decisions are profoundly instructive in this context, for two reasons. They reveal that the courts not only may scrutinize the government’s conduct in order to unearth its underlying rationale, but also must place certain rationales out of bounds.

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359. Klein, *supra* note 210 (manuscript at 67–68) (internal punctuation omitted).

360. See, e.g., *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079–81 (2012); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–15 (1993); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

361. See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, ‘[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.’”) (citation omitted); *United States v. Windsor*, 133 S. Ct. 2675, 2692–95 (2013); *Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (relying on *Moreno* to hold unconstitutional a state law discriminating against homosexuals); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

362. See *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336 (1989) (ruling that a county tax assessor cannot treat differently properties of similar value); *Twp. of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

363. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding unconstitutional a city’s decision to deny a landowner a building permit unless the property owner ceded land to the city on the ground that “the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”) (citation omitted); *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594–95 (2013) (describing as an “[e]xtortionate demand[]” a local government’s decision to condition a building permit on the owner’s deeding over an unrelated public right-of-way); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (relying on *Nollan*).

364. 413 U.S. 528 (1973).

365. 488 U.S. 336 (1989).

366. 483 U.S. 825 (1987).

Given those propositions, Public Choice Theory provides a valuable tool for illuminating the underlying purpose of social and economic legislation. That is the doctrine's *raison d'être*. If application of Public Choice Theory discloses that the true rationale for government action is illegitimate, it would be difficult for the government to defend those actions by candidly acknowledging why the government took them. More generally, if it turns out that the only explanation for government conduct is rent creation or rent extraction—better known as bribery or extortion—the courts could hardly treat either rationale as a “legitimate” governmental interest.

2. *Treating Rent Creation and Rent Extraction as Bribery and Extortion*

As noted above, Public Choice Theory teaches that interest groups and politicians trade economic and political rents in a manner akin to what criminal law historically has deemed bribery and extortion.<sup>367</sup> The question, then, is how relevant the criminal law of bribery and extortion is to the equal protection analysis of occupational licensing. At first blush, criminal law seems particularly relevant. The reason is that it would be difficult to defend licensing discrimination against an equal protection challenge if the conduct involved is tantamount to a crime. It turns out, though, that the issue is not quite that straightforward.

a. *A comparative analysis of bribery or extortion and political activity*

The Supreme Court's decision in *McCormick v. United States*<sup>368</sup> proves instructive in this regard. *McCormick* construed the Hobbs Act,<sup>369</sup> a federal statute prohibiting “extortion” that affects interstate commerce and defines that term as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>370</sup> *McCormick* acknowledged that the Hobbs Act prohibits a legislator from extorting money from private parties in return for his decision to take or refrain from

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367. See *supra* notes 105–09 and accompanying text.

368. 500 U.S. 257 (1991).

369. 18 U.S.C. § 1951 (2014).

370. *Id.* § 1951(a) & (b)(2).

taking an official act, such as casting a vote.<sup>371</sup> But the Court also recognized that such a literal interpretation of the act would outlaw any and all forms of campaign contributions, a result that would forbid legislators from performing ordinary constituent services or supporting legislation.<sup>372</sup> Congress did not intend that extraordinary result, the Court concluded, because it would lead to a senseless outcome in a political system financed by private contributions.<sup>373</sup> The distinction between a lawful and illegal contribution, therefore, is the presence of a *quid pro quo*. The Hobbs Act makes it a crime for a public official to accept payments in exchange “in return for an explicit promise or undertaking to perform or not to perform an official act.”<sup>374</sup> If an “official asserts that his official conduct will be controlled by the terms of the promise or undertaking” and receives money (or its equivalent) in return for that promise, his conduct amounts to “the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act,” and he is guilty of violating that law.<sup>375</sup>

*McCormick* establishes two principles with direct relevance here. First, the courts must scrutinize the conduct underlying campaign funding when the government prosecutes a public official for bribery or extortion in connection with his official conduct.<sup>376</sup> Second, some requests for and disbursements of campaign contributions are permissible, but others are illegitimate efforts to corrupt the political process and the parties involved can be convicted of a crime when there is a *quid pro quo* exchange of money for an official action or inaction. Writing a check to an elected official’s reelection campaign without having negotiated a *quid pro quo* may be an unavoidable feature of the American political process,<sup>377</sup> but handing an elected official a briefcase full of twenty-dollar bills in a hotel to purchase

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371. 500 U.S. at 271–75.

372. *Id.* at 272.

373. *Id.* at 272–73.

374. *Id.* at 273.

375. *Id.*

376. *Id.* at 271 (“We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry.”).

377. *See id.* at 271–74 (ruling that the Hobbs Act requires proof of a *quid pro quo* to distinguish extortion from legitimate campaign contributions).



citizenship is a crime.<sup>378</sup> To be sure, there may be no material economic difference between the two activities. The difference between a campaign contribution and a bribe may resemble the difference between dusk and twilight,<sup>379</sup> and the parties who are the object of a politician's "affection" could reasonably see it as extortion.<sup>380</sup> But three realities of American politics—political campaigns do not finance themselves, private parties have the right to contribute to the campaigns of politicians they endorse, and elected politicians can introduce and support legislation even if it affects their political supporters<sup>381</sup>—make it unreasonable to conclude that anyone can take politics out of the political process.

Nonetheless, *McCormick* is quite important for the proper constitutional analysis of occupational licensing schemes because it enlarges the category of constitutionally illegitimate governmental conduct. *Moreno* established the baseline principle that it is illegitimate for a legislature to use the lawmaking power for the "bare" purpose of injuring a politically unpopular group.<sup>382</sup> *Nollan* extended that proposition to the executive branch and also ruled that government officials cannot use government power to extort benefits from private parties.<sup>383</sup> *McCormick* added to those doctrines the rule that held that elected officials may not coerce funds from individuals in return for political favors.<sup>384</sup> Yet, that is precisely the type of government conduct that Public Choice Theory has identified as

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378. See, e.g., *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983) (collecting "Ab-scams" prosecutions).

379. Some political participants see campaign contributions as tantamount to "legalized bribery." See, e.g., LESSIG, *supra* note 111, at 8; KAISER, *supra* note 116, at 18–19 (quoting both former Sen. Russell Long and Rep. Leon Panetta to that effect). Others see them as a "gift" made in a social setting that gives rise to a cultural, even if not a legal, obligation to respond in kind when asked. See, e.g., CLAWSON, *supra* note 122, at 19 ("PAC contributions—and even huge soft money donations—are best understood as gifts, not bribes. They create a generalized sense of obligation and an expectation of mutual back scratching."); LESSIG, *supra* note 111, at 107–24 (discussing the "gift economy"). For present purposes, the difference is immaterial.

380. See, e.g., MONEY FOR NOTHING, *supra* note 85, at 104 ("Milked victims describe the process simply as blackmail and extortion."); see also, e.g., LESSIG, *supra* note 111, at 131.

381. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010).

382. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

383. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

384. 500 U.S. at 271–73.

explaining the existence of most occupational licensing schemes. The only difference is the label. The terms rent-creation and rent-extraction are used in lieu of bribery and extortion even though, economically speaking, the two pairs of conduct may be the same.

Bribery and extortion are among the oldest offenses in Anglo-American criminal law.<sup>385</sup> That fact makes it impossible for the government to maintain that any such conduct can be labeled as “legitimate” even under the most relaxed type of judicial scrutiny. The “rational basis” standard ordinarily used to evaluate social and economic legislation is quite generous to the government. Few interests fail that test.<sup>386</sup> But it would be difficult for the Supreme Court to credibly declare that the same conduct that can land a legislator in prison is nevertheless “legitimate” when not just one elected legislator engages in it, but a majority of the entire assembly. Atop that, because federal, state, and local governments prosecute legislators for bribery and extortion,<sup>387</sup> Public Choice Theory puts governments in an uncomfortable position when defending licensing schemes. It would be hypocritical for the government to prosecute the elected officials who engage in such conduct on the ground that an elected official may not trade his vote for a personal benefit, while defending the constitutionality of a licensing scheme on the ground that rent creation and rent extraction are legitimate forms of political conduct. *McCormick* makes clear that courts have the responsibil-

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385. See, e.g., Statute of Westminster 1275, 3 Edw. 1, c. 26–27 & 30 (Eng.) (extortion); An Act for the Punishment of Certain Crimes against the United States, Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (bribery of judges); An Act to Prevent Frauds upon the Treasury of the United States, Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171 (general bribery statute); 4 Commissioners of the Code, Proposed Penal Code of the State of New York § 613 (1865) (reprint 1998) (the Field Code, a nineteenth-century version of the Model Penal Code) (extortion); *Sekhar v. United States*, 133 S. Ct. 2720, 2725–26 (2013) (discussing the common law history of extortion); *McCormick*, 500 U.S. at 277–80 (Scalia, J., concurring) (discussing lower federal court decisions applying the Hobbs Act); *United States v. Perrin*, 444 U.S. 37, 43 (1979) (discussing the common law history of bribery); BLACKSTONE, *supra* note 248, at \*139–41 (bribery); 3 COKE, *supra* note 242, at 145–50 (extortion); JOHN T. NOONAN, JR., BRIBES (1984); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO *CITIZENS UNITED* 10–24 (2014) (early American law on bribery and extortion).

386. See *supra* notes 203–04.

387. See, e.g., Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012) (bribery); Hobbs Act, 18 U.S.C. § 1951 (2012) (extortion).

ity to realistically scrutinize political transactions.<sup>388</sup> If the courts honestly perform that duty, they cannot rationally say that bribery and extortion are simultaneously criminal conduct and legitimate government interests.

The question, then, is whether the principle underlying the *McCormick* decision is applicable at the wholesale level as well as the retail. That is, can the rule established in *McCormick* be applied to situations where the decision maker is not an individual legislator but rather the entire assembly? The next subsection analyzes that issue.

*b. The factual difficulty of analyzing bribery or extortion and political activity at the wholesale level*

It could be argued that the difficulty in determining the intent of a collective body makes unworkable a rule that legislation is illegitimate for constitutional purposes if it is the product of the type of political bribery and extortion that Public Choice Theory describes and that the criminal law may prohibit. After all, an axiom of Public Choice Theory is that the apparent rationale for state actions does not necessarily align with the preferences of the decision makers, let alone their constituents.<sup>389</sup> It is therefore problematic to divine the motive or intent behind any particular statute because different legislators may be driven by entirely different concerns to support a particular law.<sup>390</sup> Indeed, because it is so difficult to divine the intent of a corporate body, the argument goes, the game is not worth the

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388. 500 U.S. at 271–73.

389. See, e.g., *ARROW*, *supra* note 91.

390. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519–520, 520 n.2 (1993) (Scalia, J., concurring) (concluding that it is nonsensical to ascribe “intent” to a legislature); *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971) (“It is difficult or impossible for any court to determine the ‘sole’ or ‘predominant’ motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.”); *United States v. Donruss Co.*, 393 U.S. 297, 308 (1969) (“Rarely is there one motive, or even one dominant motive, for corporate decisions.”); *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810); *ARROW*, *supra* note 91.

candle. In any event, what matters is a statute's effect, not the motivations of the legislators who voted for it.<sup>391</sup>

A court should avoid pursuing an inquiry that requires it to answer a factually unanswerable question ("What is the last digit in  $\pi$ ?"), that requires it to use an insolubly ambiguous standard ("What conduct is 'annoying'?"<sup>392</sup>), or that forces it to make a decision that is entirely a matter of policy ("Who would be the best Secretary of State?"). That concern is one of the reasons why courts deem some issues to be "political questions" that the judiciary should leave to the political branches for resolution.<sup>393</sup> That concern, however, is not present here. It certainly is difficult to divine the intent of a collegial body, but the task is not impossibly onerous. Indeed, the Supreme Court has ruled that the courts can and must undertake precisely that inquiry when a statute is challenged as having been motivated by race- or sex-based discrimination, in violation of the Fourteenth Amendment Equal Protection Clause.<sup>394</sup> Moreover, as explained above the Court has concluded that an intent-based inquiry is feasible and necessary in several other analogous contexts. In each of those settings the Supreme Court has concluded that a judicial inquiry into the legislature's rationale or motive is not merely permissible, but also necessary.<sup>395</sup> If a court can discern a collective body's intent or motive in those contexts, the court certainly can pursue the same inquiry in this one.

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391. See *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) ("It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality.").

392. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding the term "annoying" unconstitutionally vague).

393. See, e.g., *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) ("[T]he political question doctrine [is] implicated when there is a lack of judicially discoverable and manageable standards for resolving the question before the court.") (citations and internal punctuation omitted); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

394. See, e.g., *Hunter v. Underwood*, 471 U.S. 55, 227–28 (1980) (race); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (sex).

395. See, e.g., *Or. Waste Sys., Inc. v. Or. Dep't of Env'l Quality*, 511 U.S. 93, 99 (1994) (whether statute discriminates against out of state economic participants in violation of the Commerce Clause); *Smith v. Doe*, 538 U.S. 84, 92–105 (2003) (whether statute imposes penalty without trial in violation of Due Process), *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (whether a state law challenged under the Establishment Clause has a secular purpose).

Public Choice Theory provides a useful means of analysis. It does not require courts to make political decisions; it enables the courts, simply but honestly, to analyze how the politics of the legislative process actually works.<sup>396</sup> As James Huffman has noted, “politics is seldom about principle and mostly about interests. . . . [T]he day-to-day business of government is almost entirely about the pursuit of competing private interests . . .”<sup>397</sup> Moreover, the settings in which legislatures make occupational licensing decisions are readily susceptible to analysis using microeconomics and game theory, with a dollop of historical analysis for good measure. Courts have often employed these tools to analyze decisionmaking in fields such as antitrust and constitutional law.<sup>398</sup> They perfectly apply to an inquiry into the justification for occupational licensing because when and how often politicians resort to rent creation or rent extraction is subject to the laws of supply and demand, economic and political.<sup>399</sup> Microeconomics, game theory, and history supply objective indicia that courts can use to avoid falling into the trap of substituting their own policy preferences for legal analysis.

Public Choice Theory teaches that interested parties and politicians use and respond to incentives in the private and public markets.<sup>400</sup> They will spend resources in pursuit of a benefit (or avoidance of a loss) up to the point where their individual marginal cost and marginal income curves intersect.<sup>401</sup> Their strate-

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396. See JAMES L. HUFFMAN, *PRIVATE PROPERTY AND STATE POWER* 22 (2013) (“Proponents of legislation and defenders of existing laws invariably claim that their sole motivation is to serve the public interest for reasons of principle. However, it is no coincidence that the public interest they promote generally coincides with their personal interests. Rent seeking is a very real phenomenon and an accurate way of describing much of what transpires in the political branches of government.”) (citation omitted).

397. *Id.*

398. See, e.g., *Hunter*, 471 U.S. at 228–33 (relying on the testimony of historians to determine the intent of the Alabama Constitutional Convention of 1901); *Frazier v. Cupp*, 394 U.S. 731, 737–40 (1969) (concluding that an interrogating police officer’s use of the “prisoner’s dilemma” stratagem to elicit a confession did not render the confession involuntary); POSNER, *supra* note 226, at 69–93 (identifying various economic factors that courts could use to determine whether firms have engaged in collusion prohibited by Section 1 of the Sherman Act, 15 U.S.C. § 1 (2012)).

399. See *MONEY FOR NOTHING*, *supra* note 85, at 24–25; McChesney, *supra* note 85, at 110; *supra* note 96.

400. JAMES D. GWARTNEY & RICHARD STROUP, *MICROECONOMICS: PRIVATE AND PUBLIC CHOICE* 421–35 (2d ed. 1980).

401. See RAUCH, *supra* note 102, at 73–74.

gies may differ, however, depending on the relevant demand in the private or public market setting. Rent creation is preferable to rent extraction where demand is elastic and there are no barriers to entry. Rent extraction is preferable where demand is inelastic, there are barriers to entry, and firms have large capital investments that cannot be used for an alternative purpose (for example, making pea soup rather than canned peas).<sup>402</sup> Analysis of demand elasticity can therefore help a court start its inquiry. A historical analysis of the relevant occupation also may be helpful at the outset because it may illuminate which parties sought the regulation—the public, perhaps in response to a dramatic catastrophe such as the discovery of toxic waste disposal sites at Love Canal, New York, in the 1970s,<sup>403</sup> or the regulated parties themselves, as has traditionally been the case with respect to many local occupations, such as barbering.<sup>404</sup> That knowledge is quite useful in determining who expects to benefit from the legislation at issue.<sup>405</sup>

Microeconomics and game theory also illuminate how the actors will play their parts. Rent creation may be more profitable in the short run than rent extraction, particularly for a powerful legislator, such as the Speaker of the House of Representatives, because it is easier to move a bill through a legislature if everyone lines up behind it. Nonetheless, in the long run rent extraction is potentially more profitable than rent creation. Political threats can give rise to a lucrative auction in which a politician receives political rents from competing interests.<sup>406</sup> For example, by threatening to adopt strict environmental regulations a politician can receive rents from both industry and environmental organizations.<sup>407</sup> A politician can continue that ploy for some time or can see to the enactment of only minimal regulations while holding out the threat or possibility of sup-

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402. See MONEY FOR NOTHING, *supra* note 85, at 24–25; YOUNG, *supra* note 11, at 26.

403. Lois Marie Gibbs, *History: Love Canal: The Start of a Movement*, BOS. UNIV. SCH. OF PUB. HEALTH, <http://www.bu.edu/lovecanal/intro/html> [<http://perma.cc/9T3J-WN4E>] (last visited Nov. 15, 2015).

404. See Thornton & Weintraub, *supra* note 51.

405. See WH FRAMEWORK, *supra* note 7, at 22 (“Empirical work suggests that licensed professions’ degree of political influence is one of the most important factors in determining whether States regulate an occupation.”) (citation omitted).

406. See, e.g., ROSE-ACKERMAN, *supra* note 103, at 129.

407. See MONEY FOR NOTHING, *supra* note 85, at 26–34.

plementing them at a future legislative session. Or the legislature can enact a bill with a relatively short lifespan. So-called “tax extenders”—legislation creating temporary tax benefits—are a classic example.<sup>408</sup> Their benefits last for only a defined period, requiring the beneficiaries to re-approach legislators to see to their renewal, which gives legislators the opportunity to extract rents on a periodic basis for an indefinite period.

The Supreme Court’s 2015 decision in *North Carolina State Board of Dental Examiners v. FTC*<sup>409</sup> should make the task of discerning the purpose of licensing requirements easier for the courts to perform. North Carolina law empowered a state Board of Dental Examiners, six of whose eight members had to be licensed dentists, with authority over that profession.<sup>410</sup> After dentists complained to the board that non-dentists were charging lower prices than dentists for teeth whitening, the board sent cease-and-desist letters to non-dentist teeth whitening providers, warning that the unlicensed practice of dentistry is a crime.<sup>411</sup> The Federal Trade Commission opened an investigation and ultimately concluded that the board’s actions constituted an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act.<sup>412</sup> The Supreme Court upheld the FTC’s decision, ruling that the state dental board was subject to suit under the federal competition laws.

The issue in *North Carolina State Board of Dental Examiners* was whether the board’s actions were sheltered from review by virtue of the so-called antitrust “state action doctrine,” which renders the antitrust laws inapplicable to an economic regulation adopted by a state in its sovereign capacity.<sup>413</sup> The Court rejected the claim that state action immunity applied to the board’s actions.<sup>414</sup> The Court stressed that where a state delegates control over a market to a non-sovereign actor, as North Carolina did to its board, the state action doctrine applies only if the state itself accepts political responsibility for its delega-

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408. See SCHWEIZER, *supra* note 103, at 30–38.

409. 135 S. Ct. 1101 (2015).

410. *Id.* at 1107–08.

411. *Id.* at 1108.

412. *Id.* at 1108–09 (citing 15 U.S.C. § 45 (2012)).

413. See *Parker v. Brown*, 317 U.S. 341 (1943) (adopting the state action doctrine).

414. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1110.

tion by actively supervising the private actor's decisions.<sup>415</sup> Accordingly, the state must identify an independent entity with supervisory authority over the profession in question that "must review the substance of the anticompetitive decision" and "must have the power to veto or modify particular decisions to assure they accord with state policy."<sup>416</sup> The effect of the Court's ruling is to require a state to make clear that the purpose of a regulatory program is to protect select businesses from competition. Given that requirement, the *North Carolina Dental Board* decision should enable courts to readily determine when a state is using a licensing scheme to shelter cronyism.

In sum, there is no persuasive legal reason why the judiciary cannot undertake the type of inquiry contemplated by Public Choice Theory when economic legislation is challenged as arbitrary. Courts can adequately determine the intent of a collegial body such as a legislature in a variety of contexts. Nothing about occupational licensing makes the inquiry into legislative intent a futile endeavor.

But that does not end the inquiry. The next question turns on matters of policy, not fact. How can we hold an assembly to the same legal and ethical standard that we demand of individual legislators without taking politics out of the political process? Does it make sense to treat rent-creation and rent-extraction as tantamount to bribery and extortion given what *McCormick* said about the practical operation of the contemporary political process? And does it matter that the legitimacy of a transaction is challenged under the Equal Protection Clause rather than as an alleged criminal act? The following subsection addresses these questions.

*c. The policy implications of analyzing bribery or extortion and political activity at the wholesale level*

There are major differences between prosecutions for straightforward bribery or extortion and equal protection challenges to licensing schemes. *McCormick* was a criminal prosecution, so the government could not convict McCormick of a crime unless it proved that he knowingly participated in a *quid*

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415. *Id.* at 1115–17.

416. *Id.* at 1116.



*pro quo* transaction.<sup>417</sup> In a criminal case a court must find a specific *quid pro quo* exchange between a particular legislator or group of legislators and an identified business official or association.<sup>418</sup> When reviewing an equal protection challenge to a licensing regime, however, a court need not identify a particular exchange between specific parties to decide that a licensing statute is invalid, because no individual legislator or business official is at risk of being imprisoned. That certainly would be helpful—a smoking gun is always a powerful piece of evidence—but it is not required. A statute can be unconstitutional because its justification is illegitimate, and a court can make that determination without pointing the finger at any specific legislator.<sup>419</sup>

Requiring a court to find a specific *quid pro quo* also would ignore how rent-creation and rent-extraction operate in today's political process. Politicians and private parties can avoid dealing directly with each other by using professional lobbyists or trade organizations as intermediaries. These intermediaries deal with legislators or their staffs on behalf of clients and give private parties the opportunity to make their views known on potential legislation. Lobbyists and trade organizations can also offer legislators various types of reelection support, including campaign contributions, fundraising dinners, speaking engagements, book purchases, and get-out-the-vote efforts.<sup>420</sup> These avenues provide private parties and elected officials the opportunity to come to a "meeting of the minds" on issues

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417. Even if the government had charged McCormick with being a member of or an accessory to a large-scale conspiracy to trade votes for dollars, the government would have had to prove that he knowingly joined the conspiracy and shared its goals. See, e.g., *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) ("As at common law, a person is liable under [18 U.S.C.] § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'") (citation omitted); *Pinkerton v. United States*, 328 U.S. 640 (1946) (a conspirator is liable for crimes committed by others in the conspiracy in furtherance of the illegal agreement).

418. See, e.g., U.S. DEP'T OF JUSTICE, PROSECUTION OF PUBLIC CORRUPTION CASES 299 (1988).

419. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

420. See generally FED. ELECTION COMM'N, CONGRESSIONAL CANDIDATES AND COMMITTEES (2014).

without running afoul of criminal laws. Intermediaries eliminate the need for the type of tawdry exchange of a promise for a cash-filled envelope that could result in a criminal prosecution. They do so, in Professor Lessig's words, by substituting a "gift" economy for an "exchange" economy, an economy that operates and thrives through the creation and cementing of trusted, reliable, long-term relationships, rather than through individual transfers of commodities.<sup>421</sup> Making a specific *quid pro quo* exchange the prerequisite for finding illegitimate conduct would invalidate only obvious trades between corrupt and incompetent legislators, on the one hand, and entirely unsophisticated lobbyists, organizations, and individuals on the other.<sup>422</sup> In the Darwinian world of contemporary politics, that result would leave the most sophisticated private parties free to manipulate the lawmaking process without interference by enforcement authorities or the judiciary.

Political transactions are also far more sophisticated today. As one observer has explained:

No explicit verbal threats, or *quid pro quo*, need be made. The "squeegee men" in New York City would not utter a word about extortion when they began "cleaning" windshields. They didn't have to. It's the same in Washington. Politicians and their fund-raisers usually don't call a donor and state outright that the donor has to give money or do a favor. Politicians and their fund-raisers have plenty of ways to signal their intentions loud and clear. The Permanent Political Class is well aware of the power it possesses. Its members don't need to shout. As John Hofmeister [former president of Shell Oil Company] told me, "These engagements themselves take place with carefully orchestrated be-

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421. See LESSIG, *supra* note 111, at 103-24.

422. See TEACHOUT, *supra* note 385, at 11 ("A narrow [anticorruption] law will punish any clumsy politicians like William Jefferson, who hid his rolls of cash in a freezer."); see also SCHWEIZER, *supra* note 103, at 171-72 (describing the downfall of former Illinois Governor Rod Blagojevich due to his efforts to "sell" the U.S. Senate seat of newly-elected President Barack Obama); Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1, 7 (2014) ("Congress was intended to be 'dependent on the people alone.' It has become dependent upon an additional dependence, 'the funders' of campaigns. Because of who 'the funders' are, this additional dependence is a conflicting dependence, and that conflict constitutes the 'corruption.'").

haviors, such that a distant observer would never know what is actually taking place.”<sup>423</sup>

If squeegee men and businessmen do not persuade you, perhaps a story from former U.S. Senator Evan Bayh will:

The single most frightening prospect that an incumbent now faces is that, thirty days before an election, some anonymously funded super PAC will drop \$500,000 to \$1,000,000 in attack ads in the district. When that happens, the incumbent needs a way to respond. He can't turn to his largest contributors—by definition, they have all maxed out and can't, under the law, give any more. So the only protection he can buy is from super PACs on his own side.

That protection, however, must be secured in advance: a kind of insurance, the premium for which must be paid before a claim gets filed. And so how do you pay your premium to a super PAC on your side in advance? By conforming your behavior to the standards set by the super PAC. “We'd love to be there for you, Senator, but our charter requires that we only support people who have achieved an 80 percent or better grade on our Congressional Report Card.” And so the rational senator has a clear goal—80 percent or better—that he works to meet long before he actually needs anyone's money. And thus, without even spending a dollar, the super PAC achieves its objective: bending congressmen

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423. SCHWEIZER, *supra* note 103, at 14–15 (citation omitted). Professor Lessig has illustrated the problematic nature of a *quid pro quo* exchange requirement as a precondition to what he labels “systemic corruption” and what I would classify as an example of Public Choice Theory at work:

Imagine that a company, call it Bexxon, let it be known that it intended to spend \$1 million in any congressional district to defeat any representative who believed that the federal government should enact climate change legislation. This spending would be independent of any candidate's campaign. As the Supreme Court has defined it, because it occurs in “the absence of prearrangement and coordination,” it would not fall within the range of speech properly regulable as campaign contributions. It is an “independent expenditure.” If a representative learned of that intent, and decided to shape-shift and adjust her view about the need for climate change legislation—for example, by dropping a pledge to support climate change legislation from her website, or removing her sponsorship on a prominent bill—there'd be little doubt that that change was because of Bexxon's expressed intent. But there'd also be little doubt that the change was not an instance of *quid pro quo* corruption. There's no agreement. There's no act to carry out an agreement. There's simply an expressed intent, and an action in response to that intent that preserves the political position of a politically vulnerable representative.

LESSIG, *supra* note 111, at 231–32 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

to its program. It is a dynamic that would be obvious to Tony Soprano or Michael Corleone but that is sometimes obscure to political scientists.<sup>424</sup>

Ultimately, however, the problem is not the exchange of votes for cash between a corrupt politician and an influence peddler representing a small clientele of robber barons. As Jonathan Rauch has explained, the corruption of government today is not attributable to “a few evil elites and corrupt Washington insiders.”<sup>425</sup> America has democratized special-interest politics.<sup>426</sup> Virtually everyone in America belongs to one or more interest groups, each group trades on the lobbying stock exchange, and every politician is susceptible to enticements given the need to persuade the electorate to be elected or reelected.<sup>427</sup> Nor is the problem reminiscent of past eras when everything of importance occurred in a backroom closed off to all but a select few insiders.<sup>428</sup> The trade of political and economic rents is done as if it occurred on “a New York Stock Exchange on which government benefits are sought and traded openly and (for the most part) honestly.”<sup>429</sup> The problem is a matter of arithmetic, not morality.<sup>430</sup> The public interest is not the sum of individual interests, yet it is the battle between competing individual interests that determines who gets elect-

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424. LAWRENCE LESSIG, ONE WAY FORWARD: THE OUTSIDERS GUIDE TO FIXING THE REPUBLIC 67–68 (2012) (recounting conversation with Bayh).

425. RAUCH, *supra* note 102, at 97.

426. *See id.* at 52 (“The old era of lobbying by ‘special interests’ is as dead as slavery and Prohibition. Where influence peddling was once the province of the privileged, it is now everyone’s game. Americans have achieved full democratization of the special-interest deal: influence peddling for the masses.”).

427. *See id.* at 234–35 (“[P]olitical money is not the main cause of the government’s ailments; votes are . . . . The root problem is that the groups with the money represent millions of American voters and are engaging in practices that their members, rightly or wrongly, support. In politics, money is but one kind of political weapon. You need to weaken the groups, or else they simply pick up another weapon.”).

428. *See id.* at 166 (“The culture of [political] government, by 1981, was honest and professional and astonishingly transparent; no one hid anything. But the economics of government, by then, was that of a piranha pool, with thousands of small but sharp-toothed and very strongly motivated actors determined not to be the loser at the end of the day.”).

429. *Id.* at 97.

430. *See id.* at 195–97.

ed, which issues are placed on the legislative agenda, and what bills become law.<sup>431</sup>

The second distinction between criminal prosecutions and civil lawsuits is the nature of the legal inquiry. In a criminal case, the government must prove that the defendant acted with what the criminal law calls *mens rea*, or an “evil-meaning mind.”<sup>432</sup> That inquiry is subjective. By contrast, when the question is whether legislation was the product of rent creation or rent extraction, the inquiry is objective—that is, one asks if a reasonable person would conclude that the licensing regime was designed to profit the public generally or merely some favored subset of parties. Put differently, in a constitutional challenge to a licensing scheme, the ultimate question for the court is whether there is any legitimate public interest that the program protects. In many cases, such as licensing requirements in the healing arts, the need to protect the public against quacks would be obvious, and the inquiry easy to perform. Watching an episode of *House, M.D.* does not qualify someone to diagnose disease.<sup>433</sup> In other cases, such as those involving the licensing of real estate agents, the need for such regulation is less obvious, but a case can still be made for protecting the public against charlatans.<sup>434</sup> Most people finance the purchase of a home, and the state may have an interest in requiring real estate agents to be familiar with mortgage financing to ensure that purchasers do not buy houses that they cannot afford. But there are also a large number of other tradesmen who must be licensed—barbers, bartenders, cosmetologists, floral arrangers, landscape workers, locksmiths, tree trimmers, upholsterers, and a host of others—where a licensing requirement serves no purpose other than to fill the bank accounts of licensed parties and the war chests of elected officials.

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431. *See id.* at 275 (“When he left office in 1981, Jimmy Carter delivered a warning. ‘Today, as people have become ever more doubtful of the ability of the government to deal with our problems, we are increasingly drawn to single-issue groups and special-interest organizations to ensure that, whatever else happens, our own personal views and our own private interests are protected,’ he said. ‘This is a disturbing factor in American political life. It tends to distort our purposes, because the national interest is not always the sum of all our single or special interests.’ He was right then, and he is still right.”) (citation omitted).

432. *See, e.g., Morissette v. United States*, 342 U.S. 246, 251 (1952).

433. *See Dent v. West Virginia*, 129 U.S. 114 (1888) (upholding licensing requirement to practice medicine).

434. *See Bratton v. Chandler*, 260 U.S. 110 (1922) (upholding real estate broker licensing requirement).

In those cases, the courts should hold the occupational licensing requirements unconstitutional because their provenance is attributable to the type of rent-creation or rent-extraction that *McCormick* deemed illegitimate.

Discriminating against parties simply because they do not or cannot trade political rents for economic rents should be deemed an illegitimate way of exercising government power. In fact, some commentators have recently argued that such cronyism is a form of “corruption” writ large.<sup>435</sup> The Framers may well have agreed with that conclusion. They understood corruption to be a vice with far broader reach than the crimes of bribery and extortion.<sup>436</sup> The Framers held that the Roman sense of civic virtue should infuse the government and everyone who exercised its authority.<sup>437</sup> Corruption was seen as a “rotting of positive ideals of civil virtue and public integrity.”<sup>438</sup> In their view, corruption extended beyond the classic *quid pro quo* exchange. It reached any use of government power to advance the ends of a few rather than to “promote the general Welfare.”<sup>439</sup> As Professor Teachout has explained, the Framers believed that an act, a system, or a person was corrupt when government power was used, not for the public’s benefit, as the Constitution’s Preamble contemplates, but solely for the interest of a small faction within the nation.<sup>440</sup> Put differently, a political actor acted corruptly by “either purposely ignor[ing] or forget[ing] the public good” in exercising the state’s power.<sup>441</sup> A statute designed for that purpose is illegitimate and the courts should treat it as such. Subjecting legislation that is designed to benefit only a small, readily identifiable segment of the public, not the general welfare, to judicial scrutiny would respect the Framers’ wishes by keeping the legislature from exceeding its lawful boundaries.

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435. See, e.g., TEACHOUT, *supra* note 385, at 280–84.

436. See *id.* at 50 (“Though the word *corruption* was used hundreds of times in the convention and the ratification debates, only a handful of uses referred to what we might now think of as *quid pro quo* bribes. That constituted less than one-half of 1 percent of the times corruption was raised.”) (italics in original; citation omitted).

437. See *id.* at 32–38.

438. *Id.* at 39.

439. U.S. CONST. pmb.

440. See TEACHOUT, *supra* note 385, at 38.

441. *Id.* at 48.

Government corruption should not be limited to specific *quid pro quos* and letters stuffed with cash. Those are the classic examples of corruption and, given *McCormick*, they may be the only ones currently reachable under federal criminal law. But the federal criminal code does not cover every possible manifestation of corruption. Corruption comes in many forms, such as tax exemptions that favor special local interests, lax regulatory enforcement, disinterested congressional oversight, appointment of “friendly” administrative officials, and so on.<sup>442</sup> The beneficiaries can be individuals or groups, which can be small or large, permanent or transient. In fact, one of the defining features of the late twentieth-century political process is an emphasis on “interest-group activism and redistributive programs.”<sup>443</sup> The common denominator is cronyism, favoring a select few at the expense of the public.<sup>444</sup> Drawing on James Madison’s fear of rule by factions,<sup>445</sup> Jay Cost recently argued that political corruption occurs when “the government puts private interests before public interests.”<sup>446</sup> Put more colorfully, corruption occurs when “the government does *violence* to the public interest or individual rights by allowing factions to dominate public policy for their own ends.”<sup>447</sup> In the case of Congress, the link connecting the myriad instances of political corruption can be found in its members’ use of “the vast national powers they have . . . acquired to please the parochial factions that are so critical to their electoral efforts.”<sup>448</sup>

Cost’s treatment of corruption is timely. Over the last few years, there has been a vibrant academic debate over the issue of what exactly constitutes political corruption. Should the definition of political corruption be limited to retail-level instances of *quid pro quo* exchanges, or should it also embrace wholesale-level interactions in which political institutions become corrupted by members’ incentives to serve parochial interests at the expense of the public? This issue has arisen most frequently in the context of campaign finance reform, particularly in the

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442. See COST, *supra* note 119, at 1.

443. RAUCH, *supra* note 102, at 17.

444. See COST, *supra* note 119, at 1.

445. See THE FEDERALIST NO. 10, *supra* note 267.

446. COST, *supra* note 119, at 1.

447. *Id.* at 3.

448. *Id.* at 11.

wake of the Supreme Court's decisions overturning restrictions on the right to make campaign expenditures and contributions.<sup>449</sup> For example, in *Citizens United v. FEC*<sup>450</sup> the Court held that a federal statute limiting the expenditures that an independent organization can make on behalf of a candidate violated the First Amendment's Free Speech Clause. In so ruling, the Court expressly rejected the argument that Congress may limit campaign expenditures by independent parties to forestall the appearance of corruption.<sup>451</sup> Critics of the *Citizens United* decision have vociferously argued that the Court artificially narrowed the concern over corruption to specific instances of retail exchanges and mistakenly ignored the effect that money has on the operation and appearance of the political process, an effect that renders the process corrupt because it forces elected officials to "sell" their votes to interest groups that can fund the official's campaigns or run an independent political action committee that supports the official's reelection.<sup>452</sup> But the Court has quite clearly refused to reconsider *Citizens United*, so it will likely remain the law for the foreseeable future.<sup>453</sup>

The Court's decisions in the campaign finance cases, however, do not control the answer to the issue here. *Citizens United*

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449. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Colo. Republican Fed'l Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976).

450. 558 U.S. 310 (2010).

451. See *id.* at 359–61 ("Favoritism and influence are [unavoidable] in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.") (quotation omitted).

452. See, e.g., LESSIG, *supra* note 111, at 107–24; Bruce E. Cain, *Is "Dependence Corruption" the Solution to America's Campaign Finance Problems?*, 102 CALIF. L. REV. 37 (2014); Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25 (2014); Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550 (2012) (reviewing LESSIG, *supra* note 111); Lessig, *supra* note 422.

453. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012). In *Bullock*, the Montana Supreme Court gave the U.S. Supreme Court an opportunity to reconsider *Citizens United* by upholding a state law restriction on independent campaign expenditures that was essentially the same as the one struck down in *Citizens United*. The U.S. Supreme Court dispensed with the Montana Supreme Court's effort in a one-paragraph per curiam decision citing only *Citizens United* and the Supremacy Clause, summarily reversing the judgment below.



and related cases do not deny that the exchange of political for private rents regularly occurs; they accept it as a fact of political life. The Court's campaign finance decisions do not hold that because the government cannot forbid a private party from subsidizing an official's reelection efforts, elected officials may reward a contributor in any conceivable way. Most importantly, the Court's decisions do not embrace as desirable all of the consequences of those exchanges; they address only the question of whether the government's interest in stopping those trades is so compelling as to outweigh a person's free speech right to support his or her chosen candidate. The First Amendment was critical to the Court's decisions in the campaign finance cases. In fact, *Citizens United* emphasized that the values underlying the right to engage in free speech are at their weightiest during political campaigns, because they decide the composition and structure of our government,<sup>454</sup> and that only the weightiest of interests, advanced by a precisely drawn statute, can survive challenge.<sup>455</sup> The First Amendment issues addressed in cases like *Citizens United* are not implicated in determining whether the government can justifiably discriminate among job applicants for different lines of work.

Differential treatment of licensed and unlicensed parties due to occupational licensing requirements raises issues under the Equal Protection Clause, which requires the government to regulate in an even-handed manner. The question in any such case is whether the government has a legitimate justification for treating licensed and unlicensed parties differently. It may be that rent-creation and rent-extraction have become standard operating procedures in the nation's legislatures. It may be that money has besmirched the political process. But it should not follow that legislatures can defeat an equal protection challenge

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454. See *Citizens United*, 558 U.S. at 339 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (citations and internal punctuation omitted).

455. See *id.* at 340 ("For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (citations and internal punctuation omitted).

to an occupational licensing scheme simply by proving that a particular constituency “bought” that privilege through campaign contributions.

The Constitution does not regulate how private parties can exchange money for goods or services in a bazaar, but it does limit how the government can regulate that market. Private parties may be free to purchase whatever widgets are sold in the bazaar, but the government should not be free to sell licenses as a form of immunity from prosecution as if they were pre-Reformation plenary indulgences simply because some people are willing to buy them. Allowing someone to buy from the legislature the privilege to commit what would otherwise be a crime—for example, the unlicensed practice of barbering—is offensive to longstanding tenets of Anglo-American jurisprudence<sup>456</sup> that find expression today in our constitutional and criminal law.<sup>457</sup>

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456. See Magna Carta ch. 40 (“To no one will we sell, to no one will we refuse, or delay, right or justice.”), translated and quoted at J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992); Leviticus 19:15 (“Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: [but] in righteousness shalt thou judge thy neighbor.”).

457. See *Bearden v. Georgia*, 461 U.S. 660, 674 (1983) (ruling that it is a violation of the Due Process and Equal Protection Clauses to “sentenc[e] petitioner to imprisonment simply because he could not pay the fine”); *Griffin v. Illinois*, 351 U.S. 12, 16–19 (1956) (plurality opinion) (“Providing equal justice for poor and rich, weak and powerful alike is an age-old problem . . . . In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’ . . . There can be no equal justice when the kind of trial a man gets depends on the amount of money he has.”) (citations and internal punctuation omitted); cf. 28 U.S.C. § 453 (2012) (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich . . . .’”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985) (“The first change that a Madisonian approach to judicial review would cause is that courts would enforce more stringently the rationality requirement of the equal protection, due process, contract, and eminent domain clauses. The strengthened review would not, however, prohibit the category of impermissible ends identified during the *Lochner* period. Instead it would involve review to ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefited—or, to state the matter positively, to ensure that representatives have exercised some form of judgment instead of responding mechanically to interest-group pressures.”) (citation omitted).

Wholesale-level rent-seeking should be treated in the same manner as retail-level rent-seeking for purposes of the Equal Protection Clause. The reason is that each type of exchange uses the judicial process, oftentimes including the criminal justice system, as the enforcement mechanism to exclude and punish individuals solely because they cannot play or cannot prevail in the winner-take-all legislative process that leads to the adoption of occupational licensing schemes. As Jay Cost argues, cronyism butts heads with the “Republican form of Government” guaranteed by the Constitution<sup>458</sup> because the inevitable product is not government action designed to “promote the general Welfare,”<sup>459</sup> but the sacrifice of that interest to reward a group because of its ability to reelect a favored politician. Political corruption at the wholesale level leads government officials to discriminate against disfavored parties at the retail level for reasons that the Equal Protection Clause should deem illegitimate.<sup>460</sup>

### 3. *Proving an Illegitimate State Interest*

The law governing discrimination is instructive in this regard. There, a plaintiff can establish a prima facie case of discrimination by showing that the defendant’s conduct was motivated by an intent to discriminate. The burden then shifts to the defendant to rebut that claim by proving that it would have taken the same action for an entirely lawful reason.<sup>461</sup> In the case of occupational licensing, a plaintiff should be required to establish facts giving rise to an inference of cronyism, perhaps by showing that the setting is conducive to that phenomenon and that there is no persuasive reason why a certification requirement would not solve the problems that a licensing scheme is said to address. The state’s burden would be to

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458. U.S. CONST. art. IV, § 4 (the Guarantee Clause).

459. U.S. CONST. pmb1.

460. *See supra* note 352.

461. In several cases the Supreme Court has held that, once a plaintiff proves that a constitutionally impermissible ground was a “substantial” or “motivating” factor for the government’s decision to take some adverse action against the plaintiff, the defendant may avoid liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the impermissible factor. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (Equal Protection Clause); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977) (First Amendment); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 n.21 (1977) (Equal Protection Clause).

prove that, even if one motivation for the law was protectionism, the legislature adopted the challenged licensing requirement to further a legitimate and important public interest. A party subject to the application requirement should then be able to rebut the state's proof through evidence or argument that the regulatory scheme is pretextual. The ultimate inquiry should be whether the state can justify a particular licensing requirement as serving a legitimate and important state interest rather than being yet another gift to particular rent-seekers.<sup>462</sup>

To make that inquiry a serious examination of legislative purpose, the courts must demand that a state prove that its alleged justifications are bona fide, not merely hypothetical or, even worse, concocted for the purposes of litigation. Supreme Court case law discussing the so-called "rational basis test" ordinarily used to evaluate social and economic legislation comes perilously close to allowing such manufactured defenses.<sup>463</sup>

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462. The trial process could work as follows: A party could offer proof that a particular state's requirements are far more onerous than the ones found in other states, the state could offer proof that the licensing scheme serves a state interest other than cronyism, and the complaining party could then offer evidence of argument that the state's justifications are pretextual. Few occupations are subject to licensing in every state, and the requirements for the ones that are licensed vary widely. See FURCHT-GOTT-ROTH & MEYER, *supra* note 151, at 86–87. For example, every state licenses manicurists; ten states compel 120 days of education and training, while the other forty states demand less, with two requiring only nine days or fewer. Only seven states require a license to be a tree trimmer, while only three (plus the District of Columbia) license interior designers. And Louisiana is the only state to license florists. The court would then answer the following question: Is it necessary to have a lengthy education and training period—or *any* such term—to protect the public health, safety, and welfare against ugly French nails, throw pillows, and floral arrangements?

463. One of the best summaries of the current law of "rational basis review" can be found in *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15 (1993) (citations and internal punctuation omitted):

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Where there are plausible reasons for Congress' action, our inquiry is at an end. . . . This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, and those

That type of review is tantamount to no scrutiny at all.<sup>464</sup> A more rigorous inquiry is necessary. Otherwise, bribery and extortion are rewarded as long as an attorney for the government can manufacture an ostensibly legitimate justification for a licensing rule and argue it in court with a straight face.<sup>465</sup>

To ensure that the public interests served by a licensing scheme are more than hypothetical, the courts should require the government to substantiate its defense. The courts could draw on the analysis that the Supreme Court has adopted in commercial speech cases. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>466</sup> the Court balanced the state's interest in protecting the public against injuries from commercial advertising against the value in ensuring that the public can obtain the competitive benefits of advertising.<sup>467</sup> The *Central Hudson* test requires a state to prove that the government interest at stake is substantial, that the regulation directly advances that interest, and that the regulation is no more extensive than necessary.<sup>468</sup> Although far less rigorous than other

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attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . Thus, the absence of legislative facts explaining the distinction on the record . . . has no significance in rational-basis analysis. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

464. See, e.g., NEILY, *supra* note 211.

465. See *id.*; Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 897 (2005) (arguing that minimum rational basis review allows the government to defend economic discrimination on any ground that passes the "red face" test).

466. 447 U.S. 557 (1980).

467. See, e.g., *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg., Bd. of Accountancy*, 512 U.S. 136 (1994); *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

468. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). The threshold element of the *Central Hudson* test requires that the activity sought to be advertised be lawful. *Id.* at 563. That element, however, is true by defi-

First Amendment rules,<sup>469</sup> the *Central Hudson* test nonetheless places a more demanding burden on the government than it traditionally must bear to sustain economic or social legislation.<sup>470</sup> Like the Equal Protection Clause, the *Central Hudson* test helps courts to “flush out” illegitimate motivations. Under that test, if the government cannot sustain its rebuttal burden of proof, the occupational licensing requirement should be held invalid.<sup>471</sup>

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nition in the case of occupational licensing and therefore is not relevant when the constitutionality of the regulation of the activity itself is challenged.

469. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that political speech may not be criminalized unless it is likely to lead to imminent and serious unlawful conduct).

470. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (“This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”); see also, e.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“[T]he regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”).

471. Another line of precedent might also be useful. Consider *Kelo v. City of New London*, 545 U.S. 469 (2005), a case that involved the state’s power of eminent domain. The Fifth Amendment Public Use Clause provides that the government may not take property “for public use” without paying just compensation. See U.S. CONST. amend. V. The clause bars the government from transferring property from A to B for the simple purpose of redistributing ownership. See *Kelo*, 545 U.S. at 477–78 (“[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. . . . [T]he City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”) (citations omitted). The majority rejected the public use challenge in *Kelo* on the ground that, although the state ostensibly transferred property from A to B, the transfer was but a small part of a comprehensive redevelopment plan designed to revitalize an economically depressed community. See *id.* at 477–90. Justice Kennedy concurred in the majority opinion, but also wrote separately to emphasize that a more searching inquiry may be necessary in some circumstances. “A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits,” he wrote, “just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” *Id.* at 491 (Kennedy, J., concurring) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, 450 (1985); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–36 (1973)). Justice Kennedy concluded that the city’s justification in *Kelo* was not merely a ruse designed to hide the fact that the taking was intended merely to benefit a select group of people. See *id.* at

Application of the *Central Hudson* standard to occupational licensing could eliminate a fair amount of the cronyism that winds up in the codes. A large number of statutes benefit only one particular group at the expense of every other one and the public.<sup>472</sup> The Equal Protection Clause is a reasonable tool for analyzing their constitutionality, not only for the reasons already given, but also because the clause directly challenges the kidnapping of the law for the benefit of a few, the “factions” about whom Madison warned,<sup>473</sup> even if it does so only one step at a time.<sup>474</sup> But the judicial scrutiny recommended here would not wind up erasing all of the legislation on the books now or hereafter. A state could justify its legislation by showing that it achieves a greater societal benefit than merely pro-

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493. The analysis that he would require allows a party to challenge a licensing scheme by showing that the justifications offered in its defense are pretextual, incidental, or trivial. Justice Kennedy’s standard also does not deprive the government of any ability to offer a bona fide justification for its restrictions. The state would be able to defend an occupational licensing requirement by showing that it would have enacted the challenged licensing requirement because it benefits the public as a whole despite the benefit that it showers on a selected group of people.

The Supreme Court’s Public Use Clause jurisprudence has contained little bark, and utterly no bite, for more than a century. See, e.g., ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2015). The result is that the holding in *Kelo* and the Court’s other Public Use Clause decisions are of no use to a frustrated barber, casket maker, and so forth. But if the Court were serious about what it said in *Kelo*, that type of scrutiny would be more rigorous, and far better for the public, than the review that courts ordinarily apply under the “rational basis” test.

472. See RAUCH, *supra* note 102, at 199 (“Jimmy Carter, in the 1970s, called the tax code a disgrace to the human race. If that was true, then by the mid-1980s the code was also a disgrace to chimpanzees and hyenas. It had become a microcosm of the government as a whole: a sprawling mess of handouts and favors and gimmicks and shelters, a deluxe condominium for parasites.”).

473. See *THE FEDERALIST NO. 10*, *supra* note 272 (discussing the problem of “factions”).

474. A one-step-at-a-time approach is generally ineffective at ridding the law of special interest entitlements. See RAUCH, *supra* note 102, at 212 (“If the collective-action problem is the mechanism of sclerosis, then the entitlement mind-set is the morality. The collective-action arithmetic induces everybody around the table to hold onto whatever he possesses, since, after all, nothing any one actor can do by himself will have any discernible effect on the overall situation. Meanwhile, the entitlement mentality provides moral support for this same tendency. After all, no one should be required to give up what is rightly his, at least not until everyone else has agreed to do the same. If others get to keep theirs, I get to keep mine! Of course, since everybody knows that everybody else feels equally entitled, no one has any sane reason to be the sucker who sacrifices. Checkmate. And so the entitlement mentality and the Olsonian obstacles to collective action merge, finally, into a single seamless problem.”).

moting the interests of a narrow special interest group. A statute that benefits the public as a whole would not be held unconstitutional even though it became law at the behest of, and for the intended benefit of, a small number of parties (perhaps even just one) if the public also benefitted from the law. Medical licensing requirements, for example, would readily pass that test because of the longstanding, well-recognized need to protect the public against quacks. The point of this exercise is not to extirpate favoritism from the political arena in the pursuit of an unrealistically ideal form of legislative institutionalism. The goal is simply to ensure that cronyism is not the sole purpose and effect of the exercise of government power.

*B. Treating Occupational Licensing as a Violation of the Private Delegation Doctrine Under the Due Process Clause*

The Due Process Clause may yet provide a basis for challenging the constitutionality of occupational licensing programs. The argument does not rest on the substantive due process doctrine attributed to *Lochner*. Instead, it draws its strength from a different body of case law, one illustrated by and stemming from the constitutional history of the Due Process Clause. The doctrine can be seen in a small number of Supreme Court decisions holding unconstitutional legislative efforts to delegate governmental power to private parties.<sup>475</sup> The delegation analyzed in those cases does not involve the traditional issue of whether Congress has defined an “intelligible principle” for an administrative agency to use when exercising a delegated power.<sup>476</sup> The reason for this is that no government agency is involved. These cases instead involve the scenario in which public officials confer government power on private parties who are neither legally nor politically accountable to the parties over whom they exercise that authority.<sup>477</sup> This doctrine—the “private nondelegation doctrine”—involves a legislative practice that is different in kind from the one seen in *Lochner*, but that is even more problematic.

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475. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116 (1928); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

476. See Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 365 (2015).

477. *Id.* at 408.



The complaint in those cases is not that the legislature made a substantive mistake when it balanced the competing considerations necessary to devise economic legislation. Nor is it that the legislature devised a procedural mechanism for regulating property rights that will turn out decisions that are more often mistaken than correct or that are fundamentally unfair because of some other structural defect, such as not requiring appointment of counsel. On the contrary, the problem is that the legislature has avoided making any such decision on the relevant issues by punting the ball to private parties in order to avoid taking responsibility for the outcome of whatever judgments those parties reach.<sup>478</sup>

The leading cases are *Eubank v. City of Richmond*<sup>479</sup> and *Carter v. Carter Coal Co.*<sup>480</sup> *Eubank* involved a municipal ordinance that authorized parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line.<sup>481</sup> The Supreme Court ruled that the ordinance violated the Due Process Clause because it created no standard for the property owners to use, permitting them to act in their self-interest or even arbitrarily.<sup>482</sup> *Carter Coal Co.* in-

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478. The private nondelegation doctrine has been around for more than a century, but litigants, the courts, and the academy recently have shown an interest in its contours. See, e.g., *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225 (2015); *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984).

479. 226 U.S. 137 (1912).

480. 298 U.S. 238 (1936).

481. *Eubank*, 226 U.S. at 141 (quoting Richmond ordinance).

482. *Id.* at 143–44. *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), followed *Eubank*. *Thomas Cusack Co.* involved the opposite problem. Chicago adopted a municipal ordinance prohibiting the erection and maintenance of commercial billboards in primarily residential neighborhoods unless a majority of the owners of the frontage property gave their written consent. *Id.* at 527–28 (quoting Chicago ordinance). Relying on *Eubank*, an outdoor advertising company claimed that the Chicago ordinance was unconstitutional. The Court, however, rejected as “palpably frivolous” the company’s argument that the ordinance unconstitutionally delegated governmental power to private parties, explaining that the company “cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute.” *Id.* at 530–31. Following *Thomas Cusack Co.* was *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). In *Roberge*, a trustee of a home for the elderly poor sought to obtain a permit to enlarge the facility to allow additional parties to reside there. A Seattle zoning ordinance limited buildings in the relevant vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented. *Id.* at 117–119, 118 n.1 (quoting Seattle ordinance). The city building superintendent denied the permit because the adjacent property own-

volved a delegation challenge to a federal law, the Bituminous Coal Conservation Act of 1935.<sup>483</sup> Among other things, the act authorized the district board in local coal districts to adopt a code that included agreed-upon minimum and maximum prices for coal that would become law.<sup>484</sup> The act also allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements.<sup>485</sup> Shareholders of coal producers outside of the agreements brought suit against the federal government, maintaining that the act unconstitutionally delegated congressional power to private parties.<sup>486</sup> Relying on *Eubank*,<sup>487</sup> the Supreme

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ers had not consented to the variance, and the trustee sued. Relying on *Eubank*, the Court held that, while zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it enabled the nearby property owners to deny a variance for their own, capricious reasons. *Id.* at 119–22.

483. Ch. 824, 49 Stat. 991.

484. *Carter Coal*, 298 U.S. at 280–83.

485. *Id.* at 283–84.

486. *Id.*

487. In *Carter Coal*, the Supreme Court also relied on its one-year-old decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Schechter Poultry* involved a delegation challenge to the National Industrial Recovery Act (NIRA), Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933), which delegated to trade or industrial groups the authority to define “unfair methods of competition” that later were to be approved by the President. The reach of the NIRA was stunning. “In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt Administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders.” EPSTEIN, *supra* note 262, at 270 (citation omitted). The Supreme Court held that Congress’s delegation went too far. *Schechter Poultry*, 295 U.S. at 529–43. The Court noted that the question was “whether Congress in authorizing ‘codes of fair competition’ has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.” *Id.* at 530. The Court found that the term methods of “unfair competition” had only the narrow meaning at common law of “palming off of one’s goods as those of a rival trader,” *id.* at 531, and that the term had not acquired a clear and stable understanding in contemporary usage, *id.* at 532–33. The statement of purposes set forth elsewhere in the NIRA did not limit the scope of the delegation, the Court reasoned, because the NIRA empowered private parties to define that term for their own benefit by protecting themselves against competition by rivals. *Id.* at 537–42. Finally, the Court found of no moment the NIRA requirement that the President approve an unfair competition code before it could take effect. In the Court’s view, the NIRA did not cabin the President’s discretion because it left him free to “roam at will” to “approve or disapprove” a cartel’s proposals “as he may see fit” over “a host of different trades and industries, thus extending the President’s discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast

Court ruled that the Bituminous Coal Conservation Act unconstitutionally delegated federal governmental power.<sup>488</sup> Describing that act as “legislative delegation in its most obnoxious form,” the Court held that it arbitrarily interfered with a coal producer’s property rights by vesting governmental power in the hands of a party interested in the outcome of a business transaction.<sup>489</sup> *Eubank* and *Carter Coal* therefore stand for the proposition that it is impermissible to vest governmental authority in private parties who are neither legally nor politically accountable to other government officials or to the electorate.<sup>490</sup>

Some scholars have argued that these “private nondelegation doctrine” decisions are simply an application of procedural due process requirements.<sup>491</sup> Yet, there is a different, and more fundamental, rationale for the Court’s rulings in *Eubank* and *Carter Coal*, one that looks to the constitutional history of the Due Process Clause. That history supports a rule forbidding the government from privatizing lawmaking functions, which is precisely what happens in many occupational licensing schemes.

The Due Process Clause traces its lineage to Article 39 of Magna Carta.<sup>492</sup> Magna Carta began as a peace treaty to end a civil war between King John and the English barons, but it has become one of the foundational documents of Anglo-American

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array of commercial and industrial activities throughout the country.” *Id.* at 538–39. Congress’s unprecedented delegation of authority, the Court concluded, exceeded Article I limitations. *Id.* at 541–42.

488. *Carter Coal*, 298 U.S. at 311–12.

489. *Id.* at 311.

490. See Larkin, *supra* note 476, at 408 (“The Supreme Court has revisited the private nondelegation doctrine on more recent occasions. In each case—*Curran v. Wallace*, [306 U.S. 1 (1939)], *United States v. Rock Royal Co-operative, Inc.*, [307 U.S. 533 (1939)], *New Motor Vehicle Board v. Fox Co.*, [439 U.S. 96 (1978)], and *Hawaii Housing Authority v. Midkiff*, [467 U.S. 229 (1984)]—the Supreme Court upheld the vesting of state authority in private parties. The laws at issue in each of those cases, however, left final decisionmaking authority in the hands of a state official.”).

491. See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931 (2014).

492. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); HOWARD, RUNNYMEDE, *supra* note 258, at 14–15, 23, 300 & n.6 (collecting state court cases to that effect); 2 STORY, *supra* note 299, § 1789, at 565–67. For discussions of the provenance of Magna Carta, see, e.g., THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–25 (5th ed. 1956); JAMES WHEATON, *THE HISTORY OF THE MAGNA CARTA* (2011); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

legal history.<sup>493</sup> Article 39 is the best-known component of Magna Carta.<sup>494</sup> It sought to prevent the crown from arbitrarily punishing someone not first adjudged guilty of a crime.<sup>495</sup> Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”<sup>496</sup> The restriction that the crown comply with “the law of the land” meant that “no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the Common Law, Statute Law, or Custome of England.”<sup>497</sup>

The history of Magna Carta reveals that the Due Process Clause serves as a regulation of governmental lawmaking power.<sup>498</sup> In the federal system, Articles I, II, and III, along with the Twelfth, Seventeenth, and Twenty-Second Amendments, establish the procedures for periodic election of Representatives, Senators, and Presidents, define the powers and functions of each branch,<sup>499</sup> and thereby create the “Republican

493. “In 1770 William Pitt the Elder called it ‘the Bible of the English Constitution.’ . . . In 1956 the English judge Lord Denning described it as ‘the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’” DANZIGER & GILLINGHAM, *supra* note 258, at 268. The American colonists carried the English common law with them to this nation. *See, e.g.*, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30–31 (1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 299–300 (1998).

494. *See* DANZIGER & GILLINGHAM, *supra* note 258, at xiii; HOWARD, *MAGNA CARTA*, *supra* note 258, at 14.

495. WILLIAM SHARPE MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION* 377 & n.1 (2d ed. 1914); *see id.* at 96 (“The power of the Norman kings might almost be described as irresponsible despotism, tempered by fear of rebellion.”).

496. HOLT, *supra* note 456, at app. 6, at 461.

497. 2 EDWARD COKE, *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 848–859; *see* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368–69 (1911).

498. This point is developed at length in Larkin, *supra* note 476, at 412–24.

499. *See* U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XVII (providing for popular election of Senators); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President). The Bicameralism and Presentment requirements of Article I, § 7, regulate how those officeholders may make “Law,” *see id.* art. I, § 7, cl. 2, 3, and the legislative powers granted to Congress in the next section, Article I, § 8, identify the particular subjects that those laws may govern, *see id.* art. I, § 8 (listing the “power[s]” that Congress may use law to regulate). The Article II Take Care Clause di-

Form of Government” that the Framers created for the nation and that Article IV guarantees each state.<sup>500</sup> The Due Process Clause buttresses that guarantee by subjecting all three branches to the rule of law. In this context, that command ensures that public officials cannot evade a carefully constructed constitutional scheme, federal or state, by delegating their lawmaking power to unaccountable private parties, individuals beyond the direct legal and political control of superior federal officials and the electorate. That is, the due process requirement that government officials act pursuant to “the law of the land” when the life, liberty, or property interests of the public are at stake prohibits public officeholders from vesting the power to make, implement, or interpret the law in private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate.

To be sure, the public has the right to ask the government for licensing programs. Every person has the right to “petition the Government for a redress of grievances,” even if his only grievance is that he is not as rich as he would like to be.<sup>501</sup> To make that petitioning right effective, a legislature may grant private parties an opportunity to ask the government for favors. But a legislature may not displace the legal and political protections that a government organized and operated under the rule of law guarantees the public by handing over the so-called “levers of government” to private parties.<sup>502</sup> Vesting in

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rects the President to ensure that the “Law” is faithfully executed, *see id.* art. II, § 3, while the Article II Appointments Clause ensures that only parties properly appointed to their posts may enforce the law, *see id.* art. II § 2. The Article III Judicial Power Clause grants the Supreme Court and lower federal courts the power “to say what the law is.” *See id.* art. III, § 1; *id.* § 2, cl. 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

500. *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government[.]”).

501. *See* U.S. CONST. amend. I.

502. That proposition has a different focus than the one that has grown up in the Supreme Court’s traditional nondelegation doctrine cases. The issue in those cases ever since *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), has been whether Congress has given an official sufficient guidance how to implement a statute so that he is not making up the law from scratch. By contrast, the issue in private nondelegation doctrine cases like *Eubank* and *Carter Coal* is whether there is any direct legal or political constraint on how a purely private party can exercise the governmental power. The traditional nondelegation doctrine involves the authority granted to a particular government *office*, not to a particular *person*. The private nondelegation doctrine is concerned with the legal power granted to a *private individual or group of*

private parties governmental authority over a matter otherwise designated as a subject fit only for governmental responsibility eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787. That is the bedrock due process guarantee, one so fundamental that, ironically, we regularly take it for granted.<sup>503</sup>

In sum, the history of Magna Carta discloses that the clause was designed to rein in the potentially arbitrary exercise of government power by demanding that the government act pursuant to the rule of law, rather than the private judgment of individuals. To be sure, the English barons who met at Runnymede were focused on the judgment of one particular individual—King John—but it would be silly to believe that they were concerned with *only him*. The barons sought to prevent the crown from arbitrarily taking away their lives, liberty, and property. They hardly would have been satisfied if King John had abdicated his throne in favor of a lackey he could appoint and control. A sham arrangement like that one would have been equally offensive. Contemporary law has carried forward the same principle. Every mature legal system not only outlaws specific practices deemed inimical to the public welfare—such as executing a defendant without a trial—but also prohibits artificial arrangements that are merely a sham designed to dupe the public into believing that the alternative is both different and benign—such as executing the defendant and then having a trial. It is impossible to believe that the “law of the Land” article in Magna Carta and the Due Process Clauses in our Constitution could have become the cornerstones of our legal order if they could be so easily evaded.

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*persons*. Magna Carta’s “law of the land” protects the public against problems caused by the latter attempted delegation, a delegation outside of the law.

503. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (“In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.”) (citation omitted); MCKECHNIE, *supra* note 495, at 381; McIlwain, *supra* note 492, at 30.

*Eubank* and *Carter Coal* seek to prevent a legislature from using precisely that sleight of hand to deprive a property owner of his rights. That is true regardless of whether the decision maker has a personal interest in the outcome of a decision. The Due Process Clause does not require the legislature to follow any particular rules when enacting legislation,<sup>504</sup> and the government may empower the public to adopt laws governing primary conduct through a legally regulated referendum process.<sup>505</sup> What the government may not do, however, is subject a party's life, liberty, or property to the decisions of politically and legally unaccountable parties *outside* of the rule of law. Handing government power over to private parties whose self-interests will distort their judgment is impermissible because that procedure is fundamentally unfair.<sup>506</sup> Handing that power over to the College of Cardinals is also impermissible because it denies others of the protections afforded by the rule of law, the fundamental safeguard that Magna Carta and the Due Process Clauses were intended to provide.<sup>507</sup>

So viewed, the Supreme Court's decisions in *Eubank* and *Carter Coal* are not susceptible to the criticisms levied against *Lochner* era precedents. The complaints raised against those decisions have been one variant or another of the following arguments: the Supreme Court acted illegitimately by creating a "liberty-of-contract" constitutional right found nowhere in the text of the Constitution; the Court acted corruptly by foisting its personal economic philosophy on the nation under the guise of interpretation; or the Court acted improperly by assuming a responsibility that the Constitution vests in the political branches because only elected officials can make the tradeoffs necessary for economic regulations to be acceptable to the pub-

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504. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (ruling that the Due Process Clause does not guarantee individuals the right to be heard in the legislative lawmaking process).

505. See *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) (rejecting due process challenge based on *Eubank* to a public referendum).

506. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 568–70 (1973) (ruling that it violates due process for the state to entrust optometrists with the authority to exclude rivals from that profession).

507. That rule should apply to any delegation, including one that may be only partial, to the extent that it empowers private parties to adopt rules with the force and effect of law. See, e.g., VA. CODE ANN. § 54.1–706 (2012) ("The Board shall have the discretion to impose different requirements for licensure for the practice of barbering, cosmetology, nail care, waxing, tattooing, body-piercing, and esthetics.").

lic.<sup>508</sup> Whatever merit those criticisms may have when a court second guesses the judgment of the political branches, those arguments are irrelevant when the political branches do *not* make any such judgment themselves and, instead, *hand the ball off to private parties for them to make that judgment*.

The political and social contract between the public and the government, like any other contract, involves an exchange. The public vests public officials with governmental power for them to exercise under law for the benefit of the polity, but the public retains the right periodically to review the conduct of those officials and turn them out of office if the public finds their decisions objectionable. Handing off that power to other private parties is not part of the bargain. It potentially deprives a subset of the public of the guarantee that government officials will act according to law, since the Constitution does not apply to the conduct of private parties,<sup>509</sup> and it enables public officials to avoid accountability for their decisions by enabling them to wash their hands of them. The private nondelegation doctrine, therefore, does not permit the courts to second-guess judgments made by legislatures and chief executives. Instead, it forces them to make those decisions in the first place.

### C. *The Political Justification for Heightened Judicial Scrutiny*

There are four remaining questions that must be answered. They ask whether there is any justification for subjecting economic legislation to any serious type of judicial review.

First, is some nontrivial level of judicial review of economic decisions justifiable under the Constitution? Our republican form of government assumes that the political branches have the principal responsibility for devising public law and that, over time, the democratic process will rectify whatever improvident decisions elected and appointed officials may make.<sup>510</sup> Over the last fifty years, the courts have intervened in the

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508. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain. . . . The fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

509. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621–22 (2000) (collecting cases); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the Constitution requires governmental action for its provisions to come into play).

510. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979).



workings of the political process only when one of the political branches trespasses on a specific constitutional right<sup>511</sup> or when the majority is so biased against a politically powerless minority group that making it resort to the ballot box for relief becomes little more than a cruel joke.<sup>512</sup> That is ordinarily not the case when social or economic legislation is under consideration. There is no separate, general “liberty of contract” provision in the Constitution, and the losers in any one fight can ally themselves with other groups, form a majority, and become victorious in a future battle. In fact, even James Buchanan, a founder of Public Choice Theory, argued against heightened judicial review of social or economic legislation.<sup>513</sup> If so, why should we expect legislators and courts to be more Catholic than the Pope?

Second, even if there is a sound theoretical justification for heightened judicial review, do we ask too much of the judiciary to undertake that responsibility? Is it possible for the courts to afford that protection to parties disfavored by allocative decisions without succumbing to the criticisms advanced against *Lochner*—namely, that judges are no more qualified than elected officials to make social and economic decisions because there are no neutral principles that supply the answers?

Third, does the argument developed in this Article prove too much? Assume that the courts may hold occupational licensing requirements invalid in order to protect potential entrepreneurs in small enterprises such as barbering and cosmetology because those requirements are the product of the type of venal, self-interested, microeconomic decisions that politicians make when regulating occupations. Are the courts not also obliged to treat the *macroeconomic* decisions made by Congress with the same level of scrutiny because Congress plays favorites in that arena too? If so, does that not mean that the courts will ultimately decide whether the Federal Reserve sets the cor-

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511. Such as the Free Speech Clause. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

512. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (defining a “suspect class” and explaining why it is in need of heightened judicial protection).

513. See James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483, 490–91 (1974) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)); see also, e.g., Debow & Lee, *supra* note 125, at 1009–11; Farber & Frickey, *supra* note 116, at 908.

rect discount rate for borrowing, whether Congress acted properly in raising the debt ceiling, in deciding to force future generations rather than this one to bear the burden of escalating Medicare and Medicaid costs or debt interest payments, and whether Congress mistakenly allocated more tax dollars to guns than butter? There is no principled way to draw a line between different types of economic decisions that a legislature must make, the argument goes, so there is no logical justification for excluding macroeconomic policy judgments from this new, heightened form of judicial review. That would be the logical consequence of resurrecting any type of heightened judicial review of economic decisions made by political bodies, the argument concludes, and it would lead us to a far worse state of affairs than anything that *Lochner* produced.

Fourth, is this a quixotic undertaking? Are we not ultimately asking the courts to take politics out of the political process by using the Constitution to remake legislative operations? Society rightly condemns as corrupt and illegal a legislator's unseemly backroom receipt of an envelope full of cash in exchange for a promise to do a "favor" for a private party. But we hold a different attitude toward political campaign contributions. They may be an evil, but they are a necessary evil in a system in which campaigns are expensive and privately funded. Of course, some critics condemn today's campaign fundraising processes as being indistinguishable from bribery.<sup>514</sup> But the public—like the legislative and private participants in that exchange—does not. To many people, "unlike bribery, the practice of accepting contributions and doing favors is an accepted, even cherished, part of the American political system."<sup>515</sup> Asking the Supreme Court to hold that practice not only corrupt but also unconstitutional bids the Court to go a bridge too far.

Those are powerful arguments, and they create a steep hurdle for the courts to overcome. There has been considerable academic debate over the issue whether Public Choice Theory

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514. See, e.g., AMITAI ETZIONI, CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY (1984); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985).

515. DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 26–27 (1995) (noting that politicians and their "supporters" hold that view).

justifies stricter judicial review of social and economic legislation than the “rational basis” review that the Supreme Court ordinarily uses to evaluate such legislation, and a reasonable argument can be advanced for either position.<sup>516</sup> Nonetheless, a strong argument can be made that the realities of the occupational licensing process justify more than the trivial level of judicial intervention that the Supreme Court generally applies to social and economic legislation.

To start, the private delegation doctrine provides a short answer to the above arguments. The doctrine identifies a structural flaw in the political process that renders immaterial the debate over the proper standard of review. The doctrine addresses statutes like the ones seen in cases such as *Eubank* and *Carter Coal*, statutes in which the political branches transfer their decisionmaking responsibility to private parties. The problem that this doctrine seeks to remedy arises only when the political process does *not* make a societal judgment about the proper allocation of benefits and burdens in a modern pluralistic society. Accordingly, regardless of whether the challenge to judicial review of the political branches’ socioeconomic decisions is that there is no textual warrant for holding such judgments unconstitutional or that the courts are in no better position than elected officials to make those decisions, the private delegation doctrine does not stand in the way of the type of judicial review urged in this Article. The Due Process Clause requires the political branches to act according to law, rather than punt decisions to private parties, and is unconcerned with the outcome of those judgments as long as the government makes them. The Article I Bicameralism and Presentment provisions require Congress to enact laws in a particular manner. The Due Process Clause forbids Congress and state assemblies from evading such requirements by letting private parties do the job that only legislatures can undertake. Enforcing structural limitations on the lawmaking process is not the same as second-guessing the substantive decisions that the political branches make when they properly carry out their responsibilities.

Now consider this subject from the perspective of cronyism’s victims. Public Choice Theory readily explains how and why a law favoring a select few individuals can make it onto the statute books and remain there for a considerable period of time

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516. See Bernstein, *supra* note 197, at 49 n.261 (collecting authorities).

even though it harms the public welfare.<sup>517</sup> Elected officials will be most responsive to whatever groups increase their prospects for reelection, which favors established, small, tightly knit, single-issue groups that benefit from laws granting them economic rents. They have a strong incentive to oppose the repeal of those laws because they profit immensely from them, and their small size makes it relatively efficient for them to band together in that effort. That concern is true for most occupational license holders. By contrast, the parties seeking to enter most such professions are precisely the type of individuals for whom seeking relief through the ballot box is generally a futile endeavor. Injured but disorganized individuals are powerless to prevent a compact, organized minority's interests from swaying the political process to work in its favor. The identification and coordination costs necessary to obtain the repeal of a statute are prohibitive even though the total number of members of the first group greatly outnumbers the latter.<sup>518</sup> As Robert McCloskey once put it, "scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined."<sup>519</sup> Indeed, even some scholars who believe that the Court has correctly assigned *Lochner* to the ash heap<sup>520</sup> are troubled by a consequence of that result, one that relegates courts to the role of bystanders as interest groups and politicians use the legislative process to grant favored parties "naked preferences" regardless of the effect they have on

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517. See, e.g., Note, *supra* note 188, at 1371–72; *supra* text accompanying notes 91–109.

518. See, e.g., OLSON, *supra* note 96; Stigler, *supra* note 89, at 10–13.

519. McCloskey, *supra* note 219, at 50; see Wonnell, *supra* note 214, at 110–11; Raynor, *supra* note 214, at 1096 ("[T]hat individuals excluded by licensing laws do not comprise a discrete group is not necessarily indicative of the degree of their political vulnerability. Members of discrete minorities, because they tend to share a visible characteristic, have fewer obstacles to overcome in identifying one another and organizing effectively than do individuals excluded by licensing regimes. The diffuse nature of the class, therefore, is precisely the characteristic that makes it difficult for its members to unite and effectively lobby for legislative change. Diffusion may exacerbate the vulnerability of the class in a related way, as well: Because the unifying trait of the group is invisible, excluded individuals will rarely attract the attention of legislators as a separate demographic in need of heightened protection. In this sense, 'the class of would-be producers excluded from a particular occupation is a politically invisible class of isolated individuals. . . . The political system does not merely reject their claim; to a considerable extent it fails even to recognize it.'") (citations and internal punctuation omitted).

520. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903 (1987).

the public.<sup>521</sup> The result offends the assumption that the “Republican Form of Government” the Framers created for the nation and guaranteed to each state<sup>522</sup> exemplifies the rule of law, not the rule of the rich or special interests.

The result is that the ordinary, predictable operation of the political process, which typically can be counted on to redress perceived injustices as different interest groups join, form, and abandon different alliances over time, cannot perform that chore in these circumstances. A refusal to scrutinize occupational licensing regimes with some degree of vigor, keeping in mind the practical operation of the political process as revealed by Public Choice Theory, leads to the unfortunate result that the Constitution affords the least protection for those individuals who are least able to protect themselves against, and are most harmed by, the very political process that charter created. Judicial protection of minority rights is particularly appropriate in that setting.<sup>523</sup>

The Supreme Court already engages in serious judicial review when a party challenges a federal or state law on the ground that it interferes with a so-called fundamental liberty interest, such as the right to use contraceptives and the right to obtain an abortion recognized in the *Griswold v. Connecticut*<sup>524</sup> and *Roe v. Wade*<sup>525</sup> decisions, respectively. A powerful argument can be made that each person has the same right to be free from arbitrary restraints on the enjoyment of property that he or she enjoys with respect to liberty. After all, the text of the

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521. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

522. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

523. See, e.g., *Rodriguez*, 411 U.S. at 28 (heightened judicial scrutiny is appropriate when legislation injures a “suspect class”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “a correspondingly more searching judicial inquiry” may be necessary in cases where “prejudice against discrete and insular minorities may be a special condition” because it “tends seriously to curtail the operation of those political processes” that ordinarily can protect them). A traditional defense of economic legislation is that such laws are necessary to offset the bargaining inequality between employees and employers. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting); PHILLIPS, *supra* note 186, at 14–15. That defense is unavailable in the case of occupational licensing because the legislation itself causes the inequality between licensed parties and unlicensed but qualified applicants.

524. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

525. See *Roe v. Wade*, 410 U.S. 113 (1973).

Fifth and Fourteenth Amendments places the term “property” on a par with “liberty,” giving it the same constitutional status. The courts, which are bound to apply the law evenhandedly, should give the two interests equal dignity.<sup>526</sup>

After all, it would be quite elitist to claim that liberty rights are more important than property rights because “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>527</sup> The average person certainly would rank property rights at least as high as liberty rights, because the former are necessary to enjoyment of the latter. Indeed, without protection for the right to earn the money necessary to enjoy many of the fundamental rights that the Court has created, those rights may not count for much.<sup>528</sup> Besides, the liberty-property dichotomy that the Supreme Court has created makes little sense. Is it truly rational to afford heightened judicial protection to “crush videos”—the visual depiction of the intentional torture and killing of defenseless small animals, such as dogs, by women who are barefoot or wear high heels, accompanied by the painful squeals of the dying animals<sup>529</sup>—but virtually no judicial review at all to a person’s ability to make a living to support his or her family?

If the text of the Fifth Amendment, logic, and reason are not persuasive, try history. “Long before the era of the revolutionary controversy, the centrality of property to the definition of liberty, to the rule of law, and to constitutionalism had become established British legal dogma.”<sup>530</sup> In fact, “[t]he association between liberty and property was at least as old as Parliament’s struggle against the House of Stuart.”<sup>531</sup> That understanding was widely maintained at the time of the American Revolution: “In the eighteenth-century pantheon of British lib-

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526. See, e.g., Ronald J. Krotoszynski Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 557 (1997).

527. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

528. See, e.g., Levy, *supra* note 47, at 183 (“Making a living is fundamental to one’s personhood and stake in society. Free speech is of little value to a propertyless person. With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.”).

529. See *United States v. Stevens*, 559 U.S. 460 (2010).

530. REID, *supra* note 251, at 29.

531. *Id.* at 31.

erty there was no right more changeless and timeless than the right to property."<sup>532</sup>

The Framers certainly thought that property was valuable, in part because it was *not* limited to realty and personalty.<sup>533</sup> To them, "[t]he early legal conception of property extended far beyond physical possessions to encompass the essence of human life."<sup>534</sup> "During the American Founding Era, property included not only external objects and people's relationships to them," Professor Laura Underkuffler has noted, "but also all of those human rights, liberties, powers and immunities that are important for human well-being," such as "freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties."<sup>535</sup> To the Framers, "property was [the] inspiration for the idea of a private sphere of individual self-determination securely bounded off from politics by law."<sup>536</sup> Gordon Wood, one of the nation's greatest scholars on the American Revolution, agrees:

Eighteenth-century Whiggism had made no rigid distinction between people and property. Property had been defined not simply as material possessions but, following Locke, as the attributes of a man's personality that gave him a political character: "that estate or substance which a man has and possesses, exclusive of the right and power of all the world besides." It had been thought of generally in political terms, as an individual dominion—a dominion possessed by all politically significant men, the "people" of the society. Property was not set in opposition to individual rights but was of a piece with them.<sup>537</sup>

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532. *Id.* at 27.

533. See Madison, *supra* note 264.

534. Krotoszynski, *supra* note 526, at 588 (citation omitted).

535. Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 128–29 (1990).

536. Frank Michelman, *Takings*, 1987, 88 *COLUM. L. REV.* 1600, 1626 (1988).

537. WOOD, *supra* note 493, at 219. Historian Leonard Levy makes the same point:

Harry Jaffa says that life and liberty were valuable natural rights "because they culminated in the enjoyment and possession of property." That seems mistaken for two reasons. First, the proposition seems backwards: property, in the sense that Professor Jaffa uses it, was a means of enjoying life and liberty. But one cannot push the point because liberty and property were viewed as so interdependent that there is no knowing which was seen as a precondition of the other. As a writer in the *Boston Gazette* said in 1768, "Liberty and Property are not only joined in common

Perhaps for that reason, the Framers believed that property was indispensable to political freedom. Thomas Jefferson, James Madison, Alexander Hamilton, and St. George Tucker, like John Locke before them, all believed that property was a cornerstone of a free society.<sup>538</sup> The ability “to maintain one’s just property in material things and abstract rights,” according to Bernard Bailyn, are “rights and things which a proper constitution guaranteed a free people.”<sup>539</sup> That proposition still carries weight today.<sup>540</sup>

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discourse, but are in their own natures so nearly ally’d that we cannot be said to possess the one without the other.” And second, Locke did not mean property in the conventional way that Professor Jaffa does, namely, as one’s estate or possessions with a market value. By property Locke also meant what Jefferson called the “pursuit of happiness.” Locke was not consistent: he sometimes did mean the ownership of material things, but other times he meant by property a right to *anything*, not just a right to *things*; he meant a right to rights. In his *Second Treatise*, when he wrote that the chief reason that men made compacts for governance “is the preservation of their property”—a remark some conservative scholars quote out of context—Locke did not mean assets with a cash value. He said that men “united for the general preservation of their lives, liberties, and estates, which I call by the general name—property.” And, he added, “by property I must be understood here as in other places to mean that property which men have in their persons as well as goods.”

At least four times in his *Second Treatise*, Locke used the word “property” to mean all that belongs to a person, especially the rights that he wished to preserve. Americans of the founding generation understood property in this broad Lockean sense, which we have regrettably lost. They regarded property as a basic human right, essential to one’s existence, to one’s independence, to one’s dignity as a person. Without property, real and personal, one could not enjoy life or liberty, and could not be free and independent. Only the property holder could make independent decisions and choices because he was not beholden to anyone; he had no need to be subservient. Americans cared about property not because they were materialistic but because they cared about political freedom and personal independence. They cherished property rights as prerequisites for the pursuit of happiness, and property opened up a world of intangible values—human dignity, self-regard, self-expression, and personal fulfillment.

Levy, *supra* note 47, at 174–75 (footnotes omitted).

538. See Underkuffler, *supra* note 535, at 133–38; see also PASCHAL LARKIN, PROPERTY RIGHTS IN THE EIGHTEENTH CENTURY: WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE (1930); REID, *supra* note 251, at 97–98.

539. BAILYN, *supra* note 493, at 233.

540. Levy, *supra* note 47, at 175 (“Political democracy cannot function without job-holding, property-owning, masterless citizens. Every time that a bank forecloses on a family farm, every time that an honest, hardworking shopkeeper goes into bankruptcy, and every time that some aspiring, able person loses his or her livelihood because some state-approved occupational board denies a license, political democ-



The Framers would not understand why courts should treat property rights as “poor relations,” subordinate to what we today refer to as “liberty” interests. To the Framers, “property” interests were as deserving of judicial protection as “liberty” interests because the two concepts overlapped to a large degree. The members of today’s Supreme Court either have forgotten or have ignored that principle because current Supreme Court doctrine mistakenly treats the two concepts as disjoint sets. Yet, relegating property rights entirely to the political process unjustifiably denigrates them by ignoring the importance that the nation understood property to have at the time the Constitution became law. Even if that settled eighteenth-century understanding of the scope and importance of “property” does not count for *everything*, as a matter of constitutional interpretation, it certainly counts for *something*. There is no good reason for discriminating against property rights in that manner.

There is one final point. Whether one deems Public Choice Theory a cynical or realistic description of the policymaking process, the theory does explain why occupational licensing schemes encourage subtle and overt forms of political bribery and extortion. If private parties injured by that conduct lack any opportunity for judicial relief from such cronyism-based legislation because the courts refuse to intervene, the only alternative that those parties have to being perennial losers is to play the same game themselves. They will attempt to “persuade” legislative and executive branch officials into manipulating the law and governmental power for their own interest through a variety of “favors.” The guaranteed result is not that those parties will “win” once in a while—there is never a guarantee of success—but is a further poisoning of the political process.<sup>541</sup>

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racy dies a little. Private property owned by individuals, not corporations, is the bulwark of a free society.”); Antonin Scalia, *Economic Affairs as Human Affairs*, 4 *CATO J.* 703, 704 (1984–1985) (“[I]n the real world a stark dichotomy between economic freedoms and civil rights does not exist. . . . The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern times the demise of economic freedom has been the grave of political freedom as well.”).

541. See RAUCH, *supra* note 102, at 166 (“The Maryland state lottery once ran an ad campaign on the theme ‘If you don’t play, you can’t win.’ By the 1980s, Washington had become a kind of demented casino, whose slogan was ‘If you don’t play, you can’t win—but boy, can you lose!’ Not surprisingly, everybody played.”).

The courts' refusal to intervene and call a halt to the pernicious nature of many occupational licensing schemes would not serve as an example of the judiciary paying respect to the democratic process, but as proof that today's courts have decided to overrule the Framers' judgment that property, no less than liberty, must be protected against the excesses of that process. Standing idly by and watching a preventable crime or train wreck occur may not be criminal or even wrongful conduct, but it certainly is not laudable behavior.

#### CONCLUSION

George Bernard Shaw once quipped, "All professions are conspiracies against the laity."<sup>542</sup> Although overstated for effect, Shaw's aphorism contains considerable truth. The public benefits from laws regulating who may diagnose disease, prescribe medication, and perform surgery. But not every regulatory program can be justified on the ground that it is necessary to protect the health and safety of the community. It would be risible to defend occupational licensing restrictions for barbers, cosmetologists, and hair-braiders on the ground that those restrictions are critical to the community because they protect the public from bad hair days. The true purpose of those laws is to benefit members of a favored profession by allowing them to raise prices. Elected officials pass such laws to give those workers economic rents in return for political rents. The effect is to quietly subsidize regulated parties without having to openly appropriate them money from the treasury raised by taxes imposed on the public. And politicians achieve that result without telling the electorate about the income transfer and while euchring the public into believing that the legislation is in their interest, not that of the benefitted special interest group.

The laws protecting hair care, however, do not stand alone. Numerous state regulatory schemes function simply as a means of limiting entry by potential rivals to protect incumbents against competition and allow them to raise the price of their services. Indeed, occupational licensing schemes often serve no other purpose. When that is true, occupational licensing statutes are just another form of crony capitalism, and the

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542. GEORGE BERNARD SHAW, *THE DOCTOR'S DILEMMA* 32 (1911).

public is the loser. It is time for the Supreme Court to acknowledge what is actually going on with occupational licensing and to intervene to protect the public from the worst excesses of that practice.