



## University of Baltimore Law Review

Volume 46 | Issue 1

Article 6

2016

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Kristin Tracy

*University of Baltimore School of Law*, [kristin.tracy@ubalt.edu](mailto:kristin.tracy@ubalt.edu)

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### Recommended Citation

Tracy, Kristin (2016) "'And to Your Left You'll See...": Licensed Tour Guides, The First Amendment, and the Free Market," *University of Baltimore Law Review*: Vol. 46 : Iss. 1 , Article 6.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol46/iss1/6>

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## “AND TO YOUR LEFT YOU’LL SEE . . .”: LICENSED TOUR GUIDES, THE FIRST AMENDMENT, AND THE FREE MARKET

*Kristin Tracy\**

### I. INTRODUCTION

If you are a beer-lover visiting Washington, D.C., you might want to check out “DC Brew Tours,” a “beer tour company in the Capital region that offers daily brewery tours to Washington’s best breweries, brewpubs, and bars.”<sup>1</sup> As you would expect, the tour includes samples of beer from a number of local craft breweries, as well as information about how each beer is made.<sup>2</sup> What you might not expect, however, is that, until very recently, DC Brew tour guides were legally obligated to pass a written exam about the history of D.C., a topic which has little to do with the art of brewing craft beer, in order to obtain a license before providing any paid tours.<sup>3</sup>

When you think about the First Amendment and about those figures who helped challenge and shape First Amendment jurisprudence throughout history, who do you think of? Young men burning their draft cards,<sup>4</sup> newspapers challenging prior restraint,<sup>5</sup> students wearing armbands in protest,<sup>6</sup> and, of course, tour guides. Yes, you read that correctly, tour guides. The freedom of speech is “America’s favorite freedom,”<sup>7</sup> so when a law or a case erodes that freedom, it is important to pay attention.

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\* J.D. Candidate, University of Baltimore School of Law, 2017.

1. *DC Brew Tours*, <https://dcbrewtours.com/> (last visited Oct. 31, 2016).

2. *Id.*

3. *See, e.g.*, D.C. MUN. REGS. tit. 19, § 1200.1 (2010) (amended 2015) (defining a tour guide, subject to the licensing requirements, as “any person who engages primarily in the business of guiding or directing people to any place or point of interest in the District . . . concerning any place or point of interest in the District”).

4. *See generally* *United States v. O’Brien*, 391 U.S. 367 (1968) (holding that a criminal prohibition against burning a draft card did not violate the First Amendment’s guarantee of free speech).

5. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

6. *See generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that a group of students wearing armbands in school to protest U.S. involvement in Vietnam represented constitutionally protected symbolic speech).

7. Ken Paulson, *America’s Favorite Freedom*, FIRST AMENDMENT CTR. (July 16, 2013), <http://www.firstamendmentcenter.org/americas-favorite-freedom>.

It is probably fair to assume that most of the people reading this Comment are *not* tour guides, but that does not mean that this issue should be glanced over. The instant cases deal with tour guides,<sup>8</sup> but the next plaintiff could be a journalist, a comedian, an author, or a film-maker, because these cases are not just about tour guides, they are about professional speakers.<sup>9</sup>

This Comment analyzes the lack of necessity for, and therefore, the unconstitutionality of, tour guide licensing through the lens of two recent cases: *Kagan v. City of New Orleans*<sup>10</sup> and *Edwards v. District of Columbia*.<sup>11</sup> The court in *Edwards* struck down the District of Columbia's licensing requirement as a violation of the First Amendment,<sup>12</sup> whereas the *Kagan* court came to the opposite conclusion.<sup>13</sup> Section II provides a foundation for understanding the courts' analyses of regulations affecting free speech, as well as the factual and procedural backgrounds of the two cases.<sup>14</sup> Section III asserts that the court in *Edwards* is correct—the licensing requirements for tour guides do little to serve the government interest of protecting the tourism industry, while another tool is much more effective: the free market.<sup>15</sup> I will explain the basic economic theories, which will then be applied to show how the tour guide industry is more than capable of regulating itself.<sup>16</sup> Finally, Section IV will discuss the unfortunate potential for further speech restriction if the *Kagan* camp gains more support.<sup>17</sup>

## II. THE FIRST AMENDMENT AND THE CIRCUIT SPLIT

A number of controversial and groundbreaking claims have been brought in the name of freedom of speech.<sup>18</sup> This can be largely attributed to two factors. First, as mentioned above,<sup>19</sup> Americans highly value the protections afforded by the First Amendment.

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8. *See infra* Sections II.B, II.C.

9. *Id.*

10. *Kagan v. City of New Orleans (Kagan II)*, 753 F.3d 560 (5th Cir. 2014).

11. *Edwards v. District of Columbia (Edwards III)*, 755 F.3d 996 (D.C. Cir. 2014).

12. *Id.* at 998 (“Finding the record wholly devoid of evidence supporting the burdens the challenged regulations impose on Appellants’ speech, we reverse and remand.”).

13. *Kagan II*, 753 F.3d at 562 (“The judgment of the district court upholding the constitutionality of the New Orleans licensing scheme for tour guides is affirmed.”).

14. *See infra* Part II.

15. *Edwards III*, 755 F.3d at 1005 (“Even if we indulged the District’s apparently active imagination, the record is equally wanting of evidence the exam regulation actually furthers the District’s interest in preventing the stated harms.”).

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See, e.g., supra* notes 4–6 and accompanying text.

19. *See supra* note 7 and accompanying text.

Second, those highly valued protections do not always have a clear definition or application.<sup>20</sup> The First Amendment does not provide an *absolute* freedom,<sup>21</sup> and courts have to determine when and where to draw the line.<sup>22</sup> The two recent cases of focus here, *Kagan* and *Edwards*, involve two courts looking at very similar facts, and deciding to draw the line at different places.<sup>23</sup> One of those lines, if left unchecked, threatens to infringe upon the rights of speakers wherever a business relationship is involved.<sup>24</sup>

#### A. *Speech Restriction in General*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>25</sup> While the text of the First Amendment only refers to Congress, the Supreme Court has deemed that the protections apply to the governments of individual states, as well.<sup>26</sup> Whether dealing with federal or state laws, the Supreme Court has the daunting task of defining and categorizing different types of speech,<sup>27</sup> and developing tests to determine when a speech restriction does or does not violate the First Amendment.<sup>28</sup>

For the purpose of analyzing *Kagan*<sup>29</sup> and *Edwards*,<sup>30</sup> it is important to understand two categories of speech restrictions and

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20. See discussion *infra* Section II.A.

21. See *infra* note 43 and accompanying text.

22. See *infra* note 26 and accompanying text.

23. See *infra* Sections II.B, II.C.

24. See *infra* Sections II.B, II.C

25. U.S. CONST. amend. I.

26. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

27. See, e.g., *id.* at 664.

28. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (finding a city’s sound amplification guidelines to be valid as constitutional time, place, or manner restrictions because the regulations were content-neutral, served an important government interest, were narrowly tailored, and left open ample alternative means for communicating the same message); *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (holding that burning the U.S. flag is a protected form of symbolic speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (developing the “Clear and Present Danger test” to determine whether or not the Constitution allows for restriction of high-value political speech); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (developing the four-prong “*O’Brien* test” to decide whether a content-neutral regulation on expressive speech is constitutionally valid); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722–23 (1931) (holding that prior restraints on speech are unconstitutional).

29. *Kagan II*, 753 F.3d 560 (5th Cir. 2014).

their corresponding tests: certain restrictions on symbolic speech, and time, place, or manner restrictions.<sup>31</sup> In *United States v. O'Brien*, the Supreme Court created a four-prong test to determine the constitutionality of content-neutral regulations of symbolic speech.<sup>32</sup>

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>33</sup>

The Court explained in *O'Brien* that not every act is considered protected speech, but that certain actions include “communicative element[s]” important enough to “bring into play the First Amendment.”<sup>34</sup> Prongs two and four of the test ask the court to decide whether or not a regulation is sufficiently narrowly tailored to serve a substantial government interest.<sup>35</sup> In doing this, the Court in *O'Brien* questioned the existence of “alternative means that would more precisely and narrowly assure” the achievement of the State’s goal.<sup>36</sup> If such alternative means do exist, the regulation will fail.<sup>37</sup>

Another category of speech restriction regulates the time, place, or manner of speech.<sup>38</sup> The First Amendment protects the freedom of speech, but this freedom is not absolute: “the First Amendment does not guarantee the right to communicate one’s views at all times and

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30. *Edwards III*, 755 F.3d 996 (D.C. Cir. 2014).

31. *Id.* at 1009; *Kagan II*, 753 F.3d at 562.

32. *O'Brien*, 391 U.S. at 377. After burning his card outside of the South Boston Courthouse, O’Brien was convicted under the Universal Military Training and Services Act, which prohibited the destruction of a draft card. *Id.* at 369 (“[H]e had burned his registration certificate because of his beliefs, knowing that he was violating federal law.”).

33. *Id.* at 377.

34. *Id.* at 376.

35. *Id.* at 377; see also *Edwards III*, 755 F.3d at 1002 (“Collectively, prongs two and four of the *O'Brien* test query whether the challenged regulations are narrowly tailored to further a substantial government interest.”).

36. *O'Brien*, 391 U.S. at 381.

37. *Id.*

38. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989) (challenging the constitutionality of a city’s sound-amplification guidelines); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding a Minnesota law prohibiting the distribution of literature at the State Fair except at designated booths).

places or in any manner that may be desired.”<sup>39</sup> Like those speech restrictions tested under *O’Brien*,<sup>40</sup> time, place, or manner regulations must not be based on the content or subject-matter of the speech.<sup>41</sup> The restriction must also “serve a significant governmental interest,”<sup>42</sup> must be narrowly tailored to serve that significant interest,<sup>43</sup> and must leave open “alternative forums for the expression of . . . protected speech.”<sup>44</sup>

Although they have different names and seemingly different requirements, the line separating the above-mentioned tests has been somewhat blurred.<sup>45</sup> In *Clark v. Community for Non-Violence*, the Supreme Court explained that:

[If a time, place, or manner restriction] sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O’Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served. We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under *O’Brien* and then based a crucial part of its analysis on the time, place, or manner cases.<sup>46</sup>

Essentially, time, place, or manner restrictions “must also satisfy the *O’Brien* standard.”<sup>47</sup> The integration of these two speech regulation tests<sup>48</sup> is exemplified in two recent cases dealing with the constitutionality of licensing requirements for paid tour guides.<sup>49</sup>

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39. *Heffron*, 452 U.S. at 647 (citing *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966)).

40. *See supra* notes 32–33 and accompanying text.

41. *Heffron*, 452 U.S. at 648 (citing *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980)).

42. *Id.* (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Counsel*, 425 U.S. 748, 771 (1976)).

43. *Id.* at 658 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972)).

44. *Id.* at 654.

45. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984); *see also* Angelica M. Sinopole, Comment, “No Saggy Pants”: A Review of the First Amendment Issues Presented by the State’s Regulation of Fashion in Public Streets, 113 PA. ST. L. REV. 329, 358 n.198 (2008).

46. *Clark*, 468 U.S. at 298 n.8 (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804–05, 808–10 (1984)).

47. Sinopole, *supra* note 45.

48. *See, e.g.*, Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 174–75 (2015) (“[*Edwards*] instead employs an eccentric

B. *Kagan v. City of New Orleans*<sup>50</sup>

In 2013, a group of New Orleans tour guides challenged their city's licensing requirement in the U.S. District Court for the Eastern District of Louisiana.<sup>51</sup> These original plaintiffs (now appellants) gave a variety of tours, ranging from historical, to ghost-themed, to "gustatory or libationary."<sup>52</sup> New Orleans City Code § 30-1551 required tour guides in the City to have a license,<sup>53</sup> § 30-1553 required the license applicant to pass a written examination and to have committed no felonies in the past five years,<sup>54</sup> and § 30-1557 codified the fifty dollar fee applicants must pay before obtaining a license.<sup>55</sup>

The city asserted that the license requirement ensured tour guides' knowledge of New Orleans and protected tourists from criminals and swindlers.<sup>56</sup> The tour guides argued that the City's justifications were "insufficient under the First Amendment," and asked for a

form of 'intermediate scrutiny' fashioned by cobbling together elements of the *O'Brien* test with criteria developed in the context of content-neutral 'time, place and manner' regulations.") (citation omitted).

49. There is an argument, and perhaps a better one, that the *O'Brien* test has no applicability in the tour guide cases since *O'Brien* is applied to *symbolic* speech restrictions. *See supra* notes 32–37 and accompanying text. If a tour guide's speech is viewed as strictly commercial speech (i.e., it has no symbolic or expressive nature), then an analysis under *O'Brien* is improper. *See, e.g., Post & Shanor, supra* note 48, at 165–66. *But see* Recent Case, *First Amendment—Freedom of Speech—D.C. Circuit Court Holds Unconstitutional District of Columbia's Tour Guide Licensing Regulation—Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), 128 HARV. L. REV. 777, 781 (2014) ("The *Edwards* court was correct to recognize the constitutional interest at stake because the D.C. regulation necessarily affected expressive speech."). The bottom line is that it does not really matter which test *should have* been applied. As explained above, there is a strong suggestion that the end result is the same regardless of whether the *O'Brien* test or the time, place, or manner test is applied. *See supra* notes 45–47 and accompanying text.
50. *Kagan II*, 753 F.3d 560 (5th Cir. 2014).
51. *See generally* *Kagan v. City of New Orleans (Kagan I)*, 957 F. Supp. 2d 774 (E.D. La. 2013) (holding the city's licensing scheme for tour guides did not violate the First Amendment).
52. *Id.* at 774.
53. NEW ORLEANS, LA., CODE OF ORDINANCES § 30-1551 (2011) ("No person shall conduct tours for hire in the parish who does not possess a tour guide license issued by the department of safety and permits.").
54. NEW ORLEANS, LA., CODE OF ORDINANCES § 30-1553 (2011) ("The written examination is designed to test the applicant's knowledge of the historical, cultural and sociological developments and points of interest in the city.").
55. NEW ORLEANS, LA., CODE OF ORDINANCES § 30-1557 (2011).
56. *Kagan I*, 957 F. Supp. 2d at 775–76. The court later explained, however, that "[a] tour guide may say whatever he or she wishes about a site, or anything else for that matter—the City does not regulate the content of tour guides' speech." *Id.* at 779. These two statements are incompatible.

declaratory judgment and permanent injunction.<sup>57</sup> The district court held that the challenged statutes were content-neutral and valid under the *O’Brien* test,<sup>58</sup> in part reasoning that the “[p]laintiffs do not need a license to speak and lead tours whenever, wherever, and containing whatever they please, just so long as they do not charge for them.”<sup>59</sup> There was no serious doubt regarding the city’s police power, in this situation, fulfilling the first prong of the test, since “[t]he City unquestionably has the power to license businesses as part of its police powers.”<sup>60</sup>

On appeal, the Fifth Circuit upheld the lower court’s ruling in a brief opinion.<sup>61</sup> The court emphasized the fact that the tour guides’ speech was not restricted at all *once they obtained a license*, affirming the district court’s *O’Brien* analysis: that New Orleans’ regulation is sufficiently narrowly tailored.<sup>62</sup> Immediately following this discussion, however, the Fifth Circuit went on to explain how “instructive” the Supreme Court’s opinion in *Ward v. Rock Against Racism*<sup>63</sup> was in this particular case:<sup>64</sup>

There the government had regulated sound, and the Court said that even with messages conveyed, the regulation is content-neutral so long as the regulation is justified without reference to content or speech. Because that regulation was content-neutral and only reviewed with intermediate scrutiny, it satisfied the requirement of narrow tailoring so long as the . . . regulation promotes a substantial interest that would be achieved less effectively absent the regulation.<sup>65</sup>

The court’s reliance on this authority is notable because, as discussed above,<sup>66</sup> the *Ward* case dealt with a time, place, or manner

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57. *Id.* at 776.

58. *Id.* at 780–82.

59. *Id.* at 781–82 (citation omitted) (referring to a combination of the second and fourth prongs of the *O’Brien* test—whether or not the regulation furthers a substantial government interest, and whether or not the incidental restriction on alleged First Amendment freedoms is essential to the furtherance of that interest).

60. *Id.* at 780.

61. *Kagan II*, 753 F.3d 560 (5th Cir. 2014).

62. *Id.* at 562 (“[T]he New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say.”).

63. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

64. *Kagan II*, 753 F.3d at 562.

65. *Id.* (alteration in original) (citation omitted).

66. *See supra* note 38 and accompanying text.



restriction.<sup>67</sup> As previously explained, however, the Supreme Court has asserted that the outcome may be the same no matter which test a court uses (i.e., *O'Brien* or time, place, or manner).<sup>68</sup> Following the district court's ruling, the Supreme Court denied a petition for writ of certiorari on February 23, 2015.<sup>69</sup>

C. *Edwards v. District of Columbia*<sup>70</sup>

Plaintiffs Tonia Edwards and Bill Main, owners of "Segs in the City," a tour-guide company operating in D.C., Baltimore, and Annapolis, first challenged the constitutionality of the District's statutory licensing requirement in 2010.<sup>71</sup> Plaintiffs filed for a preliminary injunction, while the District simultaneously filed a motion to dismiss.<sup>72</sup> The U.S. District Court for the District of Columbia denied both motions in 2011.<sup>73</sup> Both parties filed cross-motions for summary judgment, and in 2013, the district court again issued an opinion on the matter, this time finding for the District of Columbia.<sup>74</sup>

The challenged statute was strikingly similar to the New Orleans statutes challenged in *Kagan*,<sup>75</sup> it required all paid tour guides to obtain licenses from the District of Columbia for an annual fee of twenty-eight dollars.<sup>76</sup> D.C. Municipal Regulations accompanied this statute, and provided that a license applicant must "[n]ot have been convicted of [certain specified felonies],"<sup>77</sup> and must "pass an examination . . . covering the applicant's knowledge of buildings and points of historical and general interest in the District,"<sup>78</sup> among other

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67. *Ward*, 491 U.S. at 791 ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . .").

68. See *supra* notes 45–47 and accompanying text.

69. *Kagan II*, 753 F.3d 560 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015).

70. *Edwards III*, 755 F.3d 996 (D.C. Cir. 2014).

71. *Edwards v. District of Columbia (Edwards I)*, 765 F. Supp. 2d 3, 6–7 (D.D.C. 2011).

72. *Id.* at 6.

73. *Id.* The cases *Edwards I* and *Edwards II* were later consolidated, and *Edwards I* was dismissed as moot by the D.C. Circuit Court, so I will be focusing more on the opinions in *Edwards II & III*. See *Edwards III*, 755 F.3d at 1000 n.2.

74. *Edwards v. District of Columbia (Edwards II)*, 943 F. Supp. 2d 109, 124–25 (D.D.C. 2013), *rev'd*, 755 F.3d 996 (D.C. Cir. 2014).

75. Compare *id.*, with *Kagan II*, 753 F.3d 560, 561 (5th Cir. 2014).

76. D.C. CODE § 47-2836(a) (2012).

77. D.C. MUN. REGS. tit. 19, § 1203.1(c) (2015).

78. D.C. MUN. REGS. tit. 19, § 1203.3 (2010) (repealed 2015). On top of the annual licensing fee, this written examination cost \$200 for first-time applicants. *Edwards II*, 943 F. Supp. 2d at 114.

requirements.<sup>79</sup> Just like the plaintiffs in *Kagan*,<sup>80</sup> the plaintiffs in *Edwards* claimed that requiring a paid tour guide to first obtain a license is a violation of the Free Speech Clause of the First Amendment.<sup>81</sup> The court applied the *O’Brien* test<sup>82</sup> and found for the city, granting its motion for summary judgment.<sup>83</sup> Of particular importance is the district court’s analysis of the fit of the regulations,<sup>84</sup> where the court determined that “[t]he tour guide licensing provisions do not burden substantially more expression than is necessary to meet the District’s regulatory goals.”<sup>85</sup>

*Kagan* and *Edwards* diverged once *Edwards* reached the D.C. Circuit Court.<sup>86</sup> Again, there was no debate as to whether or not the regulation “is within the constitutional power of the Government.”<sup>87</sup> The disagreement derived from prongs two and four of the *O’Brien* test.<sup>88</sup> While the Fifth Circuit pointed to the lack of regulation or control of tour guides’ speech once they obtained a license as proof of the regulation’s appropriate fit,<sup>89</sup> the D.C. court came to the opposite conclusion, stating that “a regulation cannot be sustained ‘if there is little chance that the restriction will advance the State’s goal.’”<sup>90</sup> The court went further, and asked: “Exactly how does a tour guide with carte blanche to—Heaven forbid—call the White House the Washington Monument further the District’s interest in ensuring a quality consumer experience?”<sup>91</sup>

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79. See generally D.C. MUN. REGS. tit. 19, §§ 1200–1209 (2010) (amended 2015) (outlining the requirements for obtaining a tour guide license).

80. *Kagan II*, 753 F.3d at 561.

81. *Edwards II*, 943 F. Supp. 2d at 114–15.

82. *Id.* at 117, 121–24 (“The government has greater latitude to enact laws that only incidentally restrict speech, and such laws are reviewed under an intermediate scrutiny test.” (citing *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968))).

83. *Id.* at 124–25.

84. *O’Brien*, 391 U.S. at 377; see also *Edwards III*, 755 F.3d 996, 1002 (D.C. Cir. 2014) (“Collectively, prongs two and four of the *O’Brien* test query whether the challenged regulations are narrowly tailored to further a substantial government interest.”).

85. *Edwards II*, 943 F. Supp. 2d at 124 (“The Court therefore concludes that the regulations withstand intermediate scrutiny under the First Amendment.”).

86. See *Edwards III*, 755 F.3d at 1005–06, 1007 n.15.

87. *Id.* at 1002 (quoting *O’Brien*, 391 U.S. at 377).

88. *Id.*

89. *Kagan II*, 753 F.3d 560, 562 (5th Cir. 2014).

90. *Edwards III*, 755 F.3d at 1003 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001)). The State’s goal here is essentially the same as in *Kagan*, to protect tourists and the tourism industry. *Id.*; *Kagan II*, 753 F.3d at 561.

91. *Edwards III*, 755 F.3d at 1005. The court also found “puzzling . . . the applicability of the exam requirement to specialty tour guides, such as those focused on ghost, food or movie tours,” since a general exam would be “ill-suited to ensuring such

Beyond a discussion of the ill fit of the regulation regarding the District's interest in consumer protection and quality-control, the *Edwards* court also discussed the lack of evidence of an actual need to protect those stated interests.<sup>92</sup> Finally, and most importantly, the court posed this question: "Perhaps most fundamentally, what evidence suggests market forces are an inadequate defense to seedy, slothful tour guides?"<sup>93</sup>

### III. MARKET FORCES ARE AN ADEQUATE DEFENSE

Can market forces provide an adequate defense to the problems sought to be avoided in New Orleans and D.C. by requiring paid tour guides to be licensed?<sup>94</sup> Yes. The licenses previously required in D.C., and still required in New Orleans, are unnecessary to serve the interests asserted by each city, and, therefore, are unconstitutional.<sup>95</sup> Neoclassical economic theory lays the foundation for answering this question in the affirmative.<sup>96</sup> When applied to tour guides and other members of the service industry, this theory demonstrates the frivolity of the licensing schemes.<sup>97</sup> A prime illustration of neoclassical economic mechanisms in the tour guide industry is the potency of consumer-rating tools, such as Yelp and TripAdvisor.<sup>98</sup> The ideas discussed here are not limited to one industry; other vocations may be subject to similar unnecessary licensing requirements in the future if the reasoning in *Kagan*<sup>99</sup> is followed.<sup>100</sup>

A. "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."<sup>101</sup>

This profound quote from Adam Smith's text, *The Wealth of Nations*,<sup>102</sup> illustrates the internal market forces that render tour guide

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specialty guides are well informed." *Id.* at 1005–06. There are similar specialty guides in New Orleans. See *Kagan I*, 957 F. Supp. 2d 774, 775 (E.D. La. 2013).

92. *Edwards III*, 755 F.3d at 1003.

93. *Id.* at 1006–07. The court then used Yelp and TripAdvisor to illustrate the simple but true aphorism: "[B]ad reviews are bad for business." *Id.* at 1007.

94. *Id.* at 1006.

95. *Id.* at 1009.

96. See *infra* Section III.A.

97. See *infra* Section III.B.

98. See *infra* Section III.B.

99. See generally *Kagan II*, 753 F.3d 560 (5th Cir. 2014) (holding that New Orleans' licensing requirements for tour guides do not violate the First Amendment).

100. See *infra* Section III.C.

101. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 16 (MetaLibri Digital 2007) (1777), [http://www.ibiblio.org/ml/libri/s/SmithA\\_WealthNations\\_p.pdf](http://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf).

licensing, at least in its current form, unnecessary. As one of the first contributors to neoclassical economics,<sup>103</sup> it is only appropriate that Smith’s words can best be explained through two of the basic assumptions of this economic theory. The first assumption is that “[p]eople have rational preferences . . . that can be identified and associated with a value.”<sup>104</sup> The second is that individuals will act to maximize their own utility, and firms, or businesses, will act to maximize their profits.<sup>105</sup>

Combining the above two facets of neoclassical economics brings us to the conclusion that a consumer’s rational, utility-maximizing decision to do business only with those firms that have good reputations among other consumers<sup>106</sup> will act as a monumental incentive to firms to act in a way that will attract those consumers.<sup>107</sup> This incentive is, in part, what Adam Smith was referring to when he explained the self-interest of the “butcher, the brewer, . . . [and] the baker.”<sup>108</sup>

There are, of course, a number of critiques of this school of thought. One central criticism is that the assumption of rationality is an oversimplification of human behavior, since “[e]conomic agents . . . have social, religious, and politico-ideological dimensions,” and are “also constrained by the forces of habit, routine and well-entrenched conventions.”<sup>109</sup> Another major criticism is that the

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102. *Id.*

103. RICHARD D. WOLFF & STEPHEN A. RESNICK, *ECONOMICS: MARXIAN VERSUS NEOCLASSICAL* 10 (1987).

104. *Neoclassical Economics*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Neoclassical\\_economics](http://www.newworldencyclopedia.org/entry/Neoclassical_economics) (last visited Oct. 31, 2016); *see also* WOLFF & RESNICK, *supra* note 103, at 7 (“[Neoclassical economic theory] assumes that all goods and services are privately owned by individuals and that all individuals seek to maximize their satisfaction from consuming goods and services. Neoclassical economists proceed to analyze what such rationally motivated individuals will do with their property as they maximize their satisfaction.”).

105. *Id.*; *see also* David Dequech, *Neoclassical, Mainstream, Orthodox, and Heterodox Economics*, 30 *J. POST KEYNESIAN ECON.* 279, 280 (2008) (“[N]eoclassical economics is characterized by . . . the emphasis on rationality and the use of utility maximization as the criterion of rationality . . . .”); Herbert A. Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 *AM. ECON. REV.* 253, 256 (1959).

106. I.e., those firms that are most likely to actually maximize the consumer’s utility.

107. I.e., not be “seedy, slothful tour guides.” *Edwards III*, 755 F.3d 996, 1006 (D.C. Cir. 2014).

108. SMITH, *supra* note 101 and accompanying text.

109. Hamid Hosseini, *The Archaic, the Obsolete and the Mythical in Neoclassical Economics*, 49 *AM. J. ECON. & SOC.* 81, 84–85 (1990); *see also* D.M. Nachane, *The Unity of Science Principle and the ‘Unreasonable Effectiveness’ of Neoclassical*

notion of rational decision-making to maximize utility or profits requires “perfect knowledge,”<sup>110</sup> which often does not exist in reality.<sup>111</sup>

These criticisms, however, are largely inapplicable to the analysis presented below.<sup>112</sup> There is little chance of a consumer behaving irrationally based on habit or routine when seeking a tour guide because it is not likely that the same consumer is going on the same vacation and the same tour repeatedly.<sup>113</sup> Furthermore, while *perfect* information may not be available to all consumers, the internet<sup>114</sup> or even a travel agent can provide consumer reviews and feedback, which will likely help the consumer make rational decisions.<sup>115</sup>

### B. *Market Forces: The Tour Guide Industry*

Imagine what would happen if tour guides were not required to pass written exams and obtain licenses. Would swindling tour guides run rampant, misinforming tourists and cheating them of their money? *No.*<sup>116</sup> It is an unavoidable fact of life that there will always be dishonest businessmen and women, but it is also a fact that an

*Economics*, 43 *ECON. & POL. WKLY.* 79, 82 (2008) (discussing the Keynesian critique and citing Keynes himself as describing the “rationality postulate” as “a pretty polite technique” attempting “to deal with the present by distracting from the fact that we know very little about the future”).

110. Neoclassical economic theory assumes that economic agents—producers and consumers—have perfect knowledge, meaning they are “so keenly on the alert and so well acquainted with one another’s affairs that” there is a clear rational decision for each transaction. Hosseini, *supra* note 109, at 83 (emphasis omitted) (quoting ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 112 (8th ed. 1984)).
111. *See, e.g.*, Hosseini, *supra* note 109, at 85 (“George Shackle and Ludwig Lackmann have long maintained that perfect knowledge is impossible; whereas without it rationality and optimizing behavior become impossible.”).
112. *See infra* Section III.B.
113. *See, e.g.*, Ana María Campón et al., *Loyalty Measurement in Tourism: A Theoretical Reflection*, in *QUANTITATIVE METHODS IN TOURISM ECONOMICS* 13–14 (Á. Matias et al. eds., 2013) (“With regard to the tourism sector, Bigné et al. (2005) hold that it is difficult to measure loyalty on the basis of repeat purchases because consumption is infrequent and customers may prefer to visit new places.”).
114. Before the advent of consumer-rating websites, and before the widespread accessibility of the Internet, there was probably a better argument for the necessity of licensing schemes for tour guides since consumer opinions would be passed along very slowly, if at all.
115. *See* Alex Tabarrok & Tyler Crowen, *The End of Asymmetric Information*, *CATO UNBOUND* (Apr. 6, 2015), <http://www.cato-unbound.org/issues/april-2015/end-asymmetric-information> (“Technological developments are giving everyone who wants it access to the very best information when it comes to product quality, worker performance, . . . [and] many other areas. These developments will have implications for how markets work, how much consumers benefit, and also economic policy and the law.”).
116. *See, e.g.*, *Edwards III*, 755 F.3d 996, 1003–04 (D.C. Cir. 2014).

overwhelming majority of cities and states in the United States do *not* require tour guides to pass an exam and acquire a license before conducting business.<sup>117</sup> When the D.C. Circuit Court wrote its opinion in 2014, the court identified only four cities other than New Orleans and D.C. that also required licenses for tour guides.<sup>118</sup> According to The Institute for Justice, one of those four cities—Savannah, Georgia—has since decided to “abandon their licensing laws rather than defend them in court,”<sup>119</sup> seemingly following in Philadelphia’s footsteps.<sup>120</sup>

If only a “handful of cities . . . require[] tour guide licenses,”<sup>121</sup> then it logically follows that most cities in the United States do *not*.<sup>122</sup> This statement may seem redundant, but it must be emphasized because the Fifth Circuit would lead you to believe that tourists in these unregulated cities are at great risk of being “scammed or put in

117. *See, e.g., id.* at 1004 n.5.

Although the District’s brief identified five cities with tour-guide licensing requirements—Charleston, SC; New Orleans, LA; New York, NY; Savannah, GA; and Philadelphia, PA—Philadelphia appears to have abandoned (at least for the time being) any intention of enforcing its law. The actual fifth city, Williamsburg, Virginia, came to the court’s attention as a result of Appellants’ candor and due diligence.

*Id.* (citations omitted).

118. *Id.*

119. Robert Everett Johnson, *Counterpoint: Tour Guide Licensing is Unconstitutional*, ST. AUGUSTINE RECORD (Nov. 1, 2015, 12:05 AM), <http://staugustine.com/opinions/2015-10-31/counterpoint-tour-guide-licensing-unconstitutional>.

120. *Edwards III*, 755 F.3d at 1004 n.5 (“Philadelphia appears to have abandoned (at least for the time being) any intention of enforcing its law.”); *see also* Tait v. City of Philadelphia, 410 F. App’x 506, 509 (3d Cir. 2011).

The District Court held that the City’s claimed inability to enforce the Ordinance at this time is equivalent to a promise not to enforce the Ordinance, and at oral argument the City went further and stated that it ‘disavowed’ enforcement of the Ordinance until it announces that a written test will be administered.

*Id.*

121. Tim Krepp, *Tour Guide Licenses Unconstitutional? Maybe!*, DC LIKE A LOCAL (Sept. 16, 2010, 1:39 PM), <http://dclikealocal.com/dclikealocal/2010/9/16/tour-guide-licenses-unconstitutional-maybe.html>.

122. *See, e.g.,* S.F. Tour Guide Guild, *How to Become a Tour Guide*, <http://www.sftgg.org/docs/how-to-become-a-tour-guide.pdf> (last visited Oct. 31, 2016) (“To be a tour guide in San Francisco you don’t need a license or certification . . . .”); World Fed’n Tourist Guide Ass’ns, *Chicago (and the surrounding suburbs)*, <http://www.wftga.org/guideapedia/united-states-america/chicago-and-surrounding-suburbs> (last visited Oct. 31, 2016) (“The City of Chicago does not license tour guides . . . .”).

danger by their tour guides.”<sup>123</sup> The mere rarity of license requirements for tour guides does not itself prove that licensing is unnecessary and unconstitutional.<sup>124</sup> The fact that the government interest *may* be achieved through other means does not invalidate a regulation, but, as the court in *Kagan* explained, a regulation is not sufficiently narrowly-tailored if the substantial interest could be served just as effectively without the regulation.<sup>125</sup> The large number of cities without licensing requirements serves as undeniable evidence that market forces are just as effective as the controversial licenses, if not more so.<sup>126</sup>

As the *Kagan* court touted, New Orleans tour guides suffer no speech restrictions once they are licensed; they are free to say whatever they wish about the city.<sup>127</sup> What, then, prevents a tour guide from pointing to Basin St. Station and calling it St. Louis Cathedral?<sup>128</sup> The answer is simple, and it has nothing to do with passing an exam, paying a fee, or carrying a license: self-interest. Self-interest is what keeps a tour guide from lying or guiding a tour unprepared, because if a guide does this, it is inevitable that a tourist will notice and decide to warn others of the unsatisfying experience.<sup>129</sup> As rational economic agents seeking to maximize their own utility,<sup>130</sup> the others will heed this warning and choose to take their business elsewhere—a concept referred to as “dollar-voting.”<sup>131</sup> The tour guide, or tour guide business-owner, is also a

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123. *Kagan I*, 957 F. Supp. 2d 774, 779 (E.D. La. 2013).

124. *See id.* at 784.

125. *Kagan II*, 753 F.3d 560, 562 (5th Cir. 2014) (“[I]t satisfie[s] the requirement of narrow tailoring so long as the . . . regulation promotes a substantial interest that would be achieved less effectively absent the regulation.”) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citation omitted)).

126. *See supra* notes 113–20 and accompanying text.

127. *Kagan II*, 753 F.3d at 562 (“[T]he New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say.”).

128. *Attractions*, THE OFFICIAL TOURISM SITE OF THE CITY OF NEW ORLEANS, <http://www.neworleansonline.com/neworleans/attractions/attractions.php> (last visited Oct. 31, 2016).

129. *See infra* notes 134–36 and accompanying text.

130. *See supra* notes 104–05 and accompanying text.

131. Peter Lindsay, *Exposing the Invisible Hand: The Roots of Laissez-Faire’s Hidden Influence*, 37 *POLITY* 295, 297 (2005).

Free markets, in turn, are valued on the assumption that they allow scarce resources to be allocated in the absence of any public sanctioning of what is and what is not a worthy economic activity or good . . . emphasiz[ing] the efficiency of allocating resources via an unencumbered pricing system in which individual consumers direct production through chaotic, uncoordinated “dollar-voting.”

rational decision-maker seeking to maximize profits, and will seek to prevent this, or remedy the problem and gain back consumers’ trust and patronage.<sup>132</sup>

Evidence of the economic validity of this simple illustration can be seen in consumer rating platforms, such as Yelp and TripAdvisor.<sup>133</sup> After going on Southern Hospitality Tours’ “Cocktail and Jazz” tour in 2011, Yelp user Lauren M., from Arlington, Virginia, wrote a review to express her dissatisfaction:

I wouldn't bother with the Cocktail and Jazz tour. The drinks were nothing special and we only heard music at 2 of 5 venues. At two venues we didn't even go inside because the places were too crowded so we drank our drinks on the street. The tour guide did know his New Orleans history, but I would recommend paying \$20 for a carriage tour if that is what you're looking for.<sup>134</sup>

A few months later, Kim W., the owner of Southern Hospitality Tours, replied:

Thank you for your response. We have significantly changed the tour since you took it based on customer feedback. All of our venues are now much bigger venues and all feature live local music. The tour still includes signature cocktails but you now have the choice of a beer or well drink at the second and last venue with three signature cocktails in between. We added a lot more history to the tour and less walking as well and we can now spend more time at each venue. The tour now ends on Bourbon St. Thanks for your comment and helping us make this tour better.<sup>135</sup>

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*Id.*

132. *See supra* notes 104–05 and accompanying text.

133. *See, e.g.*, YELP, [www.yelp.com](http://www.yelp.com) (last visited Oct. 31, 2016) (proclaiming itself as the “best way to find great local businesses”); TRIPADVISOR, [www.tripadvisor.com](http://www.tripadvisor.com) (last visited Oct. 31, 2016) (helping users “[b]ook your best trip, every trip”).

134. Lauren M., *Southern Hospitality Tours*, YELP (Feb. 17, 2011), <http://www.yelp.com/biz/southern-hospitality-tours-new-orleans>.

135. Kim W., *Southern Hospitality Tours*, YELP (June 8, 2011), <http://www.yelp.com/biz/southern-hospitality-tours-new-orleans>.



This is just one example, but similar interactions regarding different tour guide companies can be found on Yelp and TripAdvisor.<sup>136</sup> Not only do these reviews show the “expressed outrage and contempt that would likely befall a less than scrupulous tour guide,”<sup>137</sup> they also demonstrate the way in which tour guide companies respond: they try to fix the problem for the future.<sup>138</sup>

Many tour guide companies may be run by people who genuinely care about tourists’ experiences, but this is not the only motivator for responding to negative feedback.<sup>139</sup> Georgios Zervas and Michael Luca conducted a Harvard Business study and found “that having an extra star on Yelp causes the revenue of a business to rise by 5 to 10 percent.”<sup>140</sup> From this, we can logically conclude that having fewer stars on Yelp causes less revenue, which would in turn cause the rational, profit-maximizing business-owner to take action.<sup>141</sup> This is a specific example of the general idea that, “[a] decline in brand recognition or a blow to a corporation’s reputation affects a corporation’s bottom line *and can be as effective a threat . . . as any government mandate.*”<sup>142</sup>

If market mechanisms are as effective as, if not *more effective than*, the licensing regulations at issue in *Kagan* and *Edwards*, then those regulations are not sufficiently narrowly tailored.<sup>143</sup> In this case, the

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136. See, e.g., Wanda C., *The Original Ghosts of Williamsburg Candlelight Tour*, TRIPADVISOR (Oct. 31, 2015), [http://www.tripadvisor.com/Attraction\\_Review-g58313-d1122733-Reviews-The\\_Original\\_Ghosts\\_of\\_Williamsburg\\_Candlelight\\_Tour-Williamsburg\\_Virginia.html#REVIEWS](http://www.tripadvisor.com/Attraction_Review-g58313-d1122733-Reviews-The_Original_Ghosts_of_Williamsburg_Candlelight_Tour-Williamsburg_Virginia.html#REVIEWS). Wanda C. went on “The Original Ghosts of Williamsburg Candlelight Tour” and expressed her dissatisfaction in a TripAdvisor post, stating that she was “disappointed” and her family found the tour to be “rather boring.” *Id.* In response to this, “angelaghost,” the manager, asked Wanda to contact her through the company’s website so that they could “take steps to fix this,” adding that the company “fell short, and that is unacceptable.” *Id.*
137. *Edwards III*, 755 F.3d 996, 1006–07 (D.C. Cir. 2014).
138. See *id.*; see also *supra* notes 103–05 and accompanying text.
139. See *supra* Section III.A.
140. Susan Seligson, *Yelp Reviews: Can You Trust Them?*, BU TODAY (Nov. 4, 2013), <http://www.bu.edu/today/2013/yelp-reviews-can-you-trust-them>; see also Sabah Karimi, *5 Ways to Attract More 5-Star Reviews for Your Tour and Activity Business*, ZOZI (Aug. 31, 2015), <https://www.zozi.com/advance/blog/5-ways-to-attract-more-5-star-reviews-for-your-tour-and-activity-business> (“70 percent of global consumers say online reviews are the second most trusted form of advertising, with word-of-mouth and recommendations from friends and family being the most trusted . . .”).
141. See *supra* notes 104–05 and accompanying text.
142. Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1674 (2015) (emphasis added).
143. See *Kagan II*, 753 F.3d 560, 562 (5th Cir. 2014).

threshold level of effectiveness is not very high to begin with.<sup>144</sup> As both courts point out, once tour guides are licensed, they are free to say whatever they wish.<sup>145</sup> It must be conceded that the licensing scheme is effective in one area: criminal background checks.<sup>146</sup> This does not, however, explain the necessity for written and oral exams that sometimes contain little to no information that will actually be used by the tour guide,<sup>147</sup> nor does it explain the need for a licensing fee.<sup>148</sup> There is no necessity for them, and they have no effect on a tour guide’s behavior or a consumer’s experience once the guide is licensed, rendering them unconstitutional at the least.<sup>149</sup>

### C. *Speakers Beware*

The debate over requiring what is essentially a “license to speak” is not only significant to tour guides: “[a]s we move from an industrial to an informational economy, more and more and more Americans will earn their livings in occupations that consist primarily in speaking,” and “everyone who speaks for a living . . . from comedians to consultants to interior designers<sup>150</sup> to therapists” will be affected.<sup>151</sup>

The same economic theories explained above<sup>152</sup> apply to these professions as well, obviating the need for licenses as a means of quality control.<sup>153</sup> Take, for example, the case of Janet Cooke, an “ex-journalist.”<sup>154</sup> In 1980, Cooke wrote an article for *The Washington Post* titled “Jimmy’s World,” a harrowing report about an eight-year-old heroin addict.<sup>155</sup> Cooke was awarded the Pulitzer

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144. *See Edwards III*, 755 F.3d 996, 1003 (D.C. Cir. 2014).

145. *See, e.g., Kagan II*, 753 F.3d at 562; *Edwards III*, 755 F.3d at 1005.

146. *See, e.g.,* NEW ORLEANS, LA. CODE OF ORDINANCES § 30-1553 (2011); D.C. MUN. REGS. tit. 19, § 1203.1(c) (2010) (amended 2015).

147. Ghost or movie tours, for example. *See Edwards III*, 755 F.3d at 1005–06.

148. The fees do, however, raise revenue, which could explain the vehement argument for their “necessity.” *See supra* note 146 and accompanying text.

149. *See Edwards III*, 755 F.3d at 1009.

150. *See, e.g.,* *Locke v. Shore*, 682 F. Supp. 2d 1283 (N.D. Fla. 2010) (holding that state license requirement for the practice of non-residential interior design is constitutional and not even subject to First Amendment free speech scrutiny).

151. Evan Bernick, *The Circuit Splits Are Out There—and the Court Should Resolve Them*, 16 ENGAGE 36, 37 (2015) (footnote omitted).

152. *See supra* Sections III.A, III.B.

153. *See supra* Section III.A.

154. Janet Cooke, WIKIPEDIA, [https://en.wikipedia.org/wiki/Janet\\_Cooke](https://en.wikipedia.org/wiki/Janet_Cooke) (last visited Oct. 31, 2016). Cooke’s occupation is listed as “ex-journalist.” *Id.*

155. David A. Maraniss, *Post Reporter’s Pulitzer Prize Is Withdrawn*, WASH. POST, Apr. 16, 1981, at A1.

Prize for her work;<sup>156</sup> the only problem was that she fabricated the story.<sup>157</sup> After this fabrication was discovered, Cooke returned the Pulitzer and resigned.<sup>158</sup> Cooke's resignation was not due solely to her own disgrace for what she had done;<sup>159</sup> consumers (i.e., readers) relied on *The Washington Post* to maximize their utility, which in this instance, meant to report the truth.<sup>160</sup> *The Washington Post*, in turn, needed readers' business to maximize their own profits.<sup>161</sup> Cooke had to resign so the *Post* could regain credibility and remain competitive in the market.<sup>162</sup>

In 2013, the Discovery Channel aired a "documentary" entitled "*Megalodon: The Monster Shark Lives*."<sup>163</sup> This so-called documentary "strung viewers along as it searched for a mythical shark that went extinct millions of years ago."<sup>164</sup> The next year, Discovery aired "*Megalodon: The New Evidence*," which provided no actual evidence.<sup>165</sup> Viewers were disappointed, and vocalized that disappointment.<sup>166</sup> For example, one viewer tweeted: "Dear discovery channel, your fake documentary that you are trying to pass off as reality is upsetting."<sup>167</sup> In 2015, the head of development at Discovery Channel stated that "*Shark Week* will be focused more on science and research this time around,"<sup>168</sup> no doubt in an effort to keep viewers happy, and, in turn, keep the channel's "crown jewel" profitable.<sup>169</sup>

Another, more simplified illustration can be made of a stand-up comedian who, like a tour guide, speaks for a living. If George Carlin had not been funny, meaning he would not have been able to provide consumers with a quality experience, then he would not have been

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See supra* notes 104–05 and accompanying text.

161. *See supra* notes 104–05 and accompanying text.

162. *See supra* notes 104–07 and accompanying text.

163. Adam Epstein, *No More Megalodon: Discovery Channel Promises a More Scientific "Shark Week" This Year*, QUARTZ (July 6, 2015), <http://qz.com/445516/no-more-megalodon-discovery-channel-promises-a-more-scientific-shark-week-this-year/>.

164. *Id.*

165. *Id.*

166. Breeanna Hare, *Discovery Channel Defends Dramatized Shark Special 'Megalodon'*, CNN (Aug. 9, 2013, 7:37 AM), <http://www.cnn.com/2013/08/07/showbiz/tv/discovery-shark-week-megalodon/>.

167. *Id.*

168. Epstein, *supra* note 163.

169. *Id.*

able to maximize his profits.<sup>170</sup> He would have then had two choices: get funnier, or find a new job. Licenses are not necessary to regulate many professions; they regulate themselves.<sup>171</sup>

The above examples may seem obvious, but that is the point. Consumers react to unsatisfactory experiences and purchases because they know that this will cause the producers in the market to react, therefore lessening the likelihood of a repeat performance.<sup>172</sup> There certainly are professions where licensing is appropriate and necessary (e.g., medicine and law)<sup>173</sup>, but the line must be drawn somewhere, and the *Kagan* decision is blurring an already wavering line.<sup>174</sup> For example, in 2013, the Fourth Circuit upheld a licensing requirement for fortune tellers against a First Amendment challenge.<sup>175</sup> The Fourth Circuit applied one of the “least developed areas of First Amendment doctrine,”<sup>176</sup> the professional speech doctrine,<sup>177</sup> to determine whether or not the license requirement constituted a violation of the plaintiff’s First Amendment rights.<sup>178</sup> The court likened the licensing in question to the basic “regulatory requirements . . . appli[cable] to law [and] medicine.”<sup>179</sup> There is a clear logical disconnect between regulations in the legal and medical professions and regulations in the fortune telling profession.<sup>180</sup> Moreover, the Fourth Circuit applied the professional speech doctrine

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170. George Carlin was very funny. See Melissa Locker, *10 Genius George Carlin Jokes*, IFC (Sep. 19, 2013), <http://www.ifc.com/2013/09/10-genius-george-carlin-jokes> (“When it comes to comedy, George Carlin sets the gold standard.”).

171. See *infra* note 203 and accompanying text.

172. See e.g., Epstein, *supra* note 163.

173. See, e.g., *Medical Licensure*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician/medical-licensure.page> (last visited Oct. 31, 2016); *Bar Admissions Basic Overview*, AM. BAR ASS’N, [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html) (last visited Oct. 31, 2016).

174. See generally *Kagan II*, 753 F.3d 560 (5th Cir. 2014) (holding that New Orleans’ licensing requirements for tour guides do not violate the First Amendment).

175. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 561 (4th Cir. 2013).

176. David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 843 (2006).

177. Nicole Brown Jones, *Did Fortune Tellers See This Coming? Spiritual Counseling, Professional Speech, and the First Amendment*, 83 MISS. L.J. 639, 649 (2014) (“[T]he professional speech doctrine has been applied when there is a ‘collision between the power of government to license and regulate those who would pursue a profession . . . and the rights of freedom of speech . . . .’”) (quoting *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring)).

178. *Moore-King*, 708 F.3d at 569–70.

179. *Id.* at 570.

180. *Id.*

after recognizing that “[a]spects of [the plaintiff’s] business are clearly . . . for *entertainment* purposes.”<sup>181</sup> What does this mean, then, for other entertainers, especially in light of the decision in *Kagan*?<sup>182</sup>

More recently, and more dauntingly, in January 2016, South Carolina State Representative Mike Pitts introduced the “South Carolina Responsible Journalism Registry Law.”<sup>183</sup> If the bill becomes law:

[Any] person who in his professional capacity collects, writes, or distributes news or other current information for a media outlet, including an employee or an independent contractor, that is not registered would be fined \$25 to \$500, would be cited with a misdemeanor and could be imprisoned up to 30 days, based on the level of offense.<sup>184</sup>

Although many doubt this bill will ever come to fruition,<sup>185</sup> there is still cause for concern, as this is not even the first attempt at statutory journalism regulation in recent history,<sup>186</sup> and it likely will not be the last.<sup>187</sup> In *Kagan* and *Edwards*, both courts recognized the importance of integrity in the industry in question,<sup>188</sup> and it would be difficult, if not impossible, to find someone who does not value integrity in journalism. The same arguments that were made about tour guides and the need to protect tourists can be made about journalists and the need to protect subscribers and viewers, sending First Amendment jurisprudence down a slippery slope.<sup>189</sup>

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181. *Id.* at 567 (emphasis added).

182. *See Kagan II*, 753 F.3d 560 (5th Cir. 2014) (holding the New Orleans licensing requirement for tour guides did not violate tour guides’ First Amendment rights).

183. *See* Gavin Jackson & Schuyler Kropf, *Republican Lawmaker Says Journalists Should Face a Registry to Work in South Carolina*, POST & COURIER (Jan. 19, 2016, 2:27 PM), <http://www.postandcourier.com/article/20160119/PC1603/160119305/republican-lawmaker-says-journalists-should-face-a-registry-to-work-in-south-carolina>.

184. *Id.*

185. *Id.* (“Charles Bierbauer . . . was one of several media representatives in the state who said Pitts’ proposal had no chance of ever becoming reality.”).

186. Michigan Republican Senator Bruce Patterson introduced a similar bill in 2010, although the registry in that case would have been voluntary. *See* Jana Winter, *Michigan Considers Law to Register Journalists*, FOX NEWS (May 28, 2010), <http://www.foxnews.com/us/2010/05/28/michigan-considers-law-license-journalists.html>.

187. *See id.*; *see also* Jackson & Kropf, *supra* note 183.

188. *See supra* Sections II.B, II.C.

189. Winter, *supra* note 186.

As consumers, we all want what we pay for: reliable information about a new city, a spooky ghost tour, a comedic performance, an education, a revealing documentary, reliable journalism.<sup>190</sup> As journalists, tour guides, teachers, and speakers, we want the freedom to express ourselves without first having to take an exam or join a registry.<sup>191</sup> Luckily, market forces accommodate the wishes of consumers *and* producers, thereby obviating the need for costly and time-consuming government regulations that do much to restrict freedom of expression, and little to advance any valid state goal.<sup>192</sup>

#### IV. CONCLUSION

Unnecessary government regulations are frustrating no matter what is being regulated. Requiring tour guides to be licensed is both an unnecessary regulation and one that infringes upon citizens’ freedom of speech.<sup>193</sup> Requiring someone to pay for and pass a written exam about the history of the city in which they intend to work will not ensure quality control in the tourism industry,<sup>194</sup> so it is a good thing that market forces are able to pick up the slack.<sup>195</sup>

Because businesses, such as tour guide companies, are motivated by profit maximization,<sup>196</sup> and because consumers are motivated by utility maximization,<sup>197</sup> quality control is almost a non-issue.<sup>198</sup> This is especially true when rational consumers have access to ratings and reviews through websites like Yelp and TripAdvisor.<sup>199</sup> Market forces work in essentially the same manner in industries such as entertainment and journalism, but the holding in *Kagan* poses a threat to those industries as well.<sup>200</sup> An extension of regulatory schemes like those seen in *Edwards* and *Kagan*<sup>201</sup> to other “professional speaker” industries would be both wasteful and offensive to the First Amendment.<sup>202</sup>

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190. See *supra* notes 106–08 and accompanying text.

191. See *supra* Section III.B.

192. See discussion *supra* Part III.

193. See *supra* Section II.C.

194. See *supra* notes 89–91 and accompanying text.

195. See *supra* Sections III.A, III.B.

196. See *supra* note 105 and accompanying text.

197. See *supra* notes 106–07 and accompanying text.

198. See *supra* note 153 and accompanying text.

199. See *supra* notes 131–39 and accompanying text.

200. See discussion *supra* Section III.C.

201. See *supra* Sections II.B, II.C.

202. See discussion *supra* Section III.C.

Bill Main, owner of Segs in the City and original plaintiff in *Edwards*, perfectly summarized the debate, and the reason for his success in D.C., in four short sentences: “There is no need for these regulations. We will regulate ourselves. We have competitors. They will regulate themselves.”<sup>203</sup>

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203. The Heritage Foundation, *D.C. Tour Guide Fights City Regulations*, YOUTUBE (Oct. 6, 2015), <https://www.youtube.com/watch?v=5hqnv4A9av4>.