

## Note

# Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform

Joseph Sanderson†

*In recent years, states have subjected more occupations to burdensome regulatory requirements that are often imposed to fetter competition. There is broad agreement that many such restrictions reduce consumer welfare and impose particular burdens on economically disadvantaged groups. This Note examines why existing tools have failed to constrain this protectionist trend. Drawing upon U.S. and foreign experiences, it proposes a statutory reform that would preserve states' roles as primary regulators of occupations subject only to limited FTC oversight to prevent protectionism and that includes numerous procedural protections to avoid excessive preemption.*

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## Introduction

“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”<sup>1</sup>

Woodworking monks are menaces to society. Or so the Louisiana State Board of Embalmers and Funeral Directors claimed in seeking to put them out of business with the threat of criminal penalties in *St. Joseph Abbey v. Castille*.<sup>2</sup> Nor was this an idle threat: the democratically elected representatives of the Louisianan people had determined that a person who sells caskets without thirty semester hours of college-level education, a year of apprenticeship, and passing an examination<sup>3</sup> deserves to spend up to 180 days in jail or pay a substantial fine.<sup>4</sup>

That would be bad enough if it were an isolated occurrence. Yet across the United States, states have enacted similarly bizarre restrictions on a plethora of occupations. Louisiana’s ban on unlicensed sales of caskets is far from alone, and, beyond the funeral trade, hundreds of state statutes erect barriers to entry by placing onerous burdens on those who wish to work in a wide variety of occupations. Widely regarded as increasing the prices consumers pay and excluding the economically disadvantaged from well-paid jobs and condemned by progressive and libertarian commentators alike, these laws nonetheless not only remain on the books, but continue to proliferate at an alarming rate.

So far, the law has not found a satisfactory way to deal with state-level protectionist economic regulation. With a handful of exceptions (including the Fifth Circuit’s recent decision in the monks’ case), courts have upheld even the most egregiously protectionist licensing schemes as constitutional. And, in the post-New Deal constitutional order, it is difficult to see how they could do otherwise: whether or not intrastate economic protectionism *per se* is a legitimate state interest,<sup>5</sup> the lesson courts have drawn from the *Lochner* era<sup>6</sup> is

† Yale Law School, J.D., 2015 (expected).

1. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

2. 712 F.3d 215 (5th Cir. 2013), *aff’g* 835 F. Supp. 2d 149 (N.D. La. 2011), *cert. denied*, 134 S. Ct. 423 (2013).

3. LA. REV. STAT. ANN. § 37:842(A) (2013).

4. *Id.* § 37:850(A).

5. Compare Powers v. Harris, 379 F.3d 1208, 1218-25 (10th Cir. 2004) (concluding that intrastate economic protectionism is a legitimate state interest), and Katharine M. Rudish, Note, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485 (2012) (same), with *St. Joseph Abbey*, 712 F.3d at 222-23 (concluding that pure protectionism cannot be a legitimate state interest), *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *aff’g* 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000), *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. CIV.1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999), and Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023 (2006). See also Asheesh Agarwal & Jerry Ellig, *Buried Online:*

that they lack the institutional competence to determine whether there is some public-regarding justification hidden behind an ostensibly protectionist regulatory measure. Antitrust law has occasionally enabled the FTC to pursue incumbent-dominated agencies that restrict entry without clear statutory authority, but the low salience of state politics has meant that statutes often specifically codify barriers to entry, meaning that state action immunity protects protectionist legislation from antitrust attack. Indeed, by enabling state legislatures to authorize what the FTC has expressly forbidden, state action immunity amounts to a rare example of reverse preemption.

With constitutional law a weak weapon against abusive licensure rules and barring a fundamental revisiting of *Parker v. Brown*,<sup>7</sup> which seems almost as improbable as a return to *Lochner*-esque intensive judicial review of economic regulation, is there *anything* that can be done to counter the special interest laws that restrict entry to occupations? A real solution to the problems caused by excessive state occupational regulation will likely require federal legislation preempting certain licensing requirements (either directly or through an agency, most likely the FTC). But what should that legislation look like?

This Note will argue that the United States can learn from European moves to liberalize entry and mobility in the professions. In Part I, I set out the problem of occupational licensing, looking at its extraordinary growth and the wide range of critics it has attracted from all sides of the political spectrum. In Part II, I look at the existing toolkit for challenging protectionist licensing laws—constitutional challenges, statutory interpretation, antitrust, and the FTC’s section 5 authority—and find that each of them only invalidates a tiny and extreme minority of restrictions, such as where a licensing board acts without clear statutory authority. In Part III, I take a comparative look at efforts to scale back barriers to entry and other restraints on competition in the professions in the European Union generally and in the United Kingdom specifically. Drawing both upon those comparative lessons and upon earlier efforts to tackle occupational licensing in the United States, in Part IV, I propose substantive standards and procedural mechanisms to ensure a progressive liberalization of labor market restrictions that avoids *Lochner*-style second-guessing of states’ policy choices.

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*State Laws That Limit E-Commerce in Caskets*, 14 ELDER L.J. 283, 294-95 (2006) (criticizing *Powers*); Asheesh Agarwal, *Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry*, 3 J.L. ECON. & POL’Y 189 (2007) (urging stricter analysis within rational basis review); Marc P. Florman, *The Harmless Pursuit of Happiness: Why “Rational Basis with Bite” Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721 (2012).

While recognizing pure protectionism as a legitimate interest may be dubious, the debate is largely academic—it will only be in a very small number of cases where no other hypothetical basis for the law can be imagined. For caskets, promoting one-stop shopping for funeral supplies and services might well suffice. See *infra* text accompanying notes 64-67.

6. See *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

7. 317 U.S. 341 (1943).

## I. The License Economy

The saga of the casket-making monks of St. Joseph Abbey took place against the backdrop of a significant growth in occupational licensing. Once confined to a small number of professions—most notably physicians and attorneys<sup>8</sup>—licensure requirements have spread far and wide,<sup>9</sup> far beyond ‘professional’ occupations,<sup>10</sup> and have experienced particular growth in the last few decades. In the late 1980s, approximately eighteen percent of workers required a government license to work;<sup>11</sup> by 2000, that had grown to approximately twenty percent.<sup>12</sup> Since then that number has grown rapidly to an estimated twenty-nine percent in 2006.<sup>13</sup> That number, moreover, does not include less intrusive forms of labor market regulation such as certification and registration;<sup>14</sup> Morris M. Kleiner and Alan B. Krueger estimate that six percent of the labor force is subject to certification requirements.<sup>15</sup>

8. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 20-21 (2006); Marc T. Law & Sukoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723, 723-24 (2005); Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1097 (1973) (“During most of the nineteenth century, state legislatures invoked the police power only to regulate the traditional professions of law and medicine.”).

9. KLEINER, *supra* note 8, at 21. According to Lawrence Friedman, the first wave of occupational licensure started around the 1890s. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 489 (1965).

10. The exact distinction between “professions” and ordinary occupations has been a matter of some contention for a century if not more. See, e.g., Abraham Flexner, *Is Social Work a Profession?*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 576, 581 (1915) (proposing six criteria for a profession). Cogan summarizes Flexner’s six criteria as: “(1) intellectual operations coupled with large individual responsibilities, (2) raw materials drawn from science and learning, (3) practical application, (4) an educationally communicable technique, (5) tendency toward self-organization, and (6) increasingly altruistic motivation.” Morris L. Cogan, *The Problem of Defining a Profession*, 297 ANNALS AM. ACAD. POL. & SOC. SCI. 105, 106 (1955).

While some of these criteria may also be the basis for choosing entry restrictions over other forms of regulation (such as ex post negligence liability), see *infra* text accompanying notes 46-47, this Note does not consider the distinction a useful one for present purposes and will generally use the term “occupation” to cover both professional and non-professional occupations.

11. KLEINER, *supra* note 8, at 1.

12. *Id.*

13. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 678 (2010) (using Gallup survey data).

14. Government regulation of entry into occupations or professions has conventionally been viewed under a tripartite classification of licensure, certification, and registration. Licensure refers to restrictions that *prohibit practice* of an occupation without government approval, often on pain of civil or criminal penalties; certification refers to restrictions that *prohibit use of certain names or titles* without possessing certain qualifications; and registration refers to restrictions that *require the government be notified* of practice of an occupation. Each may have various fees and insurance or bonding requirements attached to it. See Morris M. Kleiner, *A License for Protection*, REGULATION, Fall 2006, at 17, 17.

15. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market* 10 (Nat’l Bureau of Econ. Research, Working Paper No. 14,979, 2009), <http://www.nber.org/papers/w14979>.

Over 800 occupations are subject to licensing requirements in at least one state.<sup>16</sup> To be sure, this number includes occupations existing exclusively in the public sector, where the licensure requirement is more closely analogous to an employer's hiring or sub-contracting criteria than true occupational regulation.<sup>17</sup> A similar analogy might also apply to publicly mandated but privately funded compliance positions.<sup>18</sup> But many are purely private, and the requirements are often highly burdensome.<sup>19</sup> The Institute for Justice observes that cosmetologists must undergo considerably lengthier training than EMTs.<sup>20</sup> Interior design, licensed in three states and the District of Columbia, requires an average of 2,190 days of education and practical experience.<sup>21</sup> And in light of the travails of the monks of St. Joseph, it comes as little surprise that the state that licenses the highest number of low-income occupations is Louisiana.<sup>22</sup>

This growth of licensure has taken place despite principled opposition across the political spectrum. Free market-minded conservatives and libertarians have long seen this type of labor market regulation as undesirable<sup>23</sup>—among others, Milton Friedman wrote profusely on occupational licensure.<sup>24</sup> Organized free market advocacy groups including the

16. See KLEINER, *supra* note 8, at 5 (citing 2004 data from the Council on Licensure, Enforcement and Regulation (CLEAR)); Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189, 190 (2000) (citing 1994 data from the Council of State Governments).

17. For example, a study by the Institute for Justice, the libertarian public interest law firm that represented the monks of St. Joseph, found that every state and the District of Columbia required a license to be a school bus driver or a transit bus driver. Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST. 10 (May 2012), [http://www.ij.org/images/pdf\\_folder/economic\\_liberty/occupational\\_licensing/licensetowork.pdf](http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf). Because school and transit bus drivers are generally either public employees or work for public contractors, these licenses are essentially analogous to requirements in the job application process or the contractor's contract. That might also be true for "Preschool Teacher," regulated in 49 states and ranked by the authors as the low-income job with the most onerous entry regulation. *Id.* at 16. There is some indication that a significant component of the increase in the proportion of the population covered by occupational licensing requirements is due to the growth of teacher licensing. See KLEINER, *supra* note 8, at 5 ("[F]rom 1984 to 1998, 26 states instituted state exams for entering teaching for the first time.").

18. Carpenter et al., *supra* note 17, at 10 (listing occupations, such as "milk sampler," that appear to be compliance-related).

19. See KLEINER, *supra* note 8, at 5 (listing a variety of regulated occupations and their requirements).

20. *Id.* at 29.

21. *Id.* at 12, 14.

22. *Id.* at 22 tbl.8 (seventy-one occupations). *But see* KLEINER, *supra* note 8, at 100 (finding that Louisiana licensed eighty-one occupations in 2000, ranking thirty-second; California was first with 178 and Connecticut second with 154).

Note, however, that Kleiner's count of licensed occupations did not analyze how burdensome the licensing was, nor whether the reason for a lower count was capacious definitions of each occupation. Ranking by sheer number of occupations is often misleading: for example, if a state required that every person involved in healthcare be a doctor, it would only be counted as one licensed occupation despite the highly anticompetitive effect of requiring a medical doctorate to do a medical assistant's work.

23. See, e.g., George Will, Op-Ed., *Will Supreme Court Answer Monks' Prayers?*, WASH. POST, Nov. 14, 2012, [http://articles.washingtonpost.com/2012-11-14/opinions/35505539\\_1\\_cask-ets-funeral-merchandise-funeral-homes](http://articles.washingtonpost.com/2012-11-14/opinions/35505539_1_cask-ets-funeral-merchandise-funeral-homes).

24. E.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (40th anniversary ed. 2002); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 65-66

Cato Institute, Institute for Justice, and Pacific Legal Foundation have been prominent critics of licensing laws.<sup>25</sup> On the progressive side, even commentators generally friendly to regulation often criticize licensure<sup>26</sup>: its burdens fall disproportionately on the economically disadvantaged, and it thus restricts social mobility for the sake of enriching special interests.<sup>27</sup> Even prominent interest groups such as Common Cause and the AARP have been unsuccessful in opposing anti-consumer licensing laws.<sup>28</sup>

There is a remarkably high degree of consensus behind the view that occupational licensing laws are primarily “designed to give some profession or occupation monopoly power”<sup>29</sup> and that it is “very difficult to argue that most professional licensure laws are primarily concerned with quality control.”<sup>30</sup> As Walter Gellhorn has observed, many licensing laws have little plausible relationship to the welfare of consumers. He noted protectionist requirements such as studying information of little practical relevance,<sup>31</sup> citizenship and

(England ed. 1980); MILTON FRIEDMAN & SIMON KUZNETS, *INCOMES FROM INDEPENDENT PROFESSIONAL PRACTICE* (1954); Simon Kuznets & Milton Friedman, *Incomes from Independent Professional Practice, 1929-1936*, NAT'L BUR. ECON. RES. BULL., Feb. 5, 1939; see also Kleiner, *Occupational Licensing*, *supra* note 16, at 190 (noting that Friedman's dissertation covered the issue of occupational regulation and licensing).

25. See, for example, S. DAVID YOUNG, *THE RULE OF EXPERTS* (1987), a Cato-published book.

26. E.g., Dane Stangler, *Occupational Licensing: How a New Guild Mentality Thwarts Innovation*, PROGRESSIVE POL'Y INST. (Mar. 2012), [http://progressivepolicy.org/wp-content/uploads/2012/04/03.2012-Stangler\\_Occupational-Licensing\\_How-A-New-Guild-Mentality-Thwarts-Innovation1.pdf](http://progressivepolicy.org/wp-content/uploads/2012/04/03.2012-Stangler_Occupational-Licensing_How-A-New-Guild-Mentality-Thwarts-Innovation1.pdf); Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG., June 12, 2012, <http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html> (discussing states that require years of cosmetology school to practice African hair braiding, which is usually not taught at the schools and which uses no chemical treatments).

Matthew Yglesias is a particularly vocal critic of occupational licensing. E.g., Matthew Yglesias, *Occupational Licensing Run Amok*, THINKPROGRESS (Dec. 3, 2005, 11:28 AM), <http://thinkprogress.org/yglesias/2009/12/03/195315/occupational-licensing-run-amok>; Matthew Yglesias, *Occupational Licensing Does Not Decrease Wage Dispersion*, THINKPROGRESS (Feb. 9, 2011, 8:27AM), <http://thinkprogress.org/yglesias/2011/02/09/199866/occupational-licensing-does-not-decrease-wage-dispersion>. Alan Krueger, who has co-authored studies critical of occupational licensing, *supra* note 15, and spoken to the press criticizing it, Goldstein, *supra*, was until recently Chairman of President Obama's Council of Economic Advisors.

27. See, e.g., James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1566-67 (2010) (observing that restrictions increase costs for those who can least afford it and exclude them from jobs that could potentially improve their economic position); Ginevra Bruzzone, *Deregulation of Structurally Competitive Services: Economic Analysis and Competition Advocacy*, in *THE ANTICOMPETITIVE IMPACT OF REGULATION* 5, 10 (Giuliano Amato & Laraine L. Laudati eds., 2001) (“Those who place high value on the increase in quality may be better off, but those who would have preferred the option to choose a lower quality at a lower price will be worse off.”).

28. Kleiner, *supra* note 14, at 17.

29. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 953 (1985).

30. *Id.*

31. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 13-14 (1976).

residency requirements,<sup>32</sup> English-only tests,<sup>33</sup> and “moral character” requirements that exclude those with criminal convictions from vast swathes of the legal labor market and hinder rehabilitation and reintegration.<sup>34</sup> Additionally, lack of reciprocity—between states and sometimes even between municipalities within the same state<sup>35</sup>—enhances the protectionist effect by fettering labor market mobility even for those already licensed elsewhere.<sup>36</sup>

Licensing restricts the supply of labor in an occupation and thereby generally increases the cost to consumers. Studies estimate the increase as between four and thirty-five percent.<sup>37</sup> Although some defenders of licensing have suggested that the removal of “lemons” from the market and increased quality justify the price increases,<sup>38</sup> the effect of prohibiting entry into the market is to create monopoly power. Indeed, because it is a monopoly with the power of the state behind it, it is immune from many of the weaknesses of private cartels (such as the risk a conspirator will defect<sup>39</sup>) and of self-regulation (such as the risk that excessive rent-seeking will lead to competition

32. *Id.* at 14-15. Citizenship requirements were held unconstitutional in 1973, *In re. Griffiths*, 413 U.S. 717 (1973), but there remains a circuit split about whether states can discriminate in licensing against non-resident aliens. Compare *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (permitting exclusion of non-resident aliens on temporary work visas), with *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012) (holding such a provision both unconstitutional on Equal Protection grounds and preempted by federal immigration law).

Federal law *requires* discrimination against undocumented or unauthorized immigrants, including DACA recipients, absent a state statute specifically permitting licensure. 8 U.S.C. § 1621(c)(1)(A) (2012); see *In re Garcia*, 315 P.3d 117 (Cal. 2014) (finding that California had passed such a statute); see also *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) (ruling that DACA recipients are not exempt from Section 1621).

33. Gellhorn, *supra* note 31, at 18.

34. *Id.* at 13 (“In some states virtually the only ‘profession’ open to a once-convicted felon is that of burglar; he is barred from other activities because he is presumed to be a person of bad moral character, regardless of the nature of the felony or its relevance to his intended occupation.”); see also Bill Keller, Op-Ed., *America on Probation*, N.Y. TIMES, Jan. 26, 2014, <http://www.nytimes.com/2014/01/27/opinion/keller-america-on-probation.html> (“Sherrilyn Ifill, president of the NAACP Legal Defense and Educational Fund, says another simple measure is to repeal rules that say a felon can’t be licensed as a barber or beautician.”); Am. Civil Liberties Union of Fla., *New ACLU Report Highlights Florida’s Failure to Address Continued Voter Disfranchisement Problems; Provides Solutions*, AM. CIV. LIBERTIES UNION (Mar. 11, 2009), <http://www.aclu.org/racial-justice-voting-rights/new-aclu-report-highlights-floridas-failure-address-continued-voter-dis> (“For many, the ability to obtain an occupational license to be able to work is impeded by the precondition that one must pay restitution before being eligible for civil rights restoration.”).

35. Gellhorn, *supra* note 31, at 15 (discussing *intra*-state non-reciprocal licensing of plumbers); see also Lawrence Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & ECON. 187 (1978) (discussing the impact of *inter*-state non-reciprocity in dentist licensing).

36. Furthermore, many states allow licensing laws to be enforced directly by a plaintiff against its competitor through unfair competition laws, eliminating prosecutorial discretion. *E.g.*, *Law Offices of Matthew Higbee v. Expungement Assistance Serv.*, 153 Cal. Rptr. 3d 865 (Ct. App. 2013) (holding that a licensed lawyer could sue to enjoin an unlicensed criminal record expungement service from doing business in California).

37. KLEINER, *supra* note 8, at 59 (collecting studies).

38. *Id.* As noted *infra* in text accompanying notes 42-45, the claim that quality increases as a result of licensing is dubious.

39. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 31 (1983).

from other self-regulatory entities).<sup>40</sup> Especially where substitutes are unavailable, licensing thus empowers incumbents to increase prices.<sup>41</sup>

Empirical studies generally have found that tougher licensing requirements have little to no effect on quality or even negatively impact quality.<sup>42</sup> For example, a study of Air Force recruits found that more restrictive state dental licensing laws were not correlated with better dental health<sup>43</sup>—perhaps because more restrictive laws made it more expensive to visit a dentist or perhaps because the tougher standards were irrelevant to standards of dental care. A study that analyzed teacher licensing requirements found significant *negative* correlation between requiring experienced teachers to be licensed and teacher quality in both public and private schools,<sup>44</sup> perhaps because the added cost of obtaining the requisite qualifications made other occupations comparatively more attractive for the highest quality potential entrants. An FTC study of television repairs in 1974 found fraud against consumers equally prevalent in New Orleans (with licensing) and Washington, D.C. (without).<sup>45</sup> If, as its proponents seem to suggest, the major justification for licensing is improving quality, then that justification seems at best empirically questionable.

That is not to say that the anticompetitive effects of occupational licensing are *never* justified. Licensing may, for example, provide a less intrusive alternative to precise regulatory rules of conduct when an occupation poses genuine risks of harm. In professions where individualized judgment is truly necessary to avoid harm to customers or bystanders,<sup>46</sup> precise rules may be impossible, and education requirements prior to entry may be a more effective and proactive way to prevent harm than the vague threat of sanctions (through tort law or otherwise) after harm occurs. This is particularly important in

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40. See Ségolène Barbou des Places, *Self-Regulation and the Professions: A Perspective from Regulatory Competition Theory*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 215, 224 (Fabrizio Cafaggi ed., 2006).

41. The monopoly rents extracted from consumers by protectionist licensing schemes need not go to incumbents—where a licensing scheme requires education, for example, the provider of that education can and will charge an artificially high price for it, thereby diverting some of the monopoly profits to the educator. See Bruzzone, *supra* note 27, at 10-11.

42. Kleiner collects and summarizes various studies, mostly showing at best weak evidence of enhanced quality in licensed occupations, with some suggesting that quality increases for high-income consumers but decreases for low-income consumers. KLEINER, *supra* note 8, at 52-56.

43. *Id.* at 9, 50-51.

44. Dale Ballou & Michael Podgursky, *Teacher Recruitment and Retention in Public and Private Schools*, 17 J. POL'Y ANALYSIS & MGMT. 393, 412, 414-15 (1998). The study found significant differences between *private* schools in states where private school teachers were subject to licensing and those where they were not. *Id.* at 412.

45. KLEINER, *supra* note 8, at 55.

46. See IDA E. WENDT, EU COMPETITION LAW AND LIBERAL PROFESSIONS: AN UNEASY RELATIONSHIP? 32 (2013) (“[T]he heterogeneity of the demand and the specificity of the services require professional judgment in individual cases.”).



professions where self-employment or sole practitioners are common<sup>47</sup> because sole practitioners may lack certain incentives that are provided by the more structured environment of the firm. There is a reason why Abraham Flexner, in a 1915 speech, identified these features as part of his definition of a profession,<sup>48</sup> and a reason why the earliest licensing requirements dealt with the paradigmatic professions of medicine and law,<sup>49</sup> long characterized by self-employment or otherwise collegial structures such as worker-owned businesses rather than strict hierarchies (although this collegiality has long since broken down).<sup>50</sup>

By conditioning permission to practice on educational requirements, licensing may increase the incentive to invest in education and thereby enhance quality<sup>51</sup>—at least if the mandated education has a genuine connection to the occupation for which it is required. Licensing might thus be a rational response if regulators believe that the market is undervaluing education, perhaps because rationally ignorant consumers cannot distinguish between a qualification from an elite institution and a diploma mill until too late, or because (as in the case of emergency room doctors, process servers, or nightclub bouncers) consumers have no choice in dealing with the licensee.

Licensing has long been used to provide authorities with the ability to tackle fraudsters proactively by reducing the need to prove individual acts of fraud; this rationale is particularly true when dealing with vulnerable individuals whose ability to judge the quality of service providers or to report fraud is limited. When California faced an epidemic of fraud by sham immigration consultants targeting desperate undocumented immigrants who were unlikely to report for fear of deportation, one of its responses was to require immigration consultants go through a relatively non-onerous licensing process.<sup>52</sup> This both dissuades fraudsters from entering the field and makes it easier to track them if they do. More broadly, as a response to informational asymmetry, licensing ensures consumers do not have to expend valuable time researching the quality of service providers and reassures the risk-averse that it

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47. See *id.* at 96 (observing that self-employment is common, and arguably a defining feature in many professions).

48. Flexner, *supra* note 10, at 10.

49. See Friedman, *supra* note 9, at 489 (discussing physicians).

50. See, e.g., Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079 (2005) (observing the commoditization of the legal profession).

51. KLEINER, *supra* note 8, at 7-8. *But see supra* text accompanying notes 42-45 (collecting studies that show minimal or negative effects on quality).

52. E.g., CAL. BUS. & PROF. CODE §§ 22440-22448 (West 2010) (requiring background checks and bonding); 2013 Cal. Legis. Serv. Ch. 571 (A.B. 35) (West). Bonding or mandatory insurance requirements are still barriers to entry, but since they in effect delegate regulation of quality to insurers, they tend to avoid some of the more egregious rent-seeking problems that can occur with public regulation.

is safe to participate in the market.<sup>53</sup> It is, however, often difficult to see what additional benefits licensing provides over a certification regime that regulates *descriptions* rather than *practices*.<sup>54</sup> Moreover, even where *some* license requirement might make sense, arguments in favor of such requirements do not necessarily justify an overly restrictive requirement of the type Gellhorn describes.

In summary, there is a broad consensus that many aspects of occupational licensing laws in force today are problematic by a wide range of measures. They are likely both Pareto and Kaldor-Hicks inefficient; the burdens they place on consumers and would-be competitors likely exceed the rents they provide to their beneficiaries. They appear to create distributional problems by disproportionately harming economically disadvantaged consumers and would-be competitors, and it appears that racial minorities are especially negatively affected.<sup>55</sup> Why, then, do these laws exist? Why have they not only persisted but greatly proliferated long after the abandonment of the pro-cartelization policies of the 1930s?<sup>56</sup>

Public choice theorists have long focused on occupational licensure as a prime example of organized groups using politics to enrich themselves at the expense of diffuse majorities. Stigler's seminal *The Theory of Economic Regulation* dealt extensively with licensing.<sup>57</sup> He suggested that factors such as occupation size, income, concentration in cities, and cohesion of the opposition might be relevant to determining the ability of an occupation to seek legal barriers to competition.<sup>58</sup> More recent research has focused on the idea that subnational politics is insufficiently salient to prompt diffuse majorities to mobilize against "regimes" of organized special interest groups and the

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53. KLEINER, *supra* note 8, at 1; *see also* Thomas G. Moore, *The Purpose of Licensing*, 4 J. L. & ECON. 93, 106-09 (1961) (discussing informational asymmetry as a key justification for paternalistic licensing policies).

54. Furthermore, in the Internet era, informational asymmetries are often not as extreme as they once were. Reviewers, both lay and expert, are often only a click away, and robust First Amendment protection for reviews means that providers have few means of illicitly manipulating their online reputations.

55. *See, e.g.*, Stuart Dorsey, *Occupational Licensing & Minorities*, 7 L. & HUM. BEHAV. 171 (1983); *but see* Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J. L. & ECON. 351 (2009) (arguing, contrary to much of the previous literature, that in certain professions where information about worker quality is hard to obtain, professional licensing might in fact have benefited traditionally excluded groups).

56. *See, e.g.*, MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 86 (1993).

57. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13-17 (1971).

58. *Id.* at 13-14.

legislators with whom they form coalitions.<sup>59</sup> Empirical studies also suggest that regulated occupations are more likely to donate to state legislators.<sup>60</sup>

## II. Challenging the License Economy: The Current Toolkit

### A. Constitutional Law

Constitutional challenges are not a realistic way of tackling the problem of excessive licensing laws: rarely successful, they can at most catch a few extreme outliers, and extending constitutional prohibitions in this area would have serious deleterious consequences. Most recent occupational licensing litigation has come in the form of constitutional challenges to one scheme or another, often brought by libertarian public interest law firms seeking to reintroduce intensive scrutiny of economic regulations.<sup>61</sup> Using litigation to attack the license economy seems tempting—after all, the low degree of electoral salience of occupational licensure laws combined with the high degree of organization exhibited by professions makes democratic reform more difficult.<sup>62</sup> Leaving aside theories that have never come close to judicial endorsement since Justice Field left the Court,<sup>63</sup> constitutional claims focus on substantive economic due process, with some Equal Protection, Dormant Commerce Clause, and occasional First Amendment arguments thrown in.

59. See Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 218-21 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing the public choice literature on the effects of federalism on the salience of subnational politics).

60. E.g., KLEINER, *supra* note 8, at 32-35 (studying Minnesota).

61. I do not propose to restate the overwhelming body of scholarship explaining why neo-Lochnerism is a terrible idea. Suffice it to say that intensive constitutional review of economic regulation “has been thoroughly discredited and repudiated in subsequent cases as well as by commentators on both the left and the right. . . . [C]ountless people were hurt—many were maimed or died—because for decades the government was denied the ability to adopt protective laws.” Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1150 (1992).

62. Cf. JULIANNA S. GONEN, LITIGATION AS LOBBYING: REPRODUCTIVE HAZARDS AND INTEREST AGGREGATION 5 (2003) (reviewing the literature on why interest groups pursue litigation as a strategy to achieve their policy goals); Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287, 287 (1968) (“These litigants are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are . . . disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy.”).

63. For example, the claim that an unenumerated right protected by the Ninth Amendment is “the prohibition of grants of domestic monopolies in the ordinary trades,” MICHAEL CONANT, THE CONSTITUTION AND ECONOMIC REGULATION 181 (2008), or that the Privileges or Immunities Clause of the Fourteenth Amendment prohibits state-granted monopolies, *contra* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (upholding a state-granted butchering monopoly, and specifically rejecting Justice Field’s dissenting view that the Fourteenth Amendment prohibited monopolies in ordinary trades and avocations). See also *Butchers Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., dissenting) (restating the view, again rejected by the Court, that the Privileges or Immunities Clause required ordinary trades be open to all citizens on equal terms).

Much has already been written on whether intrastate economic protectionism can be a legitimate state interest for due process purposes,<sup>64</sup> and I do not propose to add to it here. It is worth observing, however, that in *Williamson v. Lee Optical*—itself an occupational regulation case<sup>65</sup>—the Court observed that even if pure protectionism is illegitimate, most protectionist legislation will still survive. Because courts can hypothesize public interest bases to uphold a law,<sup>66</sup> they will often be able to find some non-protectionist policy goal. It need not be particularly convincing—it may even be remarkably obtuse.<sup>67</sup> It is not for the court to judge whether the imaginary public-minded legislators adopting the law were correct; all that is necessary is that legislators who had not taken leave of their senses could come up with some reason to pass it. For example, a casket sales licensing law could theoretically be based on a belief that one-stop funeral shopping will help consumers during a difficult time or that greater concentration in the funeral industry will produce additional investment.

In short, constitutional attacks on protectionist occupational licensing schemes will at most eliminate a few outlier statutes. The current circuit split over casket sales licensing requirements demonstrates just how marginal the role of constitutional litigation is: even the most egregious instances of protectionism stand a good chance of being upheld. Perhaps the occasional casket sales ban<sup>68</sup> or photography licensure requirement<sup>69</sup> will fall to a substantive due process challenge; perhaps from time to time courts will find that blanket, non-discretionary bans on licensing certain classes of persons are so arbitrary as to violate Equal Protection;<sup>70</sup> perhaps a handful of licensing laws intrude sufficiently into the speech sphere as to create First Amendment problems.<sup>71</sup> The vast majority of licensing laws—even patently absurd ones

64. See *supra* note 5 and sources cited therein.

65. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (upholding a special interest law designed to favor ophthalmologists and optometrists over opticians).

66. *Id.* at 487 (hypothesizing reasons why the Oklahoma legislature may have passed the law).

67. See *id.* at 487 (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages . . .”); *id.* at 488 (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *id.* (“For protection against abuses by legislatures the people must resort to the polls, not to the courts” (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876))); *cf.* Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS 249 (Mark De Wolfe Howe ed., 1953) (“I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It’s my job.”).

68. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *aff’g* 110 F. Supp. 2d 658 (E.D. Tenn. 2000); *contra Powers v. Harris*, 379 F.3d 1208, 1218-25 (10th Cir. 2004).

69. *State v. Ballance*, 51 S.E.2d 731 (N.C. 1949); *cf.* *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (striking archaic and arbitrarily enforced regulation prohibiting jitneys in Houston).

70. *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013) (striking down blanket, non-discretionary prohibition on licensing individuals with felony convictions).

71. *But see, e.g., Edwards v. District of Columbia*, 943 F. Supp. 2d 109 (D.D.C. 2013) (upholding against First Amendment challenge a licensing statute that required tour guides to pass an

such as Louisiana’s florist licensing scheme<sup>72</sup>—will survive constitutional challenge. Constitutional challenges are not a realistic way to reform the license economy.

### B. Statutory Interpretation

At first glance, statutory interpretation looks like a useful weapon against protectionist licensing laws; in practice, it is almost toothless. Critics of licensing often point to the captured-by-design boards that administer licensing schemes—often composed wholly or largely of incumbents in the regulated industry, they are intended to favor incumbents when challenged by potential new entrants. Some organic statutes even compel governors to choose appointees from a list endorsed by a professional association, allowing decidedly partial lobbying groups to control the board’s composition.<sup>73</sup> The theory therefore goes that interpreting the substantive statutes they administer in a public-regarding way would constrain the boards’ discretion to favor incumbents.

The idea of statutory interpretation as a bulwark against special interest legislation is not a new one. Jonathan Macey<sup>74</sup> and Susan Rose-Ackerman<sup>75</sup> have each proposed the idea of using interpretation as a counter to “hidden-implicit”<sup>76</sup> special interest legislation—statutes “couched in public interest terms to avoid the political fallout associated with blatant special interest statutes.”<sup>77</sup> This view, which focuses on the incentives of the enacting legislators to claim credit for being virtuous servants of the public good while actually serving special interests, envisages the courts as “structur[ing] legislative deliberations to produce greater accountability.”<sup>78</sup>

examination and pay various fees), *appeals docketed*, Nos. 13-7063 & 13-7064 (D.C. Cir. Apr. 25, 2013); *Edwards v. District of Columbia*, 765 F. Supp. 2d 3 (D.D.C. 2011) (denying the earlier request for a preliminary injunction); *Kagan v. City of New Orleans*, 957 F. Supp. 2d 774 (E.D. La. 2013) (upholding a licensing statute that included examinations, fees, and drug testing requirements for tour guides), *appeal docketed*, No. 13-30801 (5th Cir. July 30, 2013).

72. *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005) (upholding florist licensing), *vacated as moot*, 198 F. App’x 348 (5th Cir. 2006) (finding that all plaintiffs had either retired or left Louisiana in the wake of Hurricane Katrina with no plans to return).

73. *E.g.*, 1914 La. Acts, No. 66 §§ 1-2 *reprinted in* STATE TIMES (Baton Rouge), July 11, 1914, at 6 (licensing funeral directors and providing for gubernatorial appointments from list of twenty-five provided by professional association).

74. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

75. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE REGULATORY STATE* 58-62 (1992).

76. Macey, *supra* note 74, at 232-33; *see also* ROSE-ACKERMAN, *supra* note 75, at 58-59 (discussing Macey’s proposal and suggesting certain modifications).

77. Macey, *supra* note 74, at 233.

78. ROSE-ACKERMAN, *supra* note 75, at 62.

The Fifth Circuit's certified question to the Louisiana Supreme Court in *St. Joseph Abbey* displayed some interest in this approach.<sup>79</sup> But the same case displays the extraordinarily limited power of statutory interpretation: like many states, Louisiana has codified many of the most anticompetitive rules. The statute unequivocally states that "funeral directing" includes "any service whatsoever connected with . . . the purchase of caskets."<sup>80</sup> It is hardly surprising, then, that the Fifth Circuit was forced to abandon the interpretation approach in its later opinion<sup>81</sup>—the text is just too clear. Of the twelve states whose funeral director licensing laws appear to give licensees a monopoly over casket sales,<sup>82</sup> in just one—Texas—has statutory interpretation been successfully used to defeat the restriction.<sup>83</sup> One can certainly argue that courts should limit special interests' spoils to those they have extracted explicitly, but that is again an approach that has only a slight effect on the margins.

### C. Antitrust and Section 5: The State Action Immunity Problem

Antitrust is similarly a weak weapon against licensing protectionism. The antitrust world is well aware of licensing's anticompetitive effects. Leading figures at the Federal Trade Commission have frequently discussed the problems of public restraints on competition—as one former FTC Chair put it:

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.<sup>84</sup>

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79. *St. Joseph Abbey v. Castille*, 700 F.3d 154, 165-68 (5th Cir. 2012); *id.* at 165 ("[I]n the discharge of our duty to avoid constitutional decisions we are to inquire if state law can reasonably be read to offer a state law footing for our judgment.").

80. LA. REV. STAT. ANN. § 37:831(42) (2013). The Fifth Circuit's Order misreads the text of the statute. 700 F.3d at 166-67 (indicating that the court believed that the statute defined funeral directing as operation of a funeral home, with all the provisions following the "or" being illustrations of what operating a funeral home meant).

81. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220 (5th Cir. 2013).

82. See ALA. CODE § 34-13-1(16) (2013); IDAHO CODE ANN. § 54-1102(11)(c) (2013); LA. REV. STAT. ANN. § 37:831(42) (2013); ME. REV. STAT. tit. 32, § 1400(5) (2013) (also requiring a funeral service license for "helping to meet the emotions and disposition of the bereaved," a category that would be alarmingly broad if understood literally); MINN. STAT. § 149A.02(19)-(22) (2013) (applying licensing indirectly through location-based sales requirement); OKLA. STAT. tit. 59, § 396.2(2)(d) (2013); TEX. OCC. CODE ANN. § 651.001(7) (West 2013); VT. STAT. ANN. tit. 26, § 1211(a)(4)(B) (2013); VA. CODE ANN. § 54.1-2800 (2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *aff'g* 110 F. Supp. 2d 658 (E.D. Tenn. 2000); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. CIV.1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

83. Re: Whether a Casket Constitutes "Funeral Merchandise" for Purposes of Chapter 651 of the Occupations Code and Related Questions, Tex. Att'y Gen. Op. JC-0505, at 2 (2002).

84. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005).

Indeed, even absent the enforcement of antitrust law against private cartels, there would still be an enormous incentive for entities to seek protectionist legislation:

[R]ational firms are likely to *prefer* public restraints. Public restraints can be far more effective at restraining competition. Public restraints are often open and notorious. Public restraints also solve the entry problem more efficiently. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides only a few licenses. . . . While cheating often undermines private cartels, those who cheat on public cartels, once identified, can be sanctioned through the government.<sup>85</sup>

It comes as little surprise, then, that the FTC has repeatedly taken on occupational licensing schemes. Once again, its successes have been minor and marginal; on the core issue of whether the Sherman Act or Federal Trade Commission Act can be used against state protectionism, the FTC's defeat has been almost total.

The reason for these failures is state action immunity. First enunciated in 1943,<sup>86</sup> the doctrine holds that Congress did not intend to preempt state-authorized anticompetitive behavior. The Sherman Act's legislative history strongly supports that conclusion.<sup>87</sup> It has been said to represent values of federalism<sup>88</sup> and regulatory experimentation<sup>89</sup> as policy values that may outweigh antitrust legislation's usual preference for maximizing economic welfare.

But these values should not blind us to the possibility of abuse. As currently formulated, once a *state* decides to rob Peter to pay Paul—to favor incumbents over consumers and competitors—the antitrust laws stand silent. State action immunity amounts to a system of (*qualified*) *reverse preemption*<sup>90</sup>:

85. *Id.*; accord Cooper & Kovacic, *supra* note 27, at 1558-62; *id.* at 1560-61 (quoting Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 385); *id.* at 1561 (quoting Ulf Bøge, President, Bundeskartellamt, Speech on the Occasion of the Opening Session of the Seoul Competition Forum 2004: State-Imposed Restrictions of Competition and Competition Advocacy 2 (Apr. 20, 2004), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/04Seoul\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/04Seoul_e.pdf)).

86. *Parker v. Brown*, 317 U.S. 341 (1943).

87. *See, e.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 200, at 171-73 (4th ed. 2013) (discussing the Sherman Act's legislative history and context).

88. *See, e.g.*, Frank P. Spinella, Jr., *Antitrust's "State Action" Doctrine and the Policy of Commerce Clause*, 39 ANTITRUST BULL. 653, 657 (1994) ("The expansion of the *Parker* doctrine is indicative of the Supreme Court's desire to promote federalism as a paramount principle.").

89. *See, e.g., id.* ("While competitive markets are generally conducive to efficiency, this is not perceived as an absolute, to which conflicting state interests must always give way, because antitrust may, in certain situations, be less conducive to efficiency than state regulation.").

90. *Cf.* 1 AREEDA & HOVENKAMP, *supra* note 87, ¶ 217b, at 384 (describing most antitrust preemption as "conditional"). I prefer to describe it as qualified or conditional *reverse preemption*: ordinarily, a competitive market is the baseline; states are the entities that are taking the

by adding the additional element of state authorization, otherwise-prohibited arrangements become entirely immune from antitrust scrutiny, however nakedly protectionist they may be, at least as long as the law avoids delegating “*unsupervised* private power to violate antitrust laws.”<sup>91</sup>

Current state action doctrine centers around whether the state in fact authorized the restraint on competition, with additional active supervision requirements where the scheme “is carried out by others pursuant to state authorization.”<sup>92</sup> Because states generally speak in the form of legislative action,<sup>93</sup> authorization in state action doctrine is in many ways analogous to statutory interpretation, although the doctrine appears to have moved from an *Erie*<sup>94</sup>-like deference to state sovereignty<sup>95</sup> to a view that federal law imposes some additional substantive standards.<sup>96</sup> Courts look for “clear articulation”<sup>97</sup> when states seek to authorize anticompetitive behavior, a standard that is strikingly similar to clear statement rules that apply in other statutory interpretation settings. These rules tend to reflect core principles of the political

action that deviates from that baseline; and, at least in the licensing context, most restrictions post-date the enactment of the Sherman Act. *See supra* notes 8-16 and accompanying text.

91. 1 AREEDA & HOVENKAMP, *supra* note 87, ¶ 217b, at 384 (emphasis added). As the treatise notes, active supervision of delegation has been a particular focus of litigation. *Id.*

92. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). This has also been described as a test of “genuine public control” when the power to restrict competition has been delegated. 1 AREEDA & HOVENKAMP, *supra* note 87, ¶ 217, at 392.

93. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1, 7 (1982) (discussing how the judicial role in policy-making has been overwhelmingly displaced by legislatures, whose acts remain on the books long after the reason they were enacted has passed).

94. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The “*Erie* problem” of interpreting state statutory law in federal courts (and vice versa) is not unique to the antitrust state action context; it is a constant problem in a federalist system and one with which courts may be failing to engage adequately. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (arguing that federal courts often fail to apply state statutory interpretation law to state statutes and may not even recognize that an “*Erie* question” exists).

95. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (“In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”).

*Parker* came from an era when suspicion of the public-mindedness of regulators was far less prevalent in elite legal circles than it is today, now that we have a greater understanding of the incentives that motivate regulators and regulated parties alike. *See, e.g.*, John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715-19 (1986) (discussing *Parker*’s public-interest model of regulation).

96. *See* Wiley, *supra* note 95, *passim*; *see also* Cmty. Commc’ns Co. v. City of Boulder, 455 U.S. 40, 54-56 (1982) (holding that Colorado’s Home Rule Amendment, which [presumptively] authorized anticompetitive behavior by municipalities under state law within its general grant of power, was insufficient to confer federal immunity because it did not affirmatively deal with the type of behavior Boulder engaged in).

Federal law also imposes a lower bar for those claiming immunity in at least one respect: it is not enough that a technical violation of state law would render the act vulnerable to state law challenge. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 371-72 (1991).

97. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99-100 (1980) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)).



order, and as such they have been called “quasi-constitutional.”<sup>98</sup> The Sherman Act<sup>99</sup> has been likened to a “constitution of the market”,<sup>100</sup> because anticompetitive practices go against the “fundamental national values of free enterprise and economic competition,”<sup>101</sup> courts should only conclude that state legislatures have deviated from that norm when they do so clearly and unequivocally.

Once that clear authorization exists, however, the courts do not scrutinize legislatures’ motives or check to see whether the restraints on competition exceed those necessary to achieve the stated policy goal. If state action immunity exists, that is the end of the matter. Good reasons exist for this—most notably, avoiding neo-*Lochnerism* under the guise of “substitution of ‘antitrust’ for ‘due process’ and ‘economic efficiency’ for ‘liberty of contract.’”<sup>102</sup> But in any case, as a means of controlling protectionist *statutes*, antitrust thus fails for largely the same reason statutory interpretation fails: usually, there is just no latitude for interpreting the statutory text as anything other than an unequivocal limit on competition.

Through the active supervision requirement, antitrust does still have some bite against delegates that exercise *discretion* in a protectionist manner. The Supreme Court has emphasized the need for evidence of *state* independent judgment, as opposed to merely rubber-stamping private protectionism.<sup>103</sup> Incumbent-dominated boards acting pursuant to ambiguous statutory authority have become particular targets of the FTC’s efforts to curtail state action antitrust immunity.<sup>104</sup> A prime example is the Commission’s enforcement actions against the South and North Carolina dentistry boards when they attempted to regulate hygienists and tooth-whitening respectively without clear statutory authority, a dispute that has now drawn the attention of the Supreme Court.<sup>105</sup> While some have criticized the FTC for insufficient regard to

98. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

99. Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)).

100. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 120 (2010) (“As amended and expanded, the Sherman Act is an important foundation of America’s constitution of the market.”).

101. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013); *see also* ESKRIDGE & FERREJOHN, *supra* note 100, at 121 (discussing the “enduring principle” of the Sherman Act).

102. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 488 (1987).

103. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

104. *See, e.g.*, J. Thomas Rosch, Commissioner, FTC, 2012 Lewis Bernstein Memorial Lecture at St. John’s University School of Law: Returning the State Action Doctrine to Its Moorings (Oct. 3, 2012), <http://www.ftc.gov/speeches/rosch/121003stateaction.pdf>.

105. *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359 (4th Cir. 2013) (denying North Carolina’s petition for review of the Commission’s denial of state action immunity), *cert. granted*, 134 S. Ct. 1491 (Mar. 3, 2014) (No. 13-534); *S.C. State Bd. of Dentistry*, Docket No. 9311 (F.T.C. Sept. 11, 2007) (decision and order), <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

federalism and democratic concerns,<sup>106</sup> it is increasingly clear that the Commission realizes that protectionist action by incumbent-dominated licensing boards is a matter of concern, and it is pushing for financially interested boards to be treated more like private parties and less like the state.<sup>107</sup> That is a welcome development, and one hopes that the trend of courts subjecting self-regulators to an active supervision requirement will continue.<sup>108</sup> In the North Carolina dentistry case, for example, the Fourth Circuit expressly held that “a state agency operated by market participants must show active state involvement,”<sup>109</sup> and it found active supervision lacking. But it is, once again, only a marginal limit on the ability of states to restrict competition on flimsy pretexts, and even that marginal limit may vanish should the Supreme Court reverse.

For a while, it appeared that the FTC’s authority over unfair or deceptive acts or practices (UDAP) in interstate commerce<sup>110</sup> might provide an opportunity to take on elements of state regulatory schemes that harmed consumers. With its rulemaking power confirmed by the D.C. Circuit in *Petroleum Refiners*<sup>111</sup> and expanded under the Magnuson-Moss Act<sup>112</sup> (albeit subject to relatively burdensome procedural requirements<sup>113</sup>), the FTC promulgated a series of rules affecting professions where state regulators were notoriously industry-friendly—among them funeral directors<sup>114</sup> and ophthalmologists.<sup>115</sup> But, while the courts upheld the Commission’s power to regulate *private* professional associations<sup>116</sup> and to impose *additional* requirements on businesses regulated by state law,<sup>117</sup> they ruled that the Commission lacked the power to *preempt* state laws that required practices that

106. E.g., Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 739-40 (2012) (“[T]he state action doctrine originates in a concern for federalism, not efficiency.”); see also Cooper & Kovacic, *supra* note 27, at 1589 (“[I]f citizens, through their elected representatives, choose to forego the benefits of competition to pursue another value, they should be allowed to do so.”).

107. See Cooper & Kovacic, *supra* note 27, at 1576-78 (discussing recent appellate opinions on the status of industry-dominated boards).

108. *Id.*; see Wash. State Elec. Contractors Ass’n v. Forrest, 930 F.2d 736, 737 (9th Cir. 1991) (en banc) (per curiam) (finding that “the private members [of the Apprenticeship Council] have their own agenda which may or may not be responsive to state labor policy” and remanding for application of the active supervision test).

109. *N.C. State Bd. of Dental Exam’rs*, 717 F.3d at 369.

110. 15 U.S.C. § 45 (2012).

111. *Nat’l Petroleum Ref. Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

112. Pub. L. 93-637, 88 Stat. 2183 (codified in scattered sections of 15 U.S.C.).

113. 15 U.S.C. § 57a (2012) (detailing special procedures to be followed in UDAP rulemakings). Compared to the rules applicable to informal rulemaking under the Administrative Procedure Act, 5 U.S.C §§ 551-559 (2012), the Magnuson-Moss rules are more burdensome.

114. Funeral Industry Practices, 47 Fed. Reg. 42260 (Sept. 24, 1982) (codified as revised by 59 Fed. Reg. 1611 (Jan. 11, 1994) at 16 C.F.R. Part 453).

115. Ophthalmic Practice Rules, 54 Fed. Reg. 10,285 (1989).

116. E.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

117. *Harry & Bryant Co. v. FTC*, 726 F.2d 993 (4th Cir. 1984) (upholding the Funeral Rule); *FTC v. Hughes*, 710 F. Supp. 1524 (N.D. Tex. 1989) (likewise).

it considered unfair or deceptive.<sup>118</sup> The D.C. Circuit “conclude[d] that the state action doctrine is applicable to limit the FTC’s rulemaking authority,”<sup>119</sup> found no clear statement in the FTC Act granting the power to preempt,<sup>120</sup> and accordingly invalidated the FTC’s preemption of state optometry law.<sup>121</sup> The First Circuit, on similar grounds, found state action immunity precluded preemption in FTC Act adjudications.<sup>122</sup> Today, then, UDAP authority is at least as limited as the Sherman Act in its applicability to state restrictions on competition.

While changes to state action immunity doctrine have often been proposed, none has come to fruition.<sup>123</sup> What can be done? A look at other systems’ approaches to scrutinizing protectionist occupational regulations may inform a solution.

### III. Finding New Tools: A Comparative Approach

The European Union has long been focused on the problem of geographic mobility and barriers to competition. But it has only been in the last decade that, with the growth of the Union’s powers and renewed focus on economic liberalization, it has begun to make serious efforts to tackle the morass of mutually contradictory occupational regulations that long characterized many member states’ labor markets. The European model—a combination of regulatory harmonization and standards that aim to preserve competition to the greatest extent possible when member states pursue other policy goals—can

118. *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990). For more detailed analysis of the case, see Tod H. Cohen, *Double Vision: The FTC, State Regulation, and Deciding What’s Best for Consumers*, 59 GEO. WASH. L. REV. 1249 (1991). Cohen describes the case as “a significant setback for the FTC’s efforts to protect consumers from anticompetitive state regulation.” *Id.* at 1250. For the view that the FTC has preemptive power under the FTC Act, see, for example, Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225, 235-43, which argues that the procedural protections of the Magnuson-Moss Act were inserted precisely in order to allow preemption under certain conditions, and Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976), which argues that *Parker* should not apply to the FTC Act but that the FTC should consider state interests.

119. *California Optometry*, 901 F.2d at 981.

120. *Id.* at 980-82.

121. *Id.* at 982.

122. *Mass. Furniture & Piano Movers Ass’n, v. FTC*, 773 F.2d 391, 392 (1st Cir. 1985).

123. See Cooper & Kovacic, *supra* note 27, at 1585-89 (examining state action immunity in depth and discussing several reform proposals); see also ANTITRUST MODERNIZATION COMM’N, REPORT & RECOMMENDATIONS 343-47, 366-77 (2007) (suggesting minor refinements related to spillover effects and states acting as market participants, and concurring in the FTC’s concerns about insufficient adherence to authorization and active supervision standards, but not proposing major reforms to state action doctrine). One failed proposal that is particularly noteworthy suggested courts look at whether state laws “obviously went further than was necessary to achieve [their] avowed purpose,” Gregory J. Werden & Thomas A. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 61 (1982), a standard that bears some resemblance to the substantive standard proposed in Section IV.A but without the institutional and procedural protections I propose.

serve as a model for federal intervention to control the license economy in the United States.

The United Kingdom, meanwhile, provides a model for an institutional approach to regulatory reform to promote competitive markets. Over the last decades, the Office for Fair Trading (and its predecessor, the Directorate-General for Fair Trading) has conducted wide-ranging reviews of professional regulation to ensure that restrictions serve the public interest rather than the interests of licensed professions. Its reports have been instrumental in persuading Parliament to repeal exceptions from competition laws that applied to the professions, and the threat of full-scale competition investigations has prodded professions to lower barriers to entry.

Additionally, Australia has since 1995 required state and territorial governments to engage in wide-ranging reviews of the competitive effects of all legislation in force under cost-benefit and necessity standards.<sup>124</sup> Because my familiarity with the institutional arrangements and constitutional context in Australia is limited, I will not analyze the Australian experience in depth in this Part; I will, however, mention certain aspects of it in passing in Part IV.

#### A. European Professional Licensing

The “economic constitution”<sup>125</sup> of the European Union has developed out of the Union’s origins as an economic community of states. At the heart of this regime lie the “four freedoms”<sup>126</sup>: free movement of goods,<sup>127</sup> free movement of services,<sup>128</sup> free movement of persons,<sup>129</sup> and free movement of capital.<sup>130</sup> Since the earliest days of the European Community, fostering a competitive marketplace has been viewed as vital in creating an integrated, single market that transcends state borders.<sup>131</sup> Having fought to dismantle tariffs, quotas, and similar restrictions on cross-border trade, early European leaders sought to avoid private agreements that had similar effects.<sup>132</sup> Although, reflecting the Union’s origins as an association of States with high levels of nationalization,

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124. See *infra* notes 200-203, 221 and accompanying text.

125. See, e.g., MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998).

126. See, e.g., CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (3d ed. 2010).

127. Treaty on the Functioning of the European Union arts. 34-35, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

128. *Id.* arts. 56-57.

129. *Id.* art. 45 (workers); *id.* art. 49 (establishment).

130. *Id.* art. 63.

131. See GIORGIO MONTI, *EC COMPETITION LAW* 39 (2007).

132. *Id.*; see also Julio Baquero Cruz, *The State Action Doctrine, in EC COMPETITION LAW: A CRITICAL ASSESSMENT* 551, 558-59 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2007) (describing free movement rules as “no substitute . . . but a complement” to competition law applied to states).

the treaties are formally neutral between public and private ownership,<sup>133</sup> the principle of free competition in the internal market is at the core of the Union.<sup>134</sup>

Occupations that require licenses—in Euro-speak, “liberal professions”<sup>135</sup>—remain common in all EU member states. Wendt lists a couple of dozen used in Commission documents, plus a catch-all “other” category for other regulated professions.<sup>136</sup> An analysis recently prepared by the Commission in a review of its regulations regarding mutual recognition of professional qualifications contained a bizarre list of 196 occupations subject to restrictions in only one member state,<sup>137</sup> including “laundry maid,”<sup>138</sup> “wine taster,”<sup>139</sup> and “kennel manager.”<sup>140</sup> Montenegro licenses hearse-drivers,<sup>141</sup> the Netherlands, post-mortem animal supervisors.<sup>142</sup> A Commission website listing regulated professions had no fewer than 445 categories in May 2013.<sup>143</sup> So far, so bad.

But the Union’s increasingly successful efforts to mitigate the burden of occupational regulation differentiate it from the United States in a positive way. Since its early days, the Union has increasingly sought to harmonize disparate state regulatory requirements; more recently, commentators have suggested that it has moved to reduce national regulations in certain sectors altogether.<sup>144</sup> It has done so through a mixture of preemptory regulation,<sup>145</sup> coordination of member state efforts, and judicial intervention.

133. IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 880 (5th ed. 2010).

134. That said, the Treaty of Lisbon formally moved the principle of competition from being an objective of the Union to a Protocol to the Treaties. Damien Gerard, *EU Competition Policy After Lisbon: Time to Review the ‘State Action Doctrine’?*, 1 J. EUR. COMPETITION L. & POL’Y 202, 202 (2010). The effect is “largely rhetorical,” *id.*, because the substantive Treaty provisions on competition remain intact and the Protocol’s wording is identical to that of the objective in the Treaties pre-Lisbon, *id.*

135. WENDT, *supra* note 46, at 1. As Wendt notes, this jargon is not exactly familiar to native speakers of English. *Id.*

136. *Id.* at 6.

137. *Impact Assessment*, EUR. COMMISSION 48-53 (2011), [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/impact\\_assesment\\_part2\\_sec1558/\\_impact\\_assesment\\_part2\\_sec1558\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/impact_assesment_part2_sec1558/_impact_assesment_part2_sec1558_en.pdf).

138. *Id.* at 52 (Portugal).

139. *Id.* at 50 (Slovenia).

140. *Id.* at 51 (Netherlands).

141. *Id.*

142. *Id.* at 49.

143. *Regulated Professions Database*, EUR. COMMISSION, [http://ec.europa.eu/internal\\_market/qualifications/regprof/index.cfm?action=stat\\_ranking&b\\_services=false](http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?action=stat_ranking&b_services=false) (last visited May 4, 2013). The number appears to have declined to 387 since then—perhaps a sign of progress.

144. *See infra* note 213.

145. Strictly speaking, “Regulation” is a European term of art for a legislative action of the Union that has direct effect without requiring intervening state action. Here, except when identifying particular Regulations, I will use “regulation” in the generic sense to mean a regulatory act.

In principle, there is no state action immunity in European law: states are under an obligation to ensure that the competition rules are effective, and therefore they *theoretically* cannot pass legislation authorizing ‘undertakings’ to act anticompetitively.<sup>146</sup> This is the *effet utile* rule—even when a Treaty provision is not addressed to them, member states may not stand in the way of it taking effect.<sup>147</sup> However, this potentially very broad principle has been boiled down to three specific rules: that states may not require or incentivize anticompetitive agreements, that states may not delegate legislative power to non-independent actors without active and independent public supervision,<sup>148</sup> and that states may not act to place an undertaking in an economically dominant position.<sup>149</sup>

While European competition law has only rarely been used to invalidate national professional regulation,<sup>150</sup> the few cases where it has been raised may be instructive for developing a system to tackle anticompetitive licensing rules without sacrificing the benefits of experimentation that federalism brings. In the *Wouters* case, a Dutch lawyer sought to challenge professional rules forbidding lawyers and accountants from working for the same firm.<sup>151</sup> The court determined that the Orde van Advocaten, the professional association and disciplinary body for lawyers, was an association of undertakings and thus directly subject to competition law.<sup>152</sup> The fact that the Orde was a public body under Dutch law did not change this.<sup>153</sup> But, nevertheless, the rule could survive because:

[N]ot every agreement . . . which restricts the freedom of action of the parties . . . necessarily falls within the prohibition . . . [A]ccount must be taken of its objectives, which are here connected with the need to make rules . . . in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience . . . . It has then to be considered whether the

146. Case 13/77 GB-Inno-BM [1977] E.C.R. 2115, ¶ 31, ¶ 35. The evolution of the doctrine is traced by Baquero Cruz, *supra* note 132, at 560-80.

147. The rule has been criticized as “a real ‘stretch’ (if not a ‘*contra legem*’ interpretation).” Gerard, *supra* note 134, at 207. It nevertheless seems firmly established.

148. In this respect, the E.U. rule is substantially the same as the American one. *See id.* at 205 (commenting that the court had adopted “a single test cent[er]ed on the notion of ‘active supervision’ of the involvement of private operators in the decision-making process, much akin to the theoretical framework applied in the USA further to *Midcal*”).

149. Baquero Cruz, *supra* note 132, at 580. There are also special rules on state aid and limited competition law derogations for state-supported industries that provide public services, but they are not material for present purposes.

150. *See* Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] E.C.R. I-5177 (upholding a professional regulation preventing lawyers from working inside an accountancy firm); *see also* WENDT, *supra* note 46, at 10 n.33 (collecting cases where the court declined to interfere with professional regulation).

151. *Wouters*, E.C.R. I-5177 ¶¶ 24-25.

152. *Id.* ¶¶ 45-49, 58-64.

153. *Id.* ¶ 65.

consequential effects restrictive of competition are inherent in the pursuit of those objectives.<sup>154</sup>

The standard by which this would be determined was whether it could “reasonably be considered to be necessary”<sup>155</sup> to achieve a public policy goal. So far, this sounds like little more than rational basis review in the United States. But there is more—the court also looks at whether the “effects restrictive of competition . . . go beyond what is necessary”<sup>156</sup> to achieve that goal. In other words, when a public policy goal is asserted, the fact that the measure adopted might rationally tackle it is not enough—it must also adequately limit damage to the general goal of a competitive marketplace.

If strictly interpreted, that requirement might force the court to choose between a myriad of policy alternatives—something judges are manifestly ill-suited to do. In U.S. terms, it would approach the presumptive invalidity that strict scrutiny brings. Fortunately, the (admittedly sparse) case law after *Wouters* indicates otherwise. The leading case so far, an English High Court case, suggests that it need only be “difficult to achieve the . . . objective without the presence of the restriction.”<sup>157</sup> This standard, which some have dubbed “[r]egulatory ancillarity,”<sup>158</sup> allows pursuit of non-competition policy objectives as long as the burden on competition is not out of all proportion to the claimed public interest goal. This mixture of broad discretion to choose goals with tailoring requirements that check for overbreadth indicative of pretexts for protectionism resembles intermediate scrutiny,<sup>159</sup> possibly without the requirement that the government interest be important.

One positive aspect of the European experience is the center’s ability to coordinate liberalization efforts in member states, both through mandatory mutual recognition rules and softer pressure. The Commission has been undertaking wide-ranging studies of the effects of professional regulation,<sup>160</sup>

154. *Id.* ¶ 97.

155. *Id.* ¶ 107.

156. *Id.* ¶ 109.

157. *Bookmakers Afternoon Greyhound Servs. v. Amalgamated Racing Ltd.* [2008] EWHC 1978 (Ch). [452], *aff’d* [2009] EWCA (Civ) 750 (Eng.); *see also* COSMO GRAHAM, EU AND UK COMPETITION LAW 99 (2010) (discussing the case and some commentators’ reactions).

In its latest case on professional regulation, the European Court found that a professional association could not monopolize the provision of Continuing Education. *Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência* (Feb. 28, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=134368&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=181738>. It did not discuss whether the *Bookmakers* court interpreted necessity correctly. *Id.* Like many European Court judgments, both *Wouters* and *OTOC* are written in somewhat vague language, a frequent problem that is probably due to the court rule prohibiting dissents and concurrences, thus obscuring judges’ disagreements about doctrine behind a single oblique text.

158. RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 130 (7th ed. 2012).

159. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

160. *See, e.g.*, Iain Paterson et al., *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States: Regulation of Professional Services*, INST. FOR ADVANCED STUD., VIENNA (2003), [http://ec.europa.eu/competition/sectors/professional\\_services/studies](http://ec.europa.eu/competition/sectors/professional_services/studies)

and it has encouraged member states to review existing professional services regulations to minimize interference with competition.<sup>161</sup> While still primarily focused on casework, the Directorate-General for Competition has pushed for the invalidation or repeal of legislation that restricts competition without a clear public-interest objective.<sup>162</sup> While, under the post-2004 competition system,<sup>163</sup> national competition authorities have primary jurisdiction where there are not major cross-border effects, the Commission has coordinated state efforts to retrospectively review regulations.<sup>164</sup> It has also used the threat of investigation and litigation to incentivize member states to reform their own systems.<sup>165</sup>

### *B. The British Experience: The Office of Fair Trading, Policing the Professions*

Within the context of the broader European push to liberalize the professional services market, the United Kingdom has undertaken several highly successful steps of its own to review professional regulations to ensure that they do not burden competition more than is necessary to achieve policy goals. The Office of Fair Trading (OFT) has been at the center of this effort.

As a member of the European Union, the substantive competition law of the United Kingdom is harmonized with E.U. law. Professional regulation in the United Kingdom occurs through a mixture of statutory provisions and Royal Charters that empower professional associations to self-regulate. Even before the latest attempts to promote competition in the professions, the United Kingdom had relatively few licensing laws outside traditional professions such as law and architecture; certification was more common.

The United Kingdom's current strategy to reduce barriers to competition in the professions began with the 1999 *Pre-Budget Report*, when Chancellor of the Exchequer Gordon Brown announced a review by the Director-General of Fair Trading of competition in the professions.<sup>166</sup> The Director-General's

/prof\_services\_ihs\_part\_1.pdf; *Report on Competition in Professional Services*, COMMISSION EUR. COMMUNITIES (2004), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0083:FIN:EN:PDF>.

161. WENDT, *supra* note 46, at 8 (discussing initiatives by a series of Commissioners to review professional licensing laws to seek to mitigate anticompetitive effects, while disclaiming intent to wholly deregulate the professions); *see also* Mario Monti, Comments and Concluding Remarks of Commissioner Monti at the Conference on Professional Regulation, EUR. COMMISSION (Oct. 28, 2003), [http://ec.europa.eu/competition/speeches/text/sp2003\\_028\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2003_028_en.pdf) (discussing competition reviews of licensing laws).

162. *Report on Competition in Professional Services*, *supra* note 160, ¶ 86.

163. *See* Council Regulation 1/2003, 2003 O.J. (L 1) 1.

164. *Report on Competition in Professional Services*, *supra* note 160, ¶¶ 92-102. *See generally* Mary Catherine Lucey, *European Union Antitrust Law & Professional Associations: The Strategic Choices of Soft Weapons by the European Commission*, 16 TULSA J. COMP. & INT'L L. 87 (2008) (discussing the Commission's strategy beyond litigation).

165. Monti, *supra* note 161.

166. John Vickers, *Competition in Professions: A Report by the Director General of Fair Trading*, OFF. FAIR TRADING ¶ 5, at 2 (2001), <http://webarchive.nationalarchives.gov.uk/20140402>



Report, published in March 2001, accepted that barriers to entry might be justified under certain circumstances, particularly where consumers would be unable to judge quality,<sup>167</sup> but should be limited to demonstrating “basic competence.”<sup>168</sup> While previous efforts had forced most professions to repeal minimum price schedules and some advertising restrictions,<sup>169</sup> other restrictions were still relatively common.<sup>170</sup> The Report called for the repeal of Schedule 4 to the Competition Act 1998,<sup>171</sup> which immunized professional rules from competition scrutiny. Parliament did so in 2002.<sup>172</sup>

The OFT has enforcement powers against those who violate competition law,<sup>173</sup> and, on a number of occasions, the mere threat of enforcement action pushed professions to reform anticompetitive rules.<sup>174</sup> Its advisory role, formal and informal, has also been significant. It has a mandatory advisory role under several statutes<sup>175</sup> as well as general powers to investigate markets. Since the repeal of Schedule 4, its power to investigate markets includes the power to review professional regulations, a power it has used to recommend reforms in markets ranging from pharmacy<sup>176</sup> to auditing.<sup>177</sup> In the auditing market, the OFT referred the market investigation to the Competition Commission for a more formal investigation.<sup>178</sup> Its review of proposed changes in the legal profession led it to object to a licensing requirement for Scottish construction

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142426/http://www.ofg.gov.uk/shared\_ofg/reports/professional\_bodies/ofg328.pdf. On April 1, 2014, the OFT was consolidated with the Competition Commission to form the Competition and Markets Authority. Aside from certain enhanced enforcement powers and procedural changes aimed at reducing duplicative work not relevant here, its role remains substantively unchanged.

167. *Id.* ¶ 27, at 6.

168. *Id.*

169. *Id.* ¶ 28, at 7.

170. *See id.* ¶ 29, at 7.

171. Competition Act, 1998, c. 41 (U.K.).

172. Enterprise Act, 2002, c. 40, § 207 (U.K.).

173. *See generally A Guide to the OFT's Investigation Procedures in Competition Cases*, OFF. FAIR TRADING (2012), [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared\\_ofg/policy/OFT1263rev](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared_ofg/policy/OFT1263rev) (discussing the process of investigation and adjudication).

174. *E.g.*, Philip Collins, Chairman, OFT, Speech at the 2006 Annual Fall Conference on Competition Law: Promoting Competition in Professions: Developments in the UK ¶ 4.7 (Sept. 29, 2006), [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared\\_ofg/sp/eechs/sp0906.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared_ofg/sp/eechs/sp0906.pdf).

175. *E.g.*, Legal Services Act, 2007, c. 29, § 57, sch. 4 (U.K.) (advisory role for legal professional regulation). The idea of an agency as a pro-competition advocate within government is not unique to the U.K.—according to Bruzzone, the Italian Competition Authority plays a similar advocacy role through fact-finding and a formal consultative role. Bruzzone, *supra* note 27, at 24.

176. *The Control of Entry Regulations and Retail Pharmacy Services in the UK: A Report of an OFT Market Investigation*, OFF. FAIR TRADING (2003), [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared\\_ofg/reports/comp\\_policy/ofg609.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared_ofg/reports/comp_policy/ofg609.pdf).

177. *Statutory Audit: Market Investigation Reference to the Competition Commission of the Supply of Statutory Audit Services to Large Companies in the UK*, OFF. FAIR TRADING (2011), [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared\\_ofg/markets-work/ofg1357MIR](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofg.gov.uk/shared_ofg/markets-work/ofg1357MIR).

178. *Id.*

dispute attorneys to have an LL.M. from one of two Scottish universities.<sup>179</sup> A dedicated team within OFT is responsible for overseeing competition in the regulated professions.<sup>180</sup>

#### IV. Restocking the Toolbox: A Call to Meta-Regulation

To corral the license economy, legislative action is likely required. Courts can, at most, affect only a few marginal restrictions; current constitutional and antitrust law permits most state-sanctioned anticompetitive behavior. The constitutional and statutory law at issue is relatively settled, and it seems unlikely to change significantly in the foreseeable future.

I propose that federal legislation should adopt a *meta-regulatory* model. Meta-regulation recognizes that the primary, day-to-day capacity to control occupations belongs to the states but “attempt[s] to steer that capacity toward[] some kind of desirable outcome,”<sup>181</sup> here mitigation of the protectionist tendency to restrict competition in order to provide rents to incumbents. While usually used to describe interactions between governmental and non-governmental regulatory systems, it has long been recognized that the concept also applies to federal-state relations.<sup>182</sup> As Scott observes, meta-regulatory techniques have varying degrees of government control;<sup>183</sup> the common denominator is that, whether it be as little as tolerating another entity’s regulatory action or as great as setting the policy for the other entity to implement, the meta-regulator refrains from directly controlling the regulated parties.

Indeed, the history of federal efforts to preempt protectionist state occupational regulations demonstrates that one crucial source of opposition was the fear that federal preemption power would mean direct federal regulation. Timothy Muris, who subsequently became the FTC’s Chairman, raised this objection, arguing that “[a]lthough the effect of state regulation is often bad, the performance of the Commission could be worse.”<sup>184</sup> That said, within the broad

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179. *Application by the Association of Commercial Attorneys*, OFF. FAIR TRADING ¶¶ 2.16-2.19 (2007), [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared\\_offt/reports/professional\\_bodies/oft957.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft957.pdf).

180. WHISH & BAILEY, *supra* note 158, at 355.

181. Colin Scott, *Self-Regulation and the Meta-Regulatory State*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW, *supra* note 40, at 131, 139.

182. *Id.*; see also Bronwen Morgan, *Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia*, 1 PUB. MGMT. 49 (1999). For more applications of meta-regulation as a concept, see Colin Scott, *Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit*, 25 L. & POL’Y 203 (2003), which discusses performance audits as meta-regulatory tools, and Colin Scott, *Regulating Everything: From Mega- to Meta-Regulation*, 60 ADMINISTRATION 61 (2012), which discusses a wide range of meta-regulatory techniques and their application.

183. Scott, *supra* note 181, at 136-39.

184. Kenneth W. Clarkson & Timothy J. Muris, *Constraining the Federal Trade Commission: The Case of Occupational Licensing*, 35 U. MIAMI L. REV. 77, 88 (1980). Clarkson &

category of meta-regulatory techniques, some come very close to federal control—such as requirements that states adopt a plan to meet a federal policy goal with the federal agency enjoying broad power to veto and direct regulation of noncompliant states. As I will discuss below, my proposal envisions a much lighter federal oversight role.

But first, we must look at why this is a matter of *federal* concern at all. The primary reason is simple: unnecessary licensing laws balkanize the United States by making it harder for someone working in an occupation in one state to continue her work in another state where the occupation is subject to additional licensing requirements or there is no mutual recognition. This has been so harmful for military families that the First Lady has been advocating for legislation to address it.<sup>185</sup> The effect can be even more severe for immigrants. The effect on geographic mobility is enormous. Federal supervision is required because this harms the *national* economy and because state governments are not designed to consider the national interest in a flexible and competitive economy. As Cooper & Kovacic put it:

In an earlier era, many regulatory controls imposed by states or municipalities mainly affected the jurisdictions that enacted the restrictions. For these types of government intervention, spillovers across state borders may have been negligible. In this context, the political process acted as a check on anticompetitive state practices. . . . Today a smaller and smaller amount of commerce is truly “local.” . . . Greater integration means that restrictive rules adopted in one state no longer can be assumed to generate effects only in that state. . . . [F]ederalism arguments . . . should be reassessed in light of the larger national interest in promoting a common economic union.<sup>186</sup>

Federalism is an important part of the American constitutional system, and perhaps this excerpt fails to do justice to the positive impacts local experimentation and local values can have.<sup>187</sup> States face different problems,

Muris use the example of the ophthalmology regulations, noting that they both preempted state laws and imposed new federal requirements. *Id.*

185. Jill Biden & Michelle Obama, Remarks by the First Lady and Dr. Biden on Military Spouse Licensing (Feb. 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/15/remarks-first-lady-and-dr-biden-military-spouse-licensing>.

186. Cooper & Kovacic, *supra* note 27, at 1565; *see also id.* at 1600-02 (proposing “finess[ing]” *Parker* so as to render vulnerable to antitrust challenge state regulations that have significant spillover effects on other states, at least when the regulations do not align with federal policy).

The “finesse” proposal suffers from certain flaws, not least that proposals to restrict state action immunity have long existed without gaining the approbation of the Supreme Court. It also fails to address the institutional competence problem: how is a court to measure spillover effects (which are ubiquitous in a modern interconnected economy) or to determine the appropriateness of proposed non-economic justifications?

187. For discussion of the various justifications for federalism and their reflections in preemption doctrine, *see generally* Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1941-48 (2008), and the sources discussed therein.

and replacing state licensing systems with uniform federal standards would remove an important tool in governments' policy arsenals; the problem is the use of licenses as instruments of protectionism, not licensing *per se*. Moreover, states can play an important filtering role in determining what policy issues are worthy of national attention.<sup>188</sup>

The fact that legislatures pass special interest provisions ought to give critics of licensing pause for thought. Whatever flaws exist in the states' systems of representative democracy, the judgment of elected representatives is entitled to serious deference. Elected legislators continue to vote for protectionist licensing laws, and such opponents as there are seem unwilling to spend political capital opposing licensing laws in legislatures or calling out proponents' corrupt bargains in elections. These laws thus have at least ostensible democratic legitimacy, and any proposal for reform should not lightly cast them aside.

Nonetheless, the case for federal intervention in the labor market is compelling. The labor market, an area where a federal role has long been accepted,<sup>189</sup> especially to promote interstate mobility, affects key areas of national economic policy related to competition and economic opportunity.<sup>190</sup> Licensing "worsens wage inequality while the higher prices fall most harshly on low-income consumers,"<sup>191</sup> and it thus interferes with key federal policy goals. It is precisely the kind of area where preemption should operate "to preserve the United States as a single integrated commercial market in the face of state legislation that threatens to create multiple markets of suboptimal scale."<sup>192</sup>

I restrict my proposal to the labor market because of these uniquely direct federal concerns. While a similar framework could arguably apply more broadly to public restraints on competition, as in Europe and Australia, it is in the field of protectionist occupational regulation that the need is greatest and the federal interest clearest. Other protectionist state economic regulations, such as agricultural cartelization and Certificate of Need laws, may exist with federal blessing or have their effects sufficiently confined to a locality that there is little federal interest in challenging them, however unwise they may be.

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188. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

189. See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-218.

190. See, e.g., Cooper & Kovacic, *supra* note 27, at 1566-67.

191. Stangler, *supra* note 26, at 2; see also William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J.L. & POL'Y 101, 108-10 (2007) (discussing attempts by South Carolina dentists to require that dentists accompany hygienists providing preventative dental care in schools in impoverished areas, which would greatly decrease the number of students to whom schools could afford to provide the care).

192. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 733 (2008) (citing Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006)); see also Merrill, *supra*, at 745-46 (citing *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949) ("[O]ur economic unit is the Nation.")).

What shape should a statute take? I propose a system with two key facets. Substantively, it would include rules prohibiting pure protectionism to the extent it affects interstate commerce and subjecting state rules with significant anticompetitive effects to a *Wouters*-style test. Procedurally, it would empower an agency, probably the FTC, to investigate particular occupational markets, to identify particularly problematic rules, and to then initiate an adjudicative process to determine whether they should be preempted.

#### A. Protectionism Scrutiny: Two Substantive Standards

Legislation should preempt *purely* protectionist labor market regulations.<sup>193</sup> Perhaps waiver authority could exist to preserve a certain degree of policy experimentation, but if that is the case, the burden should be on the state to justify its deviation from the quasi-constitutional broad national policy favoring competitive markets that enhance consumer welfare.<sup>194</sup> Moreover, applying for a waiver would be a highly public act, probably more so than the passing of a few low-salience state regulatory statutes, forcing the state to justify its protectionism to the wider public.

The second standard, adapted from the European Union's *Wouters* line of cases, is that, while states must be free to value other policies more highly than the general policy of a competitive labor market, *cessante razione legis, cessat ipsa lex*. When the policy reason for the law derogating from the competition norm ceases to be served by the law, the law must cease to interfere with competition. States can choose how highly they value consumer protection, safety, or any number of other goals—even unwise goals. Democracy and federalism so require. If Connecticut has a rational reason for believing that higher training requirements for licensed nightclub security personnel will help prevent violence,<sup>195</sup> it should be able to impose those requirements. But the existence of a legitimate end should not give a blank check to the state to displace *wholesale* the national policy favoring competition. Good public health and anti-fraud reasons likely exist to regulate embalmers; it does not follow that, in so doing, a state legislature should be able to displace competition in standalone casket sales. A standard—deferential, but short of

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193. For this purpose, residency and citizenship requirements (to the extent they are not unconstitutional or preempted anyway) should be considered purely protectionist and forbidden. Commuter or immigrant status, all other things being equal, has no connection to fitness to practice. Whether permissible as *hiring* criteria or not, as *licensing* criteria they are manifestly protectionist.

194. See ESKRIDGE & FEREJOHN, *supra* note 100, at 120 (discussing “[t]he right to an unrestrained market guaranteed by the government” (emphasis added)); *id.* at 121 (describing the Sherman Act as a “great principle”).

195. See Rich Scinto, *Governor, New Haven Mayor Denounce Violence that Left 1 Dead in City Nightclub Saturday*, NEW HAVEN REG., Oct. 26, 2013, <http://www.nhregister.com/general-news/20131026/governor-new-haven-mayor-denounce-violence-that-left-1-dead-in-city-nightclub-saturday> (“DeStefano made a wide range of proposals . . . [including a m]andate that private security at nightclubs be licensed and trained by the Police Department.”).

blind acceptance—must be set requiring that restrictions adopted to further a public interest other than competitive markets not restrain competition to an extent out of all proportion to the claimed interest. When a restriction on competition is unnecessary to serve the claimed ends, that signals that the claimed ends are at least in part pretext for protectionism. The standard should thus allow *any* policy objective (other than pure protectionism) while requiring some tailoring to prevent pretextual justifications and restrictions that are obviously broader than their claimed justifications would necessitate.

This standard is less intrusive than, for example, the one proposed for federal agencies by the National Commission for the Review of Antitrust Laws and Procedures in 1979. That would have imposed a much stricter necessity standard, a least-restrictive-alternative analysis, and an evaluation of the importance of the objective,<sup>196</sup> which would perhaps be appropriate for federal regulation but would be wholly unsuited for preempting state statutes passed by elected legislators. For the same reasons, it is also less intrusive than the *Central Hudson*<sup>197</sup> test for commercial speech and the broadly similar test the FTC itself proposed for its claimed preemption powers in the 1970s.<sup>198</sup> It is less intrusive than the Australian standard, which—while arguably not assessing the substantiality of the state’s interest<sup>199</sup>—essentially subjected *all* legislation to an economic cost-benefit analysis<sup>200</sup> carried out by the unelected National Competition Council<sup>201</sup> and provided that restricting competition must be the *only* way of achieving the objective.<sup>202</sup> The antifederalist impacts of this policy in Australia were limited by the fact that the states themselves agreed to the restrictions—akin to an Interstate Compact in the United States—although the fact that Commonwealth law removes the equivalent to state action immunity if

196. 1 NAT’L COMM’N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL xiii (1979) (“[S]uch action is *necessary* to accomplish an *overriding statutory purpose* . . . and [] the objectives of the action and the overriding statutory purpose cannot be *substantially* accomplished by alternative means having less anticompetitive effects.” (emphases added)).

197. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980) (“The State must assert a substantial interest to be achieved by restrictions on commercial speech. . . . [T]he restriction must directly advance the state interest involved . . . . [I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”).

198. Verkuil, *supra* note 118, at 243 (citing reports proposing a test of whether the restriction was vital to achieve important state goals).

199. See Laraine L. Laudati, *Reading Adam Smith into the First Amendment: The U.S. Supreme Court Doctrine of Commercial Speech*, in *THE ANTICOMPETITIVE IMPACT OF REGULATION*, *supra* note 27, at 71, 95.

200. *Competition Principles Agreement 1995* (C.O.A.G.) s 5(1)(a) (Austl.).

201. Morgan, *supra* note 182, at 55. Morgan notes that a “public interest clause” allowing for consideration of certain enumerated non-economic factors existed but appears to have had little effect. *Id.*

202. *Competition Principles Agreement 1995* (C.O.A.G.) s 5(1)(a) (Austl.) (“[T]he objectives of the law can only be achieved by restricting competition.”).

the state is not party to the Competition Principles Agreement<sup>203</sup> indicates that this was hardly voluntary.

A standard-based preemption also interferes less with state sovereignty than either wholesale regulation at the federal level<sup>204</sup> or specific federal rules.<sup>205</sup> As a meta-regulatory technique, it keeps the states as primary regulators subject only to deferential oversight. While it envisions a greater federal role than today, it does not envision “permanent consequences for the scope of state authority,”<sup>206</sup> over occupational regulation; instead, it merely adds a limited federal oversight role.

This standard is a flexible one. As such, it is important that a proper institution administer it. For the reasons I will give below, that should be an administrative agency—probably the FTC—and not the courts.<sup>207</sup>

### *B. Courts or Agencies?*

Courts are poor managers of any kind of economic policy. The lessons of the *Lochner* era counsel against vesting the task of balancing competition and non-economic policy goals in the courts. Courts are poor at assessing policy alternatives,<sup>208</sup> and judicial second-guessing of state policy goals under a statutory standard is almost as problematic as doing so under the Due Process Clause.<sup>209</sup> One reason for this is that policy must generally be flexible;<sup>210</sup> theories change,<sup>211</sup> and the relative weight to be given to non-economic policy goals is a matter of constant debate. The precedential, rule-based standard of

203. *Competition and Consumer Act 2010* (Cth) s 51(1C)(e) (Austl.) (formerly Trade Practices Act 1974).

204. See Merrill, *supra* note 192, at 731 (calling this “displacement”).

205. *Id.* (calling this “trumping”).

206. *Id.* at 732 (citing Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1613-14 (2007)).

207. Congress of course retains the power to preempt specific schemes through legislation, and it is subject to none of the constraints I discuss here because it has democratic legitimacy. See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008). But given that this has not occurred to date—perhaps because of interest group power or perhaps because generalist legislators do not wish to micromanage in an area where the states have long taken the lead—I do not consider this a realistic strategy for reforming occupational licensing.

208. Cf. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 96 (1938) (noting judicial “inexpertness”).

209. Cf. Cooper & Kovacic, *supra* note 27, at 1589 (“[T]he Court would be forced to perform world-class jurisprudential gymnastics to distinguish antitrust preemption challenges to state regulation from *Lochner*-esque challenges to the same thing.”); Garland, *supra* note 102, at 488 (making a similar point).

210. See LANDIS, *supra* note 208, at 69 (“[F]lexibility [is] a prime quality of good administration.”).

211. Indeed, one critique of existing state action law is that the doctrine has become incoherent since *Parker*’s pure state sovereignty theory was abandoned. See Wiley, *supra* note 95, at 715. Wiley himself, however, proposes a *judicial* attack on capture-derived anticompetitive legislation. *Id.*

law denies this flexibility, and judicial inexperience enhances the risk of error; the same concerns appear whenever judges are asked to review the desirability of economic regulation.<sup>212</sup> It is perhaps for these reasons that a commentator has observed that the European Commission has provoked less resistance than the European courts when it has sought liberalization.<sup>213</sup>

For that reason, an administrative system is a better way to manage the balancing of competition and other policy goals. Much as with the O.F.T. in the U.K. and the European Commission, administrative bodies are more flexible and more able to tolerate a divergence of views on policies' merits. Agencies need not confine themselves to individual controversies, and the task of *systematically* reviewing an occupation's regulatory structure is one that an expert agency is uniquely qualified to do.

It is this ability to review systematically the regulations governing an occupation that will enable the agency to untangle the often-complex webs of interrelated protectionist statutes and regulations already in force. The agency could first conduct investigations of a whole occupation,<sup>214</sup> identifying rules that are both substantially anticompetitive and likely unnecessary to achieve public interest goals. It would then be able, via a more formal adjudicative process, to conduct a more intensive review of the burdensome rules, statutory or otherwise, to determine whether they disproportionately burden competition and should be invalidated.

Perhaps the most important reason for selecting an agency approach is enforcement discretion. An agency with a monopoly over enforcement can prioritize and allocate resources to tackle the most blatant and most harmful protectionism first without creating regulatory uncertainty by challenging the whole regulatory edifice at once. Courts, by contrast, must adjudge the cases litigants bring to them, forcing states to devote significant resources to defending often-valid restrictions against an enormous number of uncoordinated challenges. An agency with discretion and a monopoly on instituting proceedings can thus pursue a gradual process of labor market liberalization—an important point since the threat of sudden deregulation is

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212. Cf. Garland, *supra* note 102, at 488 (criticizing proposals for the courts to redefine state action immunity and drawing parallels between due process-liberty of contract review of state economic regulation and antitrust-economic efficiency review of the same).

213. Lucey, *supra* note 164, at 99. The European courts have been widely criticized for excessive interference with member state economic regulation. See, e.g., Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line [2007] E.C.R. I-10779 (holding that a strike violated freedom of establishment and applying a strict form of proportionality analysis); Case C-110/05, Commission v. Italy (*Trailers*) [2009] E.C.R. I-519 (holding that Italy's prohibition on motorcycles pulling trailers required justification under a proportionality test because it restricted market access); Catherine Barnard, *Restricting Restrictions: Lessons for the EU from the US?*, 68 CAMBRIDGE L.J. 575 (2009) (forcefully criticizing the "restrictions" approach to free movement law and comparing it unfavorably to U.S. Dormant Commerce Clause doctrine); *id.* at 580 (expressly drawing *Lochner* parallels); Danny Nicol, *Europe's Lochner Moment*, 2011 PUB. L. 308 (making the *Lochner-Viking* comparison at length).

214. Cf. Cooper & Kovacic, *supra* note 27, at 1610 (proposing FTC investigations of some state regulatory measures but only as an advisory matter to inform future debate).



much more likely to provoke organized opposition from incumbents who have invested in overcoming the existing barriers to entry, often to the extent that the monopoly profits they extract from consumers have been fully capitalized.<sup>215</sup>

Some commentators criticize the role of agencies in preemption decisions. Merrill notes that agencies may have a lesser capacity than the courts to interpret state statutes in good faith and to adequately consider the small-constitutional issues of balancing state and federal authority.<sup>216</sup> The good-faith interpretation issue, however, is less of a problem in the occupational regulation field, where state statutes are usually clear;<sup>217</sup> judicial review can also mitigate the threat of misinterpretation. And the design of substantive standards and agency procedure can mitigate the risk that an agency, run amok, will trample over states' interests. Moreover, as Galle and Seidenfeld note, agencies' technical expertise means that they may be better than courts at assessing the "programmatic details and real-world consequences" of preemption decisions.<sup>218</sup> By expressly including agency preemption authority in the statute, the proposal made here satisfies Merrill's "double consideration" standard.<sup>219</sup>

There is then the question of whether this scheme should be administered by a new agency or as an additional power of an existing agency. Given that there is already an agency—the Federal Trade Commission—that has sought to deal with protectionist occupational regulation to the extent existing law allows and that specializes in analyzing restrictions on competition and their effects on consumer welfare, this is by far the most plausible solution. Moreover, as an expert agency with a role in regulating a variety of products and industries, the FTC may be less susceptible to capture than a standalone "occupational meta-regulator."<sup>220</sup>

### C. Designing a Meta-Regulatory Procedure

Implementing a system in which a federal agency might invalidate the decisions of state elected officials poses serious challenges, both constitutional and practical. To take one extreme, a unilateral, broadly discretionary federal

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215. Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975) (arguing that, after the initial beneficiaries of a government transfer scheme, the gains are likely to be capitalized so that their successors do not get monopoly profits but face large losses if the scheme is repealed and therefore organize to oppose it). An all-too-real example of this: if you pay upward of \$150,000 in law school tuition to enter the cut-throat world that is the modern legal profession, what would your reaction be if those onerous hurdles you had spent so much to leap over suddenly disappeared?

216. Merrill, *supra* note 192, at 755-56.

217. *See supra* Part II.

218. Galle & Seidenfeld, *supra* note 187, at 1972-73.

219. Merrill, *supra* note 192, at 767.

220. *See* Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 391, 414-15 (Edward J. Balleisen & David A. Moss eds., 2010).

agency veto of state derogations from the federal policy favoring competitive markets, which more or less exists in Australia,<sup>221</sup> would amount to a constitutional revolution if adopted in the United States, radically shifting the locus of political power to Washington. A proper procedure must respect the states' primary positions as regulators of occupations subject only to limited federal pro-competitive scrutiny.

A case-by-case adjudicatory process is preferable to rulemaking because it is individualized, resulting at most in the invalidation of the particular licensing scheme at issue. The FTC must not return to the "National Nanny" era,<sup>222</sup> promulgating sweeping regulations as Washington's "other legislature."<sup>223</sup> As commentators—including Timothy Muris, later FTC Chair—pointed out, the FTC of the 1970s had a tendency to "regulate[] on the slightest pretext"<sup>224</sup> and without cost-benefit analysis.<sup>225</sup> States must be able to pursue their own policy goals, however misguided Washington may consider them; rulemaking with preemption power risks denying them that choice.<sup>226</sup> Proceedings must focus on the individual question of whether a particular state scheme burdens competition significantly more than necessary to pursue the public policy goals justifying it; de-individualized rulemaking may fail to consider particular state conditions and bona fide divergences of opinion regarding policy objectives and thus creates far deeper federalism problems.

Of course, a finding that one state's scheme is protectionist may prompt other states to amend similar schemes immediately rather than contesting proceedings, but that choice should be the states'. Individualized proceedings might also have the salutary effect of incentivizing state legislatures to build a legislative record explaining the necessity of restricting competition and to mitigate anti-competitive effects proactively. Indeed, this could even be incentivized by creating a safe harbor of deference where states establish their own meta-regulators to engage in systematic reviews of legislation and regulations on the books. Such a safe harbor would result in a doubly deferential standard of review for state-reviewed restrictions and in staying FTC action pending completion of the state review.<sup>227</sup>

221. *Competition and Consumer Act 2010* (Cth) ss 51(1C)(e)(ii), 150K (Austl.) (formerly Trade Practices Act 1974); see also S.G. CORRONES, *COMPETITION LAW IN AUSTRALIA* ¶ 4.190, at 237 (4th ed. 2007).

222. Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A14.

223. Cf. Geoffrey Manne & Berin Szoka, *Time for Congress to Stop the FTC's Power Grab on Antitrust Enforcement*, FORBES (Dec. 20, 2012, 2:24 PM), <http://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement>.

224. Kenneth W. Clarkson & Timothy J. Muris, *Constraining the Federal Trade Commission: The Case of Occupational Licensing*, 35 U. MIAMI L. REV. 77, 86 (1980).

225. *Id.* at 87.

226. Non-transparent use of rulemaking for preemption has been criticized in other contexts. E.g., JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW* 44-47 (2006).

227. This would be somewhat akin to the Australian reviews of state legislation but with a far less severe "stick" for non-compliance—simple deference here as opposed to preemption there. See *supra* note 203 and accompanying text.

In order to protect the states' sovereign interests in self-governance, procedural protections could be instituted. The Magnuson-Moss Act may provide a model; indeed, Paul Verkuil argues that the Act's procedural rules exist precisely in order to protect states' sovereign interests against preemption,<sup>228</sup> although the courts ultimately declined to follow his reading of the statute.<sup>229</sup> Aside from Magnuson-Moss-style requirements for detailed fact-finding, other sensible protections might be banning preliminary injunctions, allowing the restriction to remain in effect until the adjudication and review process is completed. And only the government, not aggrieved private parties, should be able to seek judicial review of the Commission's refusal to preempt, allowing judicial review's usual salutary effects on agency deliberations<sup>230</sup> while avoiding the risk that judges will force excessive preemption.

As the O.F.T. example shows, the mere threat of administrative action may draw public attention to the special interest nature of the legislation, incentivizing legislators to correct the problem at an early stage lest voters hold them accountable for their corrupt behavior. Moreover, unlike proposals for ex ante federal approval in the legislative or regulatory process<sup>231</sup> or imposing mandatory Competition Impact Statements on the states,<sup>232</sup> ex post review has the advantage of allowing the agency to prioritize its targets—a kind of regulatory triage that would focus on the most abusive or most high-impact investigations first—and does not force the federal government to meddle with the state legislative process. Rather, the agency can wait to see what the legislature produces and then choose whether to investigate.

This does not completely eliminate the possibility that the FTC will attempt to impose national regulatory standards using its section 5 power once it has invalidated protectionist state laws that previously created exemptions through the state action exception. But the FTC can already impose national standards where states do not engage in “reverse preemption,” subject to political accountability, Magnuson-Moss procedural requirements, and judicial review, and it has been more careful in its use of its rulemaking power since the “National Nanny” era. If a regulation can overcome all the other obstacles in its path, surely a protectionist inconsistent state requirement should not be allowed to stand in its way, especially when a non-protectionist inconsistent state requirement will continue to survive.

228. Verkuil, *supra* note 118, at 235-43; see also *id.* at 245-46 (discussing the “hearing” states get on their interests through Magnuson-Moss rulemaking and comparing it favorably to Congressional fact-finding).

229. *Supra* notes 110-122 and accompanying text.

230. See Galle & Seidenfeld, *supra* note 187, at 1974-75.

231. Cooper & Kovacic, *supra* note 27, at 1607-10 (discussing this possibility and commenting that “because states promulgate literally thousands of regulations that may affect competition every year, the FTC and DOJ could not possibly perform even a cursory review of state laws at current staff levels”).

232. *Id.* at 1608-09 (“It is hard to envision politicians from any party acquiescing to a rule that requires federal competition authority input into purely state matters.”).

## Conclusion and Prospects for Reform

The license economy has metastasized to the point where it is a serious threat both to consumers and to the geographic mobility and economic opportunity of workers. Reform is urgently needed. But will it come?

In this Note, I have tried to present a middle road between the status quo and the obvious non-starter of removing state action immunity entirely.<sup>233</sup> *Supervision* of occupational regulation by a federal agency tasked with protecting the benefits of competition while deferring to state policy choices would not end regulatory diversity in the states; it would provide a much-needed check to moderate the excesses of existing occupational licensure laws and to encourage state legislatures proactively to consider competitive effects in designing new schemes.

One might expect the same special interest groups who have captured legislatures and procured anticompetitive laws on the state level to organize at the federal level to block any attempts to deprive them of their spoils. Indeed, incumbents who have invested in meeting the protectionist entry requirements are particularly likely to organize against it. But with Washington politics drawing greater public scrutiny than state politics, licensing on the agenda of public-interest pressure groups on both sides of the aisle,<sup>234</sup> and aspects of licensing attracting the attention of the White House,<sup>235</sup> perhaps the collective action problems that restrict the rollback of protectionist occupational regulations at the state level can be overcome at the federal level. Gridlock may make progress unlikely in the near future, but the bipartisan attention licensing has received means that there may eventually be cause for optimism.

Indeed, while the constitutional conclusions in *St. Joseph Abbey* may be highly dubious as a matter of current doctrine, the threat looms that more courts, frustrated at the failure of the political branches to curtail protectionist legislation, will take it upon themselves to review economic legislation more skeptically. That is what happened in the European Union with Free Movement law. It is no coincidence that many of the recent cases challenging protectionist legislation have been brought by the Institute for Justice, a libertarian public interest law firm with the avowed intent to get the courts to increase their scrutiny of economic regulation. And they will keep coming—this is a campaign to pick out the most sympathetic cases and bring one after another until doctrine gradually shifts in their direction.<sup>236</sup> For those who wish to keep the courts out of economic policy, then, it may be desirable to have some

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233. *Id.* at 1589 (observing that neither the anti-*Lochner* left nor the pro-federalism right would tolerate an abolition of the state action exception).

234. *See supra* notes 23-28 and accompanying text.

235. *See supra* note 185 and accompanying text.

236. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 7 L. & SOC'Y REV. 95 (1974) (observing how repeat players gain a strategic advantage in shaping the legal agenda).

legislative reform soon rather than risk that the courts will eventually deal with the problem themselves.

