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THE MULTIPLE JUSTIFICATIONS OF OCCUPATIONAL LICENSING

Nick Robinson*

Abstract: Nearly a quarter of all workers in the United States are currently in a job that requires an occupational license. As the prevalence of occupational licensing has grown, so have claims that its overuse is causing increased consumer costs and impairing labor mobility and economic freedom. To address these concerns, many policymakers and academics argue that licensing restrictions should be more closely tailored to the goal of protecting the public from harm and that, to guard against capture, practitioners should not regulate their own licensing. Federal courts, in turn, have drawn on this vision of the proper role of occupational licensing to significantly limit when and how licensing can be used through their interpretation of antitrust law and the First and Fourteenth Amendments of the Constitution.

This Article takes a step back to argue that these critiques of occupational licensing, and the federal jurisprudence based on them, embrace a narrow view of the role of licensing in the economy that is grounded in both an embrace of economic libertarianism and an antagonism towards professional self-regulation. While this view generally recognizes licensing as justified to protect the public from harm in limited situations, it disregards a range of other values that occupational licensing has historically been viewed to promote. This Article draws on social science literature to categorize these other justifications as (1) fostering communities of knowledge and competence; (2) developing relationships of trust; and (3) buffering producers from the market.

The Article uses specific examples from the judiciary’s occupational licensing jurisprudence to show how acknowledging this broader set of justifications should constrain the courts from imposing a narrow view of licensing’s role in the economy. It ends by suggesting that if the federal government is to shape occupational licensing policy, Congress and the Executive are better placed than the judiciary to take the lead.

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INTRODUCTION

A wide range of occupations in the United States can require a license, including medical professionals, barbers, lawyers, and security guards.¹ Despite this variety, the central mechanism behind occupational licensing is relatively generalizable. The government mandates that only those who are licensed can perform designated occupational activities.² To become licensed, one must meet prescribed entry requirements such as passing an exam or completing a training program.³ And a person may lose their license if they violate certain minimum occupational standards.⁴

The use of this regulatory tool has become one of the defining features of the contemporary U.S. labor market. In the 1950s, only about 5% of the U.S. workforce was in a job that required an occupational license but, today, studies indicate that number has risen to between 20% and 29%.⁵

1. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 4 (2006) (listing a number of occupations that can require a license).

2. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 139 (1982) (similarly defining occupational licensing as a state-authorized monopoly on certain occupational activities).

3. *Id.*

4. *Id.*

5. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. & ECON. S173, S173–76 (2013). The authors found, based on a 2008 Westat survey, that 29% of the labor force were in jobs that required licenses and another

Notwithstanding its growing prevalence, policymakers and academics frequently treat occupational licensing like a regulatory relic—a holdover from the guilds of the Middle Ages.⁶ They claim occupational licensing requirements are overused causing increases in the cost of services,⁷ limiting the employment opportunities for marginalized groups,⁸ and reducing economic freedom.⁹ In turn, they propose that occupational licensing restrictions should only be allowed when restrictions are closely tailored to the goal of protecting consumers or the public from harm.¹⁰ To guard against rent-seeking, or self-dealing behavior, policymakers argue that members of an occupation should not control their own regulation.¹¹

6% were certified for their jobs. *Id.* at S176. The authors also noted that only 5% of the labor force were in a job that required a license in the 1950s. *Id.* at S175. The data from the 1950s includes only state licenses. This percentage would be higher if the survey had included jobs that required federal, city, or county licenses as the 2008 number does. *Id.* See also MAURY GITTLEMAN, MARK A. KLEE & MORRIS M. KLEINER, FED. RESERVE BANK OF MINNEAPOLIS, ANALYZING THE LABOR MARKET: OUTCOMES OF OCCUPATIONAL LICENSING 504 (2014) (using 2008 Survey of Income and Program Participation data to find that approximately 20% of the labor force acquired licenses and another 8% were certified for their jobs).

6. See Morris M. Kleiner, *Our Guild-Ridden Labor Market*, CATO INSTITUTE: CATO ONLINE F. (Nov. 18, 2014), <https://www.cato.org/publications/cato-online-forum/our-guild-ridden-labor-market> [<https://perma.cc/L99F-NTDP>]; Jon Sanders, *Occupational Licensing: Guild by Association*, JOHN LOCKE FOUND. (Oct. 11, 2012), <https://www.johnlocke.org/update/occupational-licensing-guild-by-association/> [<https://perma.cc/A96J-DJAF>].

7. KLEINER, *supra* note 1, at 9–10 (noting that “[t]he dominant view among economists is that occupational licensing restricts the supply of labor to the occupation and thereby drives up the price of labor and services rendered”).

8. DEP’T OF TREASURY OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISORS & DEP’T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 35–39 (2015) [hereinafter WHITE HOUSE REPORT] (noting that licensing can limit the opportunities of those with a criminal record and immigrants in the labor market).

9. Libertarians, in particular, lament licensing’s restrictive impact on economic freedom. The Institute for Justice is perhaps the leading libertarian organization that has led the fight against what they view as excessive occupational licensing requirements. See INST. FOR JUST., <http://ij.org/> [<https://perma.cc/2DNC-8MMB>]. However, there are also other libertarian organizations that have advocated curtailing licensing. See, e.g., ADAM B. SUMMERS, REASON FOUND., OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES (2007) (recommending curtailing licensing requirements on behalf of the Reason Foundation); *About Reason Foundation*, REASON FOUND., <https://reason.org/about-reason-foundation/> [<https://perma.cc/HY2A-EEWL>] (promoting libertarian principles).

10. MORRIS M. KLEINER, REFORMING OCCUPATIONAL LICENSING POLICIES 17–18 (2015) [hereinafter KLEINER, REFORMING OCCUPATIONAL LICENSING POLICIES], http://www.hamiltonproject.org/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf [<https://perma.cc/48AM-Z2MF>] (arguing that states should only adopt occupational licensing restrictions where there is a benefit of protecting consumers from harm and that benefit outweighs the costs); WHITE HOUSE REPORT, *supra* note 8, at 43–45 (concluding that licensing restrictions should be closely targeted to protecting public health and safety).

11. See, e.g., DICK CARPENTER ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 25, 29–30 (2012), <https://ij.org/wp->

This critique of occupational licensing has also gained proponents in the federal courts. Although occupational licensing has traditionally been viewed as a state and local subject,¹² over the past several decades, the federal courts have created de facto occupational licensing jurisprudence through interpretation of the First and Fourteenth Amendments of the Constitution as well as antitrust law. This federal jurisprudence significantly limits when and how occupational licensing restrictions may be used. For example, in a series of cases starting in the 1970s, the U.S. Supreme Court struck down restrictions on advertisement and solicitation in the professions as violating a right to commercial speech under the First Amendment.¹³ Building on this jurisprudence, in 2014, a federal circuit court found an occupational licensing regime for local tour guides unconstitutional.¹⁴ Federal courts have also used the Equal Protection and Due Process Clauses of the Fourteenth Amendment to strike down occupational licensing requirements for jobs like African hair braiders, casket sellers, and some pest control professionals.¹⁵ And in the 2015 antitrust case *North Carolina State Board of Dental Examiners v. FTC*,¹⁶ the Court weighed in against the traditional self-regulation of many occupations. The Court found that if occupational licensing boards are “controlled” by practitioners (i.e., “market participants”) and not actively supervised by the state, the boards can face antitrust scrutiny.¹⁷ This decision led to a wave of antitrust challenges against licensing boards and caused many states to modify how they supervise these boards.¹⁸

content/uploads/2015/04/licensetowork1.pdf [https://perma.cc/B6R7-VX4M] (arguing that licensing requirements are frequently created by practitioners to keep out competition); CAROLYN COX & SUSAN FOX, FTC, *THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION* ix (1990) (recommending that “[i]f some form of regulation is necessary, then it may be better for consumers if an outside body, rather than the profession, is responsible for administering the regulations”).

12. KLEINER, *supra* note 1, at 21 (arguing that *Dent v. West Virginia*, 129 U.S. 114 (1889), gave authority over occupational licensing to the states); WHITE HOUSE REPORT, *supra* note 8, at 41–43, 54–55 (noting that “licensing policy falls in the purview of individual States,” tailoring all of its recommendations to reform licensing at the states, and mentioning only relatively minor initiatives by the federal government already undertaken to improve licensing at the state level).

13. For an overview of this free speech jurisprudence, see *infra* section II.B.

14. In 2014, the D.C. Circuit struck down the licensing of tour guides as restricting free speech under the First Amendment. See *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). For a fuller discussion of relevant First Amendment jurisprudence, see *infra* section II.B.

15. For a discussion of these cases and other relevant Fourteenth Amendment jurisprudence, see *infra* section II.C.

16. 574 U.S. ___, 135 S. Ct. 1101 (2015).

17. *Id.* at 1115–16. For a fuller discussion of the *North Carolina Board of Dental Examiners* decision, see *infra* section II.A.

18. For a discussion of this litigation and new initiatives by states to supervise licensing boards in the wake of *North Carolina Board of Dental Examiners*, see *infra* section II.A.

Some policymakers and academics have celebrated these rulings.¹⁹ Yet this federal jurisprudence risks the courts imposing, and frequently constitutionalizing, a narrow economic ideology grounded in free market libertarianism and antagonism towards professional self-regulation. Occupational licensing is generally recognized as justified to protect the public from harm, even by critics, at least in limited situations. However, other values that occupational licensing has historically been viewed to promote are frequently neglected or discounted.²⁰ This Article takes a step back to draw on the social science literature to identify three other justifications of occupational licensing that it categorizes as: (1) fostering communities of knowledge and competence; (2) developing relationships of trust; and (3) buffering producers from the market.²¹

Despite these other justifications often being overlooked, they each have roots in prominent intellectual traditions. For example, scholars like Emile Durkheim and Talcott Parsons celebrated the professions, and their ability to set enforceable standards, as critical to regulating the use of expertise in a modern society.²² These occupational communities help not just to protect consumers from harm, but also to foster the development of expert knowledge and craft in the first place and aid in the smooth functioning of the economy.²³

Meanwhile, Eliot Friedson and others have applauded occupational licensing for its ability to create stronger relationships of trust between practitioners and the public.²⁴ In this view, licensing can support practitioners' sense of trusteeship over their jobs, promoting occupational

19. See, e.g., Noah Feldman, *Smile! Alito Revisits 19th Century Law*, BLOOMBERG (Feb. 27, 2015, 8:41 AM), <https://www.bloomberg.com/view/articles/2015-02-27/smile-alito-revisits-19th-century-law> (last visited Nov. 5, 2018) (applauding the majority's opinion in *North Carolina Board of Dental Examiners*); *DC Tours*, INST. FOR JUST., <http://ij.org/case/dc-tours/> [<https://perma.cc/K43U-P5XD>] (celebrating the D.C. Circuit's decision to strike down licensing requirements for tour guides under the First Amendment).

20. See, e.g., *Economic Liberty*, FTC, <https://www.ftc.gov/policy/advocacy/economic-liberty> [<https://perma.cc/7QVG-F2EA>] (noting that occupational licensing may be justified on grounds of public health and safety but listing no other justifications).

21. For a detailed account of the justifications of occupational licensing, see *infra* Part III.

22. EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIL MORALS* 6–7 (1958) (suggesting that the professions develop and enforce professional rules for the benefit of society); TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34 (1954) (suggesting that professions were vital to the development of modern society).

23. See *infra* section III.A.

24. ELIOT FRIEDSON, *PROFESSIONALISM, THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE* 1–16 (2001) (concluding that, historically, professionalism was driven by expertise coupled with an internal code of ethics that oriented professionals differently towards their work).

duty, civic engagement, and alternative sources of authority that can help check both government and corporate power.²⁵

Finally, occupational licensing can be viewed as a protectionist force for producers. Thinkers like Karl Polyani have claimed that one of the primary goals of the state should be to protect workers from the dislocating forces of the market.²⁶ Occupational licensing requirements can reduce turnover in the labor force, raise wages of practitioners, and, more generally, help protect the position of the professional middle class.²⁷ Even if these benefits to practitioners with a license come with costs to consumers or other workers, they can help provide stable jobs for a substantial segment of the labor force that, in some situations, may bring a broader set of benefits to society.²⁸

To be clear, this Article does not argue that these justifications for occupational licensing are applicable in every context or that the overuse of occupational licensing does not (it certainly can).²⁹ Rather, it claims that the choice of when and how to use licensing is a political decision that involves answering questions about what values the economy should prioritize and how it should function. For instance, is occupational knowledge and craft best generated and standardized through the market, professional communities, or other means?³⁰ In a specific occupation, should the government promote labor market individualism or

25. For a discussion of how occupational licensing and self-regulation may promote this sense of social trusteeship, see *infra* section III.B.

26. See generally KARL POLYANI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2001). As scholars like James Whitman and Michael Sandel have shown, U.S. law has not always equated public welfare so squarely with consumer welfare, but also emphasized protecting certain forms of production. See James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *YALE L.J.* 340 (2007) (explaining that, compared to law in the United States today, law in both the United States historically and contemporary Europe was more focused on producer interests); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 231–45 (1996) (noting that, as opposed to solely protecting consumer interests, antitrust law was originally envisioned, in part, as a tool to preserve the decentralized economy of small businesses and trades necessary for self-governance).

27. GITTLEMAN, KLEE & KLEINER, *supra* note 5 (suggesting that those with a license earn higher pay, are more likely to be employed, and have a higher probability of retirement and pension plan offers).

28. For a fuller discussion of this argument, see generally *infra* section III.C.

29. There are real concerns about licensing that should be addressed. For example, much recent attention by reformers has emphasized seemingly absurd licensing requirements, such as for interior designers or florists, or the employment barriers licensing creates for immigrants or those with a criminal record. See WHITE HOUSE REPORT, *supra* note 8, at 35–39.

30. See section III.B.

professional trusteeship?³¹ Or how should the regulation of a sector of the economy balance the interests of consumers with those of producers?³²

Using specific examples from the First Amendment, Fourteenth Amendment, and antitrust contexts, this Article shows how acknowledging this broader set of potential justifications should caution the federal courts from imposing any particular economic vision of the role of occupational licensing.³³ Instead, this Article suggests that Congress and the Executive should take the lead if the federal government is to be increasingly involved in occupational licensing. These branches of government have already become directly involved in setting occupational licensing standards in specific fields—such as transportation and finance—and have promoted a range of “best practices” for occupational licensing more generally.³⁴ Compared to federal courts, Congress and the Executive have a greater range of interventions available to them, can more readily tailor these interventions to specific occupations, and, given their more direct political accountability, are better suited to weigh different visions of licensing in the economy.³⁵

This Article proceeds in five Parts. Part I briefly examines the growth of occupational licensing in the United States, the primary policy criticisms of occupational licensing, and its traditional regulation by state and local governments. Part II describes the development of a federal occupational licensing jurisprudence that significantly limits when and how licensing requirements can be imposed. Part III lays out four justifications for occupational licensing. Part IV shows through specific examples why acknowledging this broader set of justifications should limit the federal courts’ interventions. Part V concludes that Congress and the Executive, not the courts, are better positioned within the federal government to take on a more proactive role in shaping the use of occupational licensing in the economy.

I. OCCUPATIONAL LICENSING

A. *Growth and Contemporary Reach*

Whether caste in India or the guild system in Europe, social and legal rules about who can perform certain occupational activities have long

31. See section III.C.

32. See section III.D.

33. See Part IV.

34. For a fuller discussion of these federal interventions, see *infra* section II.B.

35. *Id.*

existed.³⁶ Restrictions have been based on family lineage, agreements with local rulers, gender, or other criteria.³⁷ Over time, most of these forms of occupational regulation have decreased in prominence or been eliminated,³⁸ just as many forms of worker self-organization have also waned. For example, union membership, which historically was often all but required to perform certain crafts,³⁹ has declined from about 35% of the private sector workforce in the United States in the 1950s to 6.6% in 2012.⁴⁰

Occupational licensing, on the other hand, has seen a steady increase in its role in organizing the labor force.⁴¹ At first, this expansion might seem counter-intuitive. After all, consumers are more educated than ever before, as are workers,⁴² arguably creating less of a chance of abuse of consumers and so less need for licensing. Demand for licensing has frequently come from professional associations and regulatory boards dominated by practitioners, leading some to claim this growth has been significantly driven by regulatory capture.⁴³ Yet, the government and the

36. For more on the history of guilds in Europe and their power to monopolize certain crafts or trades, see S.R. Epstein, *Craft Guilds, Apprenticeship, and Technological Change in Pre-industrial Europe*, in *GUILDS, INNOVATION AND THE EUROPEAN ECONOMY, 1400–1800*, 52–53 (S.R. Epstein & Maarten Prak eds., 2008). For a general description of the caste system in India, see MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 7–17 (1984).

37. KLEINER, *supra* note 1, at 19–20.

38. For example, Article 15 of the Constitution of India prohibits discrimination on the basis of caste or sex. BHĀRATĪYA SAMVIDHĀNA [CONSTITUTION] Jan. 26, 1950, art. 15 (India). Guilds were abolished in much of Europe by the turn of the eighteenth century. See S. R. Epstein & Maarten Prak, *Introduction: Guilds, Innovation, and the European Economy, 1400–1800*, in *GUILDS, INNOVATION AND THE EUROPEAN ECONOMY, 1400–1800*, *supra* note 36, at 1.

39. Craft unions have a long history not only in the United States, but in medieval Europe and in ancient Rome and Greece. See JOHN P. FREY, *CRAFT UNIONS OF ANCIENT AND MODERN TIMES* (1945). Craft unions in mid-twentieth century United States dominated certain crafts, providing apprenticeship and other training to their members. *Id.* at 104–12.

40. Steven Greenhouse, *Share of the Workforce in a Union Falls to 97 Year Low, 11.3%*, N.Y. TIMES (Jan. 23, 2013), <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html> (last visited Dec. 3, 2018).

41. See *supra* note 5.

42. For example, in 1940 in the United States, approximately 38% of persons between the ages of twenty-five and twenty-nine had graduated high school. By 2013, this number had risen to about 90%. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2016-006, *DIGEST OF EDUCATION STATISTICS* 38 tbl.104.20 (2014), https://nces.ed.gov/programs/digest/d13/tables/dt13_104.20.asp [<https://perma.cc/FUB8-HR3Q>].

43. See, e.g., KLEINER, *supra* note 1, at 59 (noting that licensing requirements could be a form of rent capture by practitioners who are attempting to limit entry into the occupation or restrict information about pricing). For an early account of regulatory capture, see George J. Stigler, *Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (arguing that certain groups “demand” regulation where it economically benefits them, thus influencing the “supply” of regulation).

public have also been substantial drivers of more licensing.⁴⁴ This trend may be a result of consumers becoming more risk-averse.⁴⁵ At the same time, the economy in the United States has become more complex, technology-driven,⁴⁶ and service-based,⁴⁷ arguably necessitating more workers being licensed.

In 2017, the U.S. Department of Labor found in its Current Population Survey (CPS) that 22% of those employed in the United States had an occupational license.⁴⁸ This statistic is in line with previous recent estimates, ranging from 20% to 29%, of how many workers in the U.S. labor force have occupational licenses.⁴⁹ Table 1 below is based on the CPS and lists the number of persons in the United States in major occupational groupings where occupational licensing is common.⁵⁰

44. Marc T. Law & Sukko Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing*, 65 J. ECON. HIST. 723, 726–27 (2005) (arguing that evidence from the Progressive era indicates that licensing spread mostly not because practitioners worked to restrict competition, but because of specialization, urbanization, and advances in knowledge that made it difficult for consumers to judge the quality of professional services). More recently, much of the demand for increasing the stringency of licensing requirements for accounting, real estate appraisers, and stock brokers came from the government in the wake of financial crisis. *See infra* section V.A.

45. It is difficult to quantify whether society has become more risk adverse. However, society has certainly focused on new risks, such as the dangers of technology, which may be perceived to be mitigated through occupational licensing. *See* EUGENE ROSA, AARON MCCRIGHT & ORTWIN RENN, *THE RISK SOCIETY REVISITED: SOCIAL THEORY AND RISK GOVERNANCE* 3 (2013).

46. KLEINER, *supra* note 1, at 63 (noting that as certain occupations adopted more complex technology, the labor force required higher-quality and standardized labor).

47. WHITE HOUSE REPORT, *supra* note 8, at 19 (noting that the share of workers in services, which are more likely to be licensed than in industry, has increased since the 1950s).

48. *Labor Force Statistics from the Current Population Survey: Data on Certifications and Licenses*, U.S. DEP'T OF LABOR (Feb. 8, 2018), <http://www.bls.gov/cps/certifications-and-licenses.htm> [https://perma.cc/HN8D-8UDT] [hereinafter BLS TABLE 53] (follow “PDF” hyperlink for “Certification and licensing status of the employed by occupation” annual table). Another 3% were occupationally certified but had no occupational license. *Id.*

49. Kleiner & Krueger, *supra* note 5; GITTLEMAN, KLEE, & KLEINER, *supra* note 5.

50. BLS TABLE 53, *supra* note 48.

Table 1:
**Number of Persons Employed in Select Occupational Fields and
 Number and Percent with an Occupational License (2017)⁵¹**

Occupation	Number Employed	Number Licensed	Percent Licensed
Healthcare practitioners	9,141,000	6,691,000	73.2%
Legal occupations	1,827,000	1,140,000	62.4%
Education, training, and library occupations	9,215,000	4,690,000	50.9%
Healthcare support occupations	3,506,000	1,620,000	46.2%
Protective service occupations	3,113,000	1,108,000	35.6%
Community and social services occupations	2,635,000	848,000	32.2%
Personal care and service occupations	5,939,000	1,675,000	28.2%
Architecture and engineering occupations	3,224,000	719,000	22.3%
Life, physical, and social science occupations	1,431,000	338,000	23.6%
Transportation and material moving occupations	9,445,000	1,757,000	18.6%
Management, business, and financial operations occupations	25,379,000	4,822,010	19.0%
Natural resources, construction, and maintenance occupations	14,193,000	1,342,000	16.5%
Total Employed Workforce	153,337,000	33,734,000	22.0%

51. *Id.*

Although critics of occupational licensing often highlight seemingly absurd licensing requirements imposed by some states, such as for florists or interior designers,⁵² this table shows that most workers in the United States with an occupational license work in fields more often connoted with licensing, such as health care, education, law, social services, and protective services.

While the CPS is the most authoritative data currently available on occupational licensing, it does have shortcomings. The CPS uses expansive occupational categories. For instance, the survey finds that 62.4% of those in “legal occupations” have an occupational license.⁵³ However, the category of “legal occupations” includes paralegals and legal assistants.⁵⁴ If only practicing lawyers had been asked in the survey (about 1.14 million persons), the number of those licensed would likely have been close to 100%.⁵⁵

The above CPS data can also be misleading in other ways. In numerous occupations where licensing is mandatory for certain occupational activities, it is nonetheless common for many in the occupation not to be licensed. For example, to become an accountant one does not have to be licensed, but one does have to be licensed to be a certified public accountant (CPA), allowing the practitioner to perform certain auditing activities that are barred to others.⁵⁶ Occupational licensing requirements may still significantly shape the training of unlicensed practitioners in these occupations.⁵⁷

52. See CARPENTER ET AL., *supra* note 11, at 33–35 (recommending removing or reducing needless occupational licensing barriers); KLEINER, REFORMING OCCUPATIONAL LICENSING POLICIES, *supra* note 10, at 5 (noting no seeming rationale for licensing requirements for interior designers, travel guides, or auctioneers).

53. BLS TABLE 53, *supra* note 48.

54. For a full list of occupations included under the category “legal occupations,” see *Labor Force Statistics from the Current Population Survey*, U.S. DEP’T OF LABOR (Jan. 19, 2018), <https://www.bls.gov/cps/cpsaat11b.htm> [<https://perma.cc/LDQ5-QGJH>] [hereinafter BLS TABLE 11B].

55. *Id.* (detailing number of lawyers in the United States in 2016).

56. Only CPAs can perform mandatory audits of publicly traded U.S. companies. *Frequently Asked Questions FAQs - Become a CPA*, AM. INST. CPAS, <http://www.aicpa.org/BECOMEACPA/FAQS/Pages/FAQs.aspx> [<https://perma.cc/HTW7-N3QG>]. Similarly, engineers must be licensed to provide services in the market, but most practicing engineers are not personally licensed, instead working under an engineer who is licensed. Christopher Gearon, *Mandated Master’s Degrees Could Change the Engineering Game*, U.S. NEWS & WORLD REPORT (Mar. 17, 2014, 10:30 AM), <http://www.usnews.com/education/best-graduate-schools/top-engineering-schools/articles/2014/03/17/mandated-masters-degrees-could-change-the-engineering-game> (last visited Nov. 5, 2018) (noting that about 20% of all engineers are professionally licensed).

57. For example, to become a professional engineer, one must, among other qualifications, earn a four-year degree from an accredited engineering program. Graduates of these programs who do not

Occupational licensing requirements also significantly vary by State. Counselors, for instance, may or may not need a license depending on the type of counseling they do and the state in which they work.⁵⁸ The CPS data therefore might not show the pervasiveness of licensing in some fields in certain states.

Finally, the CPS data suffer from differing perceptions about what is an occupational license. For example, the CPS data find that about 1.76 million workers in the transportation sector have a license. Yet, an estimated 3.5 million truck drivers are in the country, almost all of whom presumably have a commercial driver's license.⁵⁹ The CPS survey asks workers whether "you have a currently active professional . . . state or industry license."⁶⁰ Truck drivers may have answered "no" to this question because they do not view their vehicular license as a "professional license." Yet little conceptual difference exists between having a license to drive a truck versus having a license to cut hair: in either case, one must pass a test to receive the license and may lose it if found violating certain standards.

The point of the CPS data provided in Table 1 is not to get lost in debates over exactly how many people in which occupations have occupational licenses in the United States. Rather, it is to show the major fields in which occupational licensing is common and its general pervasiveness across different realms of the workforce. This pervasiveness, and particularly its use in certain occupations, has led to frequent criticism that the next section briefly details.

B. Criticism

Academics, activists, and policymakers generally make two interlinked arguments against occupational licensing. First, they argue that licensing requirements are frequently overly expansive and restrictive.⁶¹ Second,

ultimately become a licensed professional engineer will nonetheless have their education shaped by their school meeting the requirements of this accreditation. *See What Is a PE?*, NAT'L SOC'Y PROF. ENGINEERS, <https://www.nspe.org/resources/licensure/what-pe> [<https://perma.cc/N3VL-RWKS>]; *About ABET*, ABET, <http://www.abet.org/about-abet/> [<https://perma.cc/2S55-32K9>].

58. For example, licensing requirements for rehabilitation counselors vary by state. *How to Become a Rehabilitation Counselor*, U.S. DEP'T OF LABOR (July 13, 2018), <http://www.bls.gov/oooh/community-and-social-service/rehabilitation-counselors.htm#tab-4> [<https://perma.cc/CKL8-YFCZ>].

59. BLS TABLE 11B, *supra* note 54.

60. *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STAT. (Apr. 28, 2017), <https://www.bls.gov/cps/certifications-and-licenses-faqs.htm> [<https://perma.cc/5HAB-X7BY>].

61. CARPENTER ET AL., *supra* note 11, at 7 (recommending removing or reducing needless occupational licensing barriers).

that occupational licensing's traditional self-regulation can lead to rent-seeking behavior by practitioners.⁶² These arguments are detailed in this section.

Critics point to several adverse consequences of overly burdensome licensing requirements. Perhaps the most widespread criticism is that such restrictions are anticompetitive, creating barriers that drive up the price of labor and generate higher costs for consumers.⁶³ This argument has a long lineage. Adam Smith warned that laws that regulate occupations can create unhealthy monopolies,⁶⁴ and Milton Friedman devoted his dissertation and a chapter of *Capitalism and Freedom* to detailing the adverse consequences of occupational licensing.⁶⁵ More recently, economists like Morris Kleiner have charted in more detail how licensing can increase the price of services and decrease labor mobility.⁶⁶

Critics of occupational licensing have also pointed to other damaging effects of licensing requirements. Libertarians, for instance, claim that licensing not only has negative effects on the economy such as increasing prices for services, but also reduces the economic freedom of both workers and consumers.⁶⁷ This rights-based perspective opposes occupational licensing because it constrains human choice, regardless of whether occupational licensing has a positive or negative effect on the economy.

Just as libertarians have criticized occupational licensing for restricting economic freedom, some progressive advocates have criticized it for perpetuating social hierarchy.⁶⁸ Those with the fewest resources are frequently the least equipped to undertake the educational and testing requirements necessary for a license.⁶⁹ These requirements have also been

62. *Id.* at 29–30 (arguing that licensing requirements are frequently created by practitioners to keep out competition).

63. KLEINER, *supra* note 1, at 59–62, 66–68.

64. ADAM SMITH, *THE WEALTH OF NATIONS* 69–70 (1776) (“The exclusive privileges of . . . statutes of apprenticeship, and all those laws which restrain, in particular employments . . . are a sort of enlarged monopolies, and may frequently . . . keep the market price of particular commodities above the natural price, and maintain both the wages of the labor and the profits of the stock employed about them somewhat above their natural rate.”)

65. *See generally* MILTON FRIEDMAN & SIMON KUZNETS, *INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE* (1945) (published version of Milton Friedman’s dissertation); *see also* FRIEDMAN, *supra* note 2, at 137–60.

66. KLEINER, *supra* note 1, at 59–62, 66–68.

67. For example, the Institute for Justice, a leading advocate for reducing occupational licensing, has within its mandate to “secure economic liberty.” CARPENTER ET AL., *supra* note 11, at 200.

68. WHITE HOUSE REPORT, *supra* note 8, at 35–38.

69. DAVID HARRINGTON & JARED TREBER, *INST. FOR JUSTICE, DESIGNED TO EXCLUDE: HOW INTERIOR DESIGNERS USE GOVERNMENT POWER TO EXCLUDE MINORITIES & BURDEN CUSTOMERS*

used in the past to purposely exclude marginalized social groups, like African-Americans,⁷⁰ and today frequently limit the ability of those with criminal backgrounds and immigrants to enter the labor force.⁷¹ And where occupational licensing has the effect of increasing prices, the poor are generally in the worst position to pay, limiting their ability to buy needed services.⁷²

To combat overly expansive or restrictive licensing requirements, these critics have generally recommended that they be targeted more narrowly, replaced with less restrictive regulatory options, like certification or registration, or eliminated entirely.⁷³ Significantly, some policymakers have claimed licensing restrictions should only be allowed where they protect the public from harm. For example, the American Legislative Exchange Council, an influential membership group of state legislators that supports free markets, has promoted model legislation that would require states to allow licensing only when it can be shown to protect against a “present and recognizable harm to the public health or safety” and is the least restrictive option.⁷⁴

(2009) (concluding that minorities and older people are less likely to have a college degree and so are more likely to be excluded from states where there is a licensing requirement for interior designers).

70. Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, in OCCUPATIONAL LICENSURE AND REGULATION 166, 175 (1980) (concluding that licensing laws were used discriminatorily from the 1890s to the 1950s to exclude African-Americans from licensed occupations and craft unions but that by 1970 such laws had at best a modest effect on black employment).

71. WHITE HOUSE REPORT, *supra* note 8, at 35–38.

72. *See, e.g.*, BRADLEY LARSEN, STANFORD UNIV. & NAT’L BUREAU OF ECON. RESEARCH, OCCUPATIONAL LICENSING AND QUALITY: DISTRIBUTIONAL AND HETEROGENEOUS EFFECTS IN THE TEACHING PROFESSION 4 (2015), [https://web.stanford.edu/~bjlarsen/Larsen%20\(2015\)%20Occupational%20licensing%20and%20quality.pdf](https://web.stanford.edu/~bjlarsen/Larsen%20(2015)%20Occupational%20licensing%20and%20quality.pdf) [<https://perma.cc/QNQ9-5BZF>] (explaining that stricter licensing requirements for teachers lead to higher output quality but improvements disproportionately accrue with high-income school districts and arguing that this outcome may be a result of low-income school districts responding to higher-priced teachers with larger class sizes or emergency-certified teachers).

73. *See, e.g.*, CARPENTER ET AL., *supra* note 11, at 7 (recommending removing or reducing needless occupational licensing barriers); FRIEDMAN, *supra* note 2, at 144–46 (suggesting that registration and certification could be alternatives to licensing in some contexts); WHITE HOUSE REPORT, *supra* note 8, at 44 (discussing certification, registration, and mandatory bonding as alternatives to occupational licensing). In actual practice, “certification” and “registration” may be used as synonyms with the term “licensed,” which can cause confusion. For example, a “certified” public accountant or a “registered” nurse is simply another name for licensure. *See* BENJAMIN SHIMBERG, BARBARA F. ESSER & DANIEL H. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 8 (1973).

74. *The Occupational Licensing Defense Act*, AM. LEGIS. EXCH. COUNCIL (Dec. 8, 2017), <https://www.alec.org/model-policy/the-occupational-licensing-defense-act-2/> [<https://perma.cc/DEB2-VKPL>].

The argument that occupational licensing is overly expansive is often coupled with the concern that it is particularly susceptible to regulatory capture because in many fields members of the occupation play a formal role in regulating the occupation itself by sitting on occupational licensing boards.⁷⁵ Concerns about self-regulation of occupations have gained particular traction as the regulatory state has become more sophisticated, so regulation of occupations directly by the state, without as central a role for practitioners, now seems more feasible and, for many, more legitimate.⁷⁶ As such, where occupational licensing is necessary, some policymakers maintain it should be controlled not by practitioners, but by technocrats or public members of licensing boards who are viewed as more likely to adopt licensing requirements only when they are in the interests of consumers or the public.⁷⁷

C. *States' Regulation of Occupational Licensing*

Most observers have traditionally viewed occupational licensing as primarily controlled by states and localities.⁷⁸ For example, when the Obama White House issued a report in 2015 aimed at curtailing the use of occupational licensing it declared that “licensing policy falls in the purview of individual States.”⁷⁹ The report did not mention any substantial federal role in occupational licensing and tailored all of its recommendations for state and local governments.⁸⁰ Leading scholars on occupational licensing have similarly taken the view that occupational

75. FRIEDMAN, *supra* note 2, at 140–41; KLEINER, *supra* note 1, at 59.

76. *See, e.g.*, DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 241–43 (2009) (noting that in the legal profession the federal government has become a much more active player in its regulation, reducing its insularity and autonomy); Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 *GEO. J. LEGAL ETHICS* 1, 52–53 (2016) (arguing that the legal profession has begun to be seen more like other commercial services and that the government has increasingly encroached on its regulation).

77. *See, e.g.*, WHITE HOUSE REPORT, *supra* note 8, at 52 (advocating for more public membership on occupational licensing boards).

78. For example, Justice Alito in his dissent in *North Carolina Board of Dental Examiners v. FTC*, noted that “[i]n 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States’ sovereign police power.” 574 U.S. ___, 135 S. Ct. 1101, 1119 (2015) (Alito, J., dissenting). *See also* *Dent v. West Virginia*, 129 U.S. 114, 129 (1889) (explaining that states have long used occupational licensing requirements to provide for the general welfare of the people in upholding a Fourteenth Amendment due process challenge to West Virginia’s medicine licensing requirements).

79. WHITE HOUSE REPORT, *supra* note 8, at 41.

80. *Id.* at 41–43. The report merely made mention of relatively minor initiatives by the federal government already undertaken to improve licensing at the state level. *Id.* at 54–55.

licensing is primarily a state and local issue and largely ignored the role of federal actors.⁸¹

It is easy to see why this perspective has dominated. The federal government has not acted to preempt the field for occupational licensing as it has for other issues, such as labor laws with the National Labor Relations Act.⁸² Nor has the Constitution been read to preempt state action in the field, as with foreign affairs.⁸³ Instead, state governments generally still decide what activities to license and then frequently delegate the actual implementation of licensing requirements to volunteer, or quasi-volunteer, boards of practitioners operating at the state level.⁸⁴ These boards, which may have public representatives, set and enforce standards for the occupation.⁸⁵ State administrative procedure acts apply to the actions of these boards, requiring notice and comment for new regulations and a hearing if a license is to be taken away or suspended.⁸⁶

There is, of course, variation to this general model of states delegating to occupational licensing boards even where states are in control. For example, truck drivers are regulated directly by state authorities with no delegation to a licensing board.⁸⁷ Similarly, the highest court of a state,

81. KLEINER, *supra* note 1, at 21 (arguing that *Dent v. West Virginia*, 129 U.S. 114, 129 (1889), gave authority over occupational licensing to the states).

82. *See, e.g., Machinists v. Wis. Emp. Relations Comm'n*, 427 U.S. 132 (1976) (finding that federal labor policy precluded a state from enjoining a union and its members from striking); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (finding that even when the National Labor Relations Board did not act, the National Labor Relations Act precluded states from taking actions over which the Board would otherwise have jurisdiction).

83. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (1999) (finding Massachusetts's Burma sanctions law to be preempted by federal control over foreign relations); *Zschernig v. Miller*, 389 U.S. 429 (1968) (finding an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries unconstitutional because it preempted the U.S. foreign relations power).

84. Regulatory arrangements between states and amongst different occupations can be diverse. Some boards are appointed by the government, others by the legislature, and some elected by the profession. A staff may aid the board in its functions. For an overview of these possible arrangements, see COUNCIL ON LICENSURE, ENF'T & REGULATION (CLEAR), FRAMEWORK FOR DEVELOPING CONSISTENT DESCRIPTIONS OF REGULATORY MODELS: UNITED STATES 3 (2006), http://www.clearhq.org/resources/Regulatory_Model_United_States.pdf [<https://perma.cc/6YU8-U9KQ>] [hereinafter CLEAR].

85. *Id.*

86. *Id.* For a detailed overview of how the Administrative Procedure Act of Texas informs the actions of occupational licensing boards in Texas, see ATT'Y GEN. OF TEX., ADMINISTRATIVE LAW HANDBOOK (2018), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/AdministrativeLawHandbook.pdf> [<https://perma.cc/64UH-S6GF>].

87. *Commercial Driver's License Program*, FED. MOTOR CARRIER ADMIN., <http://www.fmcsa.dot.gov/registration/commercial-drivers-license> [<https://perma.cc/6ECJ-VZFT>] (explaining that a commercial driver's license must be obtained from one's home state's department of motor vehicles).

rather than a licensing board or the state executive, regulates lawyers, at least formally.⁸⁸

Yet this traditional broad-brush account of state control over occupational licensing overlooks three critical ways licensing is governed at the federal level.

First, and not explored in detail in this Article, this state-centric view misses the significant role played by national professional associations. These associations frequently lobby legislatures to license specific occupations in the first place and work with licensing boards to adopt model rules or best practices that these national associations promulgate.⁸⁹ As such, national professional associations provide expertise for states' licensing efforts and play an important coordinating role, helping to harmonize occupational licensing rules across states.⁹⁰ They can even become formally involved in implementing regulation, as in the case of medical professional associations' role in accrediting medical schools.⁹¹

Second, and again not explored in this Article, national organizations are created by states to coordinate standards in particular fields. For example, the National Council of Examiners for Engineering and Surveying (NCEES) is a non-profit organization that is composed of the legally constituted state boards that regulate engineering and/or

88. For example, the New York State Board of Law Examiners is responsible for administering the bar exam and operates under the auspices of the New York State Court of Appeals. N.Y. ST. BD. OF L. EXAM'RS, <http://www.nybarexam.org/Default.html> [<https://perma.cc/9K3L-N9BR>]. In New York, complaints against lawyers are heard by disciplinary and grievance committees appointed by respective appellate divisions of the judicial system. *Attorney Grievance Committees*, N.Y. ST. UNIFIED CT. SYS., <http://www.nycourts.gov/attorneys/grievance/> [<https://perma.cc/M44X-YXPG>].

89. Alan B. Krueger & Morris M. Kleiner, *The Prevalence and Effects of Occupational Licensing* 3 (Ctr. for European Policy Studies, Working Paper No. 174, 2008) (noting that professional associations lobby state legislatures for licensing requirements).

90. For example, the American Bar Association promulgates the Model Rules of Professional Ethics that serve as a model for the ethics rules of most states. *Model Rules of Professional Conduct*, ABA (Oct. 25, 2018), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [<https://perma.cc/42N3-AC48>].

91. For example, most states require that practitioners of medicine graduate from a medical school accredited by the Liaison Committee on Medical Education (LCME). *Scope and Purpose of Accreditation*, LIAISON COMMITTEE ON MED. EDUC., <http://lcme.org/about/> [<https://perma.cc/YC5N-KW7W>]. The LCME is, in turn, jointly sponsored by the American Medical Association (AMA) and the Association of American Medical Colleges (AAMC). *Relationship with Sponsors*, LIAISON COMMITTEE ON MED. EDUC., <http://lcme.org/about/sponsors/> (last visited Nov. 5, 2018). The AMA is a membership organization of physicians and state and national medical societies, while the AAMC is a membership organization of medical colleges in the country. *About the AAMC*, ASS'N AM. MED. CS., <https://www.aamc.org/about/> [<https://perma.cc/27YH-8XM8>]; see also *About Us*, AM. MED. ASS'N, <https://www.ama-assn.org/about> [<https://perma.cc/HP95-GYC2>].

surveying.⁹² It provides national exams for engineers and surveyors as well as model rules and laws for states and state boards.⁹³

Third, and the focus of this Article, the traditional state-centric account of occupational licensing misses another key component of national governance—namely, the increasingly prominent role that the federal government plays in regulating occupational licensing. The next Part explores the interventions of the federal courts, while the last Part turns to Congress and the Executive, suggesting that these two branches are generally better suited than the judiciary to regulate licensing at the federal level.

II. THE FEDERAL JUDICIARY’S OCCUPATIONAL LICENSING JURISPRUDENCE

As both occupational licensing and critiques of it have become more pervasive, the federal courts have produced a more fully developed jurisprudence regulating its use. This Part focuses on how the federal courts have interpreted antitrust law and the First and Fourteenth Amendments to place significant limits on both when and how occupational licensing restrictions can be used. Significantly, in doing so, the courts have explicitly or implicitly promoted a free market view of licensing in which licensing is justified only when it clearly protects the public from harm and professional self-regulation is viewed as synonymous with regulatory capture.

A. *Antitrust*

Legal scholars have long noted that the actions of occupational licensing boards can be in tension with U.S. antitrust law.⁹⁴ After all, members of occupational licensing boards are frequently also market

92. NAT’L COUNCIL OF EXAM’RS FOR ENG’G & SURVEYING, BYLAWS 1 (2015), <http://ncees.org/wp-content/uploads/2012/11/2015-Bylaws.pdf> [<https://perma.cc/J24E-7R2E>] (see Article 1). The NCEES’s Board of Directors is elected from those who already sit on state licensing boards. *About*, NAT’L COUNCIL EXAMINERS FOR ENGINEERING & SURVEYING, <http://ncees.org/about/> [<https://perma.cc/PT3E-NKRS>].

93. *About*, NAT’L COUNCIL EXAMINERS FOR ENGINEERING & SURVEYING, *supra* note 92.

94. *See, e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1137–39 (2014) (describing how prominent antitrust scholars agree that occupational licensing boards should only be given antitrust immunity if they are held publicly accountable for anticompetitive behavior); Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 668–69 (1991) (noting that there is a tension between the consumer welfare pro-competition impulse of antitrust law and occupational licensing).

participants in the fields that they are regulating.⁹⁵ Occupational licensing boards routinely make regulatory decisions that are by their nature anticompetitive, such as making requirements to become a practitioner more stringent (thus raising barriers for new entrants into the market) or taking away the license of practitioners who violate professional rules (thereby eliminating competitors). However, the United States Supreme Court's doctrine of state-action immunity, articulated in *Parker v. Brown*,⁹⁶ generally protects actions of state and local governments from antitrust scrutiny.⁹⁷ The doctrine was also historically seen to provide broad protection to actions of occupational licensing boards (which have been viewed as state agencies) as long as the boards derived their authority to act from the state.⁹⁸

Even so, this broad protection has its limits. Professional associations, in particular, have faced antitrust scrutiny in the past. For example, in *Goldfarb v. Virginia State Bar*,⁹⁹ the Court found in a unanimous decision that the professions could be regulated by antitrust laws because they were engaged in a "trade or commerce."¹⁰⁰ As such, it held that minimum fee schedules promoted by a state bar association violated antitrust laws because the state bar association acted to enforce these schedules even though they were not required to do so by the state.¹⁰¹ Similarly, in *National Society of Professional Engineers v. United States*,¹⁰² the Court struck down a professional association's ban on competitive bidding.¹⁰³

95. *Id.*

96. 317 U.S. 341 (1943).

97. *Id.* at 350–52 (holding that an anticompetitive marketing program which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Sherman Act was not intended to prohibit a State from imposing a restraint as an act of government).

98. Justice Alito noted in dissent in *North Carolina Board of Dental Examiners v. FTC* that "[i]n *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare." 574 U.S. ___, 135 S. Ct. 1101, 1117 (2015) (Alito, J., dissenting); see also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (noting "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required . . .").

99. 421 U.S. 773 (1975).

100. *Id.* at 787–88 (finding that lawyers, although a learned profession, were engaged in a "trade or commerce" and so could be regulated by antitrust laws).

101. *Id.* at 790 ("We need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.").

102. 435 U.S. 679 (1978).

103. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (finding that the National Society of Professional Engineers canon of ethics banning competitive bidding violated the Sherman Act); see also *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (finding that a policy of a dental

Outside the occupational licensing context, the United States Supreme Court has also allowed for antitrust scrutiny where the state has delegated regulatory authority to other actors in some situations.¹⁰⁴ Famously, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,¹⁰⁵ the Court found that the state of California's delegation of fixing wine prices to wine producers and wholesalers violated the Sherman Act. In the case, the Court created a two-part test for determining whether *Parker* state-action immunity would shield third parties.¹⁰⁶ This two-part test was summarized in *FTC v. Ticor Title Insurance Co.*,¹⁰⁷ where the Court held that "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct."¹⁰⁸

Applying this logic, the Court significantly expanded the historic reach of antitrust law in relation to occupational licensing boards in *North Carolina Board of Dental Examiners*. The North Carolina State Board of Dental Examiners is a state agency that licenses dentists in the state and is comprised mostly of practicing dentists.¹⁰⁹ It sent cease and desist letters to non-dentist teeth whiteners that operated in shopping malls and other locations, claiming that they were practicing dentistry without a license.¹¹⁰ State law was ambiguous about whether teeth whitening actually constituted dentistry and the FTC filed a case against the Dental Board, labeling the Board's actions anticompetitive.¹¹¹ In response, the Dental

association to require dentist members to withhold x-rays from insurance companies violated antitrust law); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332 (1982) (holding that doctors in a medical society fixing maximum fees violated antitrust law). *But see* *Hoover v. Ronwin*, 466 U.S. 558 (1984) (rejecting an antitrust challenge to admission rules to the Arizona State Bar because the Arizona Supreme Court itself maintained ultimate control over who was to be admitted even if it delegated authority to write these rules to a commission of lawyers).

104. *Patrick v. Burget*, 486 U.S. 94 (1988) (holding that the state action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer review committees).

105. 445 U.S. 97 (1980).

106. *Id.* at 111–14.

107. 504 U.S. 621 (1992).

108. *Id.* at 631.

109. *N.C. State Bd. of Dental Exam'rs. v. FTC*, 574 U.S. ___, 135 S. Ct. 1101, 1108 (2015).

110. *Id.*

111. *Id.* at 1110 (noting that state law was silent on whether teeth whitening constituted the practice of dentistry).

Board claimed the cease and desist letters sent by the FTC should be considered state action and be provided antitrust immunity.¹¹²

In a six-to-three decision, Justice Kennedy, writing for the majority, found that the first part of the *Midcal* state-action immunity test was met because the state had a clear policy of prohibiting the unauthorized practice of dentistry.¹¹³ However, the second part of the test—active state supervision—was not. Kennedy emphasized that “[l]imits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”¹¹⁴ He found that the state did not actively supervise or explicitly sanction the Dental Board’s decision that teeth whitening was to be included in the unauthorized practice of dentistry or the sending of the cease and desist letters to the teeth whiteners.¹¹⁵ Because active market participants controlled the Board, its actions deserved a heightened level of scrutiny by the Court and as a result it failed to meet the second prong of the *Midcal* test.¹¹⁶

In his decision, Justice Kennedy did not define what would have constituted active state supervision, claiming it varied by context.¹¹⁷ However, he found it required at least three components, all of which were absent in the case of the North Carolina Board of Dental Examiners’ actions: (1) “The [state] supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it;”¹¹⁸ (2) “the [state] supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy;”¹¹⁹ and

112. *Id.* (“In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board’s actions are cloaked with *Parker* immunity.”).

113. *Id.* (“The parties have assumed that the clear articulation requirement is satisfied, and we do the same.”).

114. *Id.* at 1111. Justice Kennedy continued, “[t]he lesson is clear: *Midcal*’s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.” *Id.* at 1113. In this way, the Court’s reasoning echoed the writings of legal antitrust scholars. *Id.* at 1116; *see also* Edlin & Haw, *supra* note 94 (arguing occupational licensing boards dominated by market participants should face antitrust scrutiny).

115. *Id.* at 1116.

116. *Id.* (noting that “[t]he Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here”).

117. *Id.* (“It suffices to note that the inquiry regarding active supervision is flexible and context-dependent.”).

118. *Id.*

119. *Id.*

(3) “the mere potential for state supervision is not an adequate substitute for a decision by the State.”¹²⁰

As Justice Alito noted in his dissent, this decision signaled a shift in the Court’s jurisprudence.¹²¹ Alito argued that the *Midcal* test should not have been applied to the North Carolina Dental Board as the two-prong test had only previously been applied to situations where the state delegated power to private actors.¹²² However, the Dental Board was a state agency created by the state that acted at its behest, even if the Board was comprised of market participants.¹²³

The *North Carolina Board of Dental Examiners* decision has far-reaching implications for the regulation of occupational licensing. Under *North Carolina Board of Dental Examiners*, regulatory actions of licensing boards that are controlled by practitioners can now come under antitrust scrutiny if they are not actively supervised by the state.¹²⁴ Because the work of many licensing boards involves limiting output by placing restrictions on who can and cannot practice in an occupation, the Court opened up unsupervised licensing boards to antitrust challenges.¹²⁵

After the *North Carolina Board of Dental Examiners* decision, a wave of private action suits against various state occupational licensing authorities arose.¹²⁶ In one closely followed case, a telemedicine company

120. *Id.*

121. *Id.* at 1117.

122. *Id.*

123. *Id.* at 1117–18 (Alito, J., dissenting) (“Under *Parker*, the Sherman Act . . . do[es] not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter.”).

124. *Id.* at 1116.

125. *See, e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984) (noting that where “the challenged practices create a limitation on output . . . our cases have held that such limitations are unreasonable restraints of trade”).

126. These suits have had varying success. *See, e.g.*, *Petrie v. Va. Bd. of Med.*, 658 Fed. App’x 352 (4th Cir. 2016) (dismissing antitrust challenge by chiropractor who had been punished by Board of Medicine for offering services that required medical license because restraint on one practitioner not enough to account for restraint on trade and could not show agreement among board members to restrain trade); *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL 401234 (M.D.N.C. Jan. 30, 2017) (allowing for antitrust suit to proceed against acupuncture licensing board for warning physical therapists not to perform dry needling); *Wallen v. St. Louis Metro. Taxicab Comm’n*, No. 4:15cv1432, 2016 WL 5846825 (E.D. Mo. Sept. 30, 2016) (finding that Uber could proceed in an antitrust suit against a taxicab commission for denying it access to a market); *Colindres v. Battle*, No. 1:15-CV-2843-SCJ, 2016 WL 42589330 (N.D. Ga. June 6, 2016) (finding that an antitrust suit against a Georgia dental board for threatening to close teeth whiteners survived a motion to dismiss); *Robb v. Conn. Bd. of Veterinary Med.*, 157 F. Supp. 3d 130 (D. Conn. Jan. 20, 2016) (dismissing an antitrust challenge by a veterinarian who had been disciplined by the state board for using a vaccination procedure not prescribed by the board); *Axcess Med. Clinic, Inc. v. Easterling*, No. 3:14cv112, 2015 WL 5642975 (S.D. Miss. Sept. 24, 2015) (antitrust challenge to rules requiring

brought suit against the Texas Medical Board for a regulation that barred physicians from treating a patient without a prior in-person physical exam.¹²⁷ The district court granted an injunction against the regulation, and the Texas Medical Board later dropped its appeal, seemingly fearing that the circuit court would rule that the regulation did not have state action immunity.¹²⁸

In response to the Court's decision, many states have also increased supervision of occupational licensing boards. They have adopted a variety of tactics to do so, which may or may not actually meet Justice Kennedy's vague and context-specific standard of supervision.¹²⁹ For example, in California, the Attorney General has held that any regulatory decision of a state licensing board must be reviewed by a state official.¹³⁰ In Oklahoma, the applicable regulations must be reviewed by the Attorney General.¹³¹ Several states have passed or introduced legislation to change how the actions of regulatory boards are reviewed.¹³² In Connecticut, legislation was passed in 2015 that required regulatory boards related to health to notify the Department of Public Health if they receive a complaint related to a regulatory decision and then abide by the holding of the Department of Public Health Commissioner on the matter.¹³³ In 2017, Mississippi passed a law that created an occupational licensing

physician ownership of pain management clinics); Voluntary Dismissal, CoesterVMS.com, Inc. v. Va. Real Estate Appraiser Bd., 1:15-cv-00980 (E.D. Va. Oct. 6, 2015) (voluntary dismissal of antitrust challenge to denial of licensure due to past conduct); Complaint, WSPN Corp. v. Tenn. Dep't of Health, No. 3:15-cv-00840 (M.D. Tenn. July 30, 2015) (claiming restraint in trade in hearing aid market because of regulations by licensing board); Terry Carter, *LegalZoom Resolves \$10.5M Antitrust Suit Against North Carolina State Bar*, ABA J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar/ [<https://perma.cc/9DWQ-9R7Q>] (detailing LegalZoom antitrust settlement with North Carolina State Bar that allows it to operate in state).

127. See *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015).

128. See Michelle Casady, *Texas Medical Board Drops 5th Circ. Telemedicine Appeal*, LAW360 (Oct. 18, 2016, 3:34 PM) <https://www.law360.com/articles/852571/texas-medical-board-drops-5th-circ-telemedicine-appeal> (last visited Oct. 26, 2018).

129. *N.C. Bd. of Dental Exam'rs*, 135 S. Ct. at 1116.

130. See FTC, AM. MED. ASS'N & MANATT, STATE ACTION ISSUES IN THE WAKE OF *NORTH CAROLINA BOARD OF DENTAL EXAMINERS* 19–20 (2016), https://www.americanbar.org/content/dam/aba/administrative/healthlaw/14_state_action_issues_in_the_wake_of_the_north_carolina_dental_board_decision.authcheckdam.pdf [<https://perma.cc/J3HK-ZNPB>].

131. *Id.*

132. *Id.*

133. JAMES ORLANDO, CONN. OFFICE OF LEGISLATIVE RESEARCH, *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. FEDERAL TRADE COMMISSION* (2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0041.pdf> [<https://perma.cc/4B26-8857>].

review commission that actively supervises many of the state's licensing boards.¹³⁴ The California Supreme Court went so far as to strip the Committee of Bar Examiners of the power to determine the passing score on the bar exam so as to help avoid potential antitrust liability.¹³⁵

As such, the U.S. Supreme Court's antitrust jurisprudence has significantly shaped how occupational licensing is regulated. In response to an increasingly aggressive federal judiciary, states have added a variety of forms of state control over licensing decisions and reduced independent occupational self-regulation.

B. *First Amendment*

Under *Parker*, explicit state action (such as legislation requiring licensing for an occupation in the first place) is immune from antitrust scrutiny.¹³⁶ However, this is not true in the free speech context. Federal courts can, and frequently do, strike down occupational licensing requirements that violate the First Amendment even if the state has authorized these requirements through legislation or active supervision.

The Court's free speech jurisprudence, as it relates to occupational licensing, can be divided into that protecting the speech of licensed practitioners and that protecting the speech of unlicensed market participants. Amidst its developing First Amendment doctrine, the Court's commercial speech jurisprudence and its interventions to protect the speech of unlicensed market participants has arguably, at times, led to the constitutionalization of a free market ideology in the occupational licensing context.

A licensed practitioner's speech has traditionally received different levels of protection whether it is political speech, commercial speech, or "professional" speech. A practitioner's political speech generally receives robust protection under the First Amendment and is not the focus here.¹³⁷

134. Nick Sibila, *New Mississippi Law Will Reign in Licensing Boards, Regulate State Regulators*, FORBES (April 23, 2017, 2:00 PM), <https://www.forbes.com/sites/instituteofjustice/2017/04/13/new-mississippi-law-will-rein-in-licensing-boards-regulate-state-regulators/#13d65b01715b> [<https://perma.cc/9J69-2CZG>].

135. Staci Zaretsky, *California Bar Examiners Stripped of Authority to Determine Passing Score on State Bar Exam*, ABOVE THE LAW (July 11, 2017, 12:13 PM), <http://abovethelaw.com/2017/07/california-bar-examiners-stripped-of-authority-to-determine-passing-score-on-state-bar-exam/> [<https://perma.cc/8T22-EY35>].

136. See *Parker v. Brown*, 317 U.S. 341, 350–52 (1943).

137. For example, in *NAACP v. Button*, the Court struck down provisions of law in Virginia aimed at curtailing the activities of the NAACP that banned lawyers from the "improper solicitation of any legal or professional business" because these provisions operated to infringe on protected political speech. 371 U.S. 415, 419, 442–44 (1963). In *Baird v. State Bar of Arizona*, the Court held that

Historically, a practitioner’s professional speech—i.e., where a client relies on professional advice—has been given very limited First Amendment protection. For instance, a doctor generally has no free speech defense when providing advice to a patient that does not conform to accepted standards of professional practice and, as a result, doctors can lose their licenses or face tort liability.¹³⁸ However, this traditional understanding of the professional speech doctrine was cast into question by the Court in 2018 in *National Institute of Family and Life Advocates v. Becerra*.¹³⁹ In the five to four decision, the Court struck down on First Amendment grounds a California requirement that licensed and unlicensed pregnancy clinics must inform patients that the state provides free or low-cost abortion services.

In the majority decision, Justice Thomas rejected the argument that such notice requirements were “professional speech” that was immune from First Amendment scrutiny.¹⁴⁰ Thomas noted that the Court has never officially recognized “professional speech” as a separate category of speech, even if lower courts have.¹⁴¹ He indicated state regulation of professions would only receive immunity from free speech scrutiny in two instances. First, immunity would be granted when states regulate “professional conduct” and it only “incidentally burden[s] speech,” such as through torts for professional malpractice.¹⁴² Second, states could “require professionals to disclose factual, noncontroversial information in their commercial speech” if the disclosure related to services the regulated entity provided.¹⁴³

allowing licensing boards to ask prospective members of the bar whether they are members of the Communist Party violated their First Amendment free expression rights. 401 U.S. 1 (1971). *But see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (finding New York’s more narrowly tailored requirement that bar applicant’s state they believe in the form of government in the United States and are loyal to that government does not violate the First Amendment).

138. ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 12–13 (2013) (noting that a dentist does not have a First Amendment defense if she offers advice to a patient based on an unaccepted theory but does if she offers the theory to the public). The doctor, though, may have a free speech defense if the state attempts to mandate that a practitioner perform an action or speech incompatible with the accepted standards of their professional community. *See generally* Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1297–98 (2016) (arguing that states should not be able to compel professional communities to communicate speech that is incompatible with a professional community’s insights).

139. 585 U.S. ___, 138 S. Ct. 2361 (2018).

140. *Id.* at 8.

141. *Id.*

142. *Id.* at 9–10.

143. *Id.* at 8–9.

Significantly, Justice Thomas's opinion did not ultimately hinge on whether a category of "professional speech" exists as he ultimately held that California's notice requirements did not even survive intermediate scrutiny.¹⁴⁴ Also, the case is potentially distinguishable from some other occupational licensing contexts because it involved the state government compelling specific speech from a practitioner. However, the judgment seems to indicate the professional speech doctrine may not provide occupational licensing regulations the same wide protection from First Amendment scrutiny as in the past. Indeed, some academics have argued strict First Amendment scrutiny should be applied to all professional speech.¹⁴⁵

While professional speech may be subject to more First Amendment scrutiny in the future, the commercial speech of professionals already is significantly scrutinized. The Court has increasingly viewed practitioners' commercial speech—such as when practitioners solicit work or advertise their services—as deserving of First Amendment protection. This shift has been deeply contested as many have viewed the professions' traditional distance from the rules of the market as integral to ensuring that practitioners provide services to clients in a public-spirited manner.¹⁴⁶ For example, in *Brotherhood of Railroad Trainmen v. Virginia*,¹⁴⁷ the Court found that the solicitation of personal injury cases amongst members of a labor union by the union and its lawyer was protected free speech that could not be banned by the state.¹⁴⁸ Justice Clark in dissenting with Justice Harlan, lamented that the decision's application of the First Amendment

144. *Id.* at 14. It is not clear why Justice Thomas applied an intermediate standard in the case as speech classified as professional speech is exempted from First Amendment scrutiny. Potentially, he was responding to California's claim that the notice requirement was at best commercial speech and so would be subject to intermediate scrutiny. See Cory L. Andrews, *The Dog That Didn't Bark in the Night: SCOTUS's NIFLA v. Becerra and the Future of Commercial Speech*, FORBES (July 5, 2018, 11:02 AM), <https://www.forbes.com/sites/wlf/2018/07/05/the-dog-that-didnt-bark-in-the-night-scotuss-nifla-v-becerra-and-the-future-of-commercial-speech/#28e23f0c3ddc> [<https://perma.cc/VA46-L32P>]. Notably, Justice Thomas also placed heavy emphasis on the notice requirements being a "content-based" regulation. *Becerra*, 138 S. Ct. at 2371.

145. See Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016) (cited by Justice Thomas in *Becerra*, 138 S. Ct. at 2375).

146. See, e.g., *Bates v. Arizona*, 433 U.S. 350, 397–98 (1977) (Burger, J., dissenting) (arguing that the characteristics of the legal profession, such as its code of professional ethics and its sense of public responsibility, are thought to suffer if restraints on advertising are diluted).

147. 377 U.S. 1 (1964).

148. *Id.* at 1 (finding the State failed to show any appreciable public interest in preventing the union from carrying out its plan to recommend the lawyers it selects to represent injured workers).

“overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise.”¹⁴⁹

The following decades saw an enlargement of the Court’s commercial speech doctrine, further limiting the types of restrictions on market activity that states could place on occupations that require a license.¹⁵⁰ In 1976, the Court ruled in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*¹⁵¹ that advertisement by licensed pharmacists was protected commercial speech and struck down a state law that banned pharmacists from advertising price information.¹⁵² The Court made clear that these advertising restrictions concerned practitioners’ “retail” face more than their professional face,¹⁵³ was not in itself harmful to the public,¹⁵⁴ and so was not protected from First Amendment scrutiny. The following year, in *Bates v. State of Arizona*,¹⁵⁵ the Court struck down, on similar grounds, an Arizona statute that barred lawyer advertisement.¹⁵⁶ A series of U.S. Supreme Court cases followed that further specified what types of lawyer advertisement and solicitation were protected under the First Amendment.¹⁵⁷ These decisions significantly restricted when the

149. *Id.* at 9. *But see* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (finding that states could ban direct, in-person commercial solicitation by lawyers).

150. For an overview of the history of the commercial speech doctrine, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 779–91 (1999); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017).

151. 425 U.S. 748 (1976).

152. *Id.* at 769–72 (holding that commercial speech is protected speech under the First Amendment).

153. *Id.* at 768–69 (“[T]his case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license. . . . The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.”).

154. *Id.* at 770 (“[T]his [price] information is not in itself harmful . . .”).

155. 433 U.S. 350 (1977).

156. *See id.* at 381–82 (holding that advertisement by lawyers is commercial speech that is subject to protection by the First Amendment).

157. *See* *Thompson v. W. Med. Ctr.*, 535 U.S. 357 (2002) (striking down a restriction on advertising of pharmacists selling “compounded drugs” as violating the commercial speech doctrine); *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985) (finding that illustrations in lawyer advertisement were protected free speech, but full information regarding contingency fees should be included in advertisement); *In re R. M. J.*, 455 U.S. 191 (1982) (finding that a lawyer who listed categories of specialty not included in pre-specified list under state Supreme Court rule was protected action under First Amendment); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (finding solicitation of clients through letter by non-profit legal organization was protected political speech). *But see* *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (finding that although advertising by lawyers

state could limit advertising in medicine and law, arguably contributing to what many claim is an increasing commercialization of these and other professions.¹⁵⁸

Besides using free speech to invalidate professional restrictions on practitioners' commercial speech, the federal judiciary has also enlarged First Amendment protections for unlicensed market participants and, in the process, struck down licensing restrictions. At least before *NIFLA*, professional speech has been categorically exempted from First Amendment scrutiny where there was a "personal nexus between professional and client" and the practitioner is exercising judgment on behalf of the client in a way that is tailored to their circumstances.¹⁵⁹ As such, the federal courts have generally dismissed free speech challenges to the ability of states to require a license for occupational activities that involve speech.¹⁶⁰

That said, unlicensed market participants have generally received protection for their speech when they are speaking about a professional activity if it is to the public at large. For instance, in *Lowe v. Securities Exchange Commission*,¹⁶¹ the Securities and Exchange Commission (SEC) attempted to restrain Christopher Lowe, who was not a registered investment advisor, from publishing a newsletter that offered non-personalized investment advice. The majority opinion found that the SEC did not have the power to do so based on an issue of statutory interpretation.¹⁶² Justice White, concurring, argued that Lowe's newsletter was protected under the First Amendment. He claimed that when speech, even technical speech, is directed at the public, and not tailored to specific

is commercial speech protected by the First Amendment, a restriction barring lawyers from soliciting victims of a disaster for thirty days was constitutional).

158. See STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* (1994) (arguing that professions are becoming commercialized); Robinson, *supra* note 76, at 52 (noting a variety of professions, and particularly lawyers, have become more responsive to competitive market forces as their relationship to the market becomes more like other occupations).

159. See Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133, 193 (2016) ("As a number of scholars have pointed out, much is excluded from the coverage of the First Amendment—meaning what sort of speech acts it protects at all—either in categories that First Amendment doctrine expressly excludes or that courts (and litigants) implicitly exclude as self-evidently not covered."); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 187–88 (2015) (detailing the development of the personal nexus test).

160. See, e.g., *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013) (holding that regulation of fortune tellers was the regulation of professional speech and so did not violate the First Amendment); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1291 (N.D. Fla. 2009) (finding that a licensing requirement for interior designers was not subject to First Amendment scrutiny).

161. 472 U.S. 181 (1985).

162. *Id.* at 209–11.

clients, then requiring a speaker to secure a government-issued license to engage in that speech is subject to First Amendment scrutiny.¹⁶³ This reasoning has been followed in lower court decisions.¹⁶⁴

In *Edwards v. District of Columbia*,¹⁶⁵ the D.C. Circuit used this distinction between public and non-public speech to strike down a licensing requirement for an entire occupation: tour guides. In writing for the Court, Judge Janice Rogers Brown found the tour guides' speech was not professional speech as it was not tailored to the specific circumstances of each customer.¹⁶⁶ As such, she held the licensing regime unconstitutional because there was no evidence that the harms the tour guide-licensing regime claimed to mitigate, such as tourists being swindled or having their welfare jeopardized by unlicensed guides, actually existed or could not be addressed through less restrictive means.¹⁶⁷

Significantly, the D.C. Circuit's decision in *Edwards* is directly at odds with the Fifth Circuit's decision in *Kagan v. City of New Orleans*.¹⁶⁸ In that case, the Fifth Circuit did not determine whether tour guides used "professional" speech or not, but instead found that tour guide licensing

163. *Id.* at 232 (White, J., concurring) ("If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such . . .").

164. *See, e.g.,* *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 876–79 (E.D. Cal. 2004) (using the First Amendment to strike down requirements that "for sale by owner" websites be operated only by licensed real estate brokers); *Taucher v. Born*, 53 F. Supp. 2d 464, 482 (D.D.C. 1999) (striking down registration requirements for people who publish information about commodities trading under the First Amendment).

165. 755 F.3d 996 (D.C. Cir. 2014).

166. *Id.* at 1000 n.3 ("The District's brief suggests the tour-guide license, like licensing schemes for lawyers and psychiatrists, is merely an occupational license subject only to rational basis review. . . . The District is wrong. 'One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.' Appellants do no such thing. They provide virtually identical information to each customer. . . . In any event, given the regulations' incoherence, we doubt the District could survive even rational basis review." (citations omitted)).

167. *Id.* at 1005–09 (explaining why the alleged harms were not actual likely harms and how they could be mitigated in a less restrictive manner). For a full list of harms that Washington D.C. claimed would be mitigated by licensing tour guides, see *id.* at 1003.

168. 753 F.3d 560 (5th Cir. 2014).

in New Orleans was content neutral and promoted a substantial state interest and so survived free speech scrutiny.¹⁶⁹

Libertarians critical of occupational licensing have claimed that the federal judiciary's expanding free speech doctrine in the occupational licensing context should lead to free speech scrutiny of all licensing restrictions that involve occupational speech.¹⁷⁰ Robert Post and other scholars have countered that such a position would make many licensing requirements for a range of occupations, including doctors and lawyers, subject to First Amendment scrutiny.¹⁷¹ This could both limit the ability of states to create licensing requirements that involve speech and make these restrictions subject to constant challenge by litigants.¹⁷² In other words, it would constitutionalize a much more constrained and free-market approach to the use of occupational licensing.

C. *Fourteenth Amendment*

Finally, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution have also been used to strike down occupational licensing requirements and promote a more libertarian view of when licensing should be used.

Under the U.S. Supreme Court's jurisprudence, a state only needs to meet a rational basis standard to justify these requirements under the Fourteenth Amendment.¹⁷³ And, indeed, historically the judiciary has been hostile to Fourteenth Amendment occupational licensing

169. *Id.* at 562 (“New Orleans, by requiring the licensees to know the city and not be felons or drug addicts, has effectively promoted the government interests, and without those protections for the city and its visitors, the government interest would be unserved.”).

170. Sherman, *supra* note 159 (arguing that the natural extension of the U.S. Supreme Court's free speech jurisprudence is to apply strict scrutiny to all occupational speech).

171. Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 178 (2015) (arguing that the inevitable consequence of the libertarian reasoning of Paul Sherman and the Circuit Court in *Edwards* would be to limit the ability of the state to require persons to convey accurate and reliable information in the context of occupational speech).

172. *Id.*

173. Courts applying rational basis review seek only to determine whether a law is “rationally related” to a “legitimate” government interest, whether real or hypothetical. *FTC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 n.6 (1993). So, for example, in *FTC v. Beach Communications*, the Court explained that to meet the rational basis test, a legislature did not have to explain the purpose of a statute and the statute could be based on the court's own “rational speculation unsupported by evidence or empirical data.” *Id.* at 315.

challenges.¹⁷⁴ For example, in *Williamson v. Lee Optical of Oklahoma*,¹⁷⁵ the Court upheld an Oklahoma statute that had been challenged under the Fourteenth Amendment. The statute forbade opticians from fitting lenses without a prescription from an ophthalmologist or optometrist even where the optician was just replacing the same lens.¹⁷⁶ The Court reasoned that although this requirement might seem excessive, the legislature could have concluded some people might benefit from visiting a doctor before having their lenses replaced.¹⁷⁷

Beginning in the 1990s, the federal courts have cast more scrutiny on occupational licensing requirements, and organizations promoting the free market, like the Institute for Justice, have attempted to use Fourteenth Amendment jurisprudence to promote a “right to earn a living.”¹⁷⁸ In *Cornwell v. Hamilton*,¹⁷⁹ a district court held that California’s regulations requiring African hair braiders to fulfill the same requirements of barbers and cosmetologists were unconstitutional. It found most of the skills required for becoming a barber or cosmetologist were not relevant to African hair braiding.¹⁸⁰ At the same time, the skills needed for African hair braiding were not tested by the barber and cosmetologist requirements.¹⁸¹ As such, it violated the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment to lump these

174. See *Semler v. Or. State Bd. of Dental Exam’rs*, 294 U.S. 608 (1935) (rejecting a challenge to a law restricting advertisement of dentists on the grounds that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment); *Dent v. West Virginia*, 129 U.S. 114 (1889) (upholding West Virginia’s physician licensing law against Fourteenth Amendment challenge).

175. 348 U.S. 483 (1955).

176. *Id.* at 484–85.

177. *Id.* at 487 (noting that “[t]he Oklahoma law may exact a needless, wasteful requirement in many cases” but that “it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement”). In one of the few instances where the U.S. Supreme Court did strike down a licensing restriction on rational basis review, it involved a much more politically charged subject matter. In *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 246–47 (1957), the Court ruled that it was irrational for an applicant to the New Mexico bar to be denied entry because of previous arrests (but no convictions), the previous use of an assumed name, and membership in the Communist party twenty years prior.

178. See Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Petitioner, *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (No. 04-716), <http://www.cato.org/publications/legal-briefs/powers-v-harris> [<https://perma.cc/X23F-FDJQ>] (Amicus brief by Cato Institute and Pacific Legal Foundation arguing for the recognition of a right to earn living under the Due Process clause of the Fourteenth Amendment); CARPENTER, *supra* note 11; Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003) (arguing for the recognition of a right to earn a living under the Fourteenth Amendment).

179. 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

180. *Id.* at 1118–19.

181. *Id.* at 1118 (finding “that the State’s mandated curriculum . . . does not teach braiding while at the same time it requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks”).

disparate occupations together and treat them alike.¹⁸² Later lawsuits in Utah and Texas involving African hair braiders required to meet barber and cosmetology licensing requirements resulted in similar decisions.¹⁸³

In *Craigmiles v. Giles*¹⁸⁴ and *St. Joseph Abbey v. Castille*,¹⁸⁵ the Sixth and Fifth Circuits respectively found that requirements that caskets could only be sold by funeral home directors who had met certain licensing requirements did not further public safety or another legitimate state goal and so were unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁸⁶ Similarly, in *Merrifield v. Lockyer*,¹⁸⁷ the Ninth Circuit found that applying pest control licensing requirements on some practitioners that did not use pesticides, but not others, was merely protectionist, served no government interest such as protecting consumers from harm, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁸

Other federal judges, though, have been less open to striking down occupational licensing requirements under the Fourteenth Amendment. For example, in contrast to *Cornwell*, a Missouri district court decision in 2016 upheld cosmetology requirements challenged by an African hair braider under the Fourteenth Amendment, finding they did have a public health and consumer protection rationale.¹⁸⁹ And in contrast to *Craigmiles* and *St. Joseph Abbey*, the Tenth Circuit in *Powers v. Harris*¹⁹⁰ upheld licensing requirements for selling funeral caskets. Significantly, Chief Judge Tacha, in writing the opinion in *Powers*, found that “absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state

182. *Id.* at 1119 (finding that the link between the practice of African hair braiding and the cosmetology requirements were irrational).

183. *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2015 WL 75244 (W.D. Tex. 2013) (striking down Texas requirements for a cosmetology school as it applied to a woman who wanted to teach African hair braiding, claiming the extensive requirements for a cosmetology school were irrational for African hair braiding and violated a freedom to pursue one’s profession); *Clayton v. Steinagal*, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012) (striking down parts of Utah cosmetology act that applied to African hair braiders because they “irrationally” squeezed two disparate occupations into the same professional mold).

184. 312 F.3d 220 (6th Cir. 2002).

185. 712 F.3d 215 (5th Cir. 2013).

186. *Id.* at 227; *Craigmiles*, 312 F.3d at 228–29.

187. 547 F.3d 978 (9th Cir. 2008).

188. *Id.* at 990–92 (finding that the state requiring licensing for non-pesticide pest controllers of bats, raccoons, skunks, and squirrels, but not of mice, rats, or pigeons had no rational basis and so violated the Equal Protection Clause of the Fourteenth Amendment).

189. *Niang v. Carroll*, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at *16–17 (E.D. Mo. Sept. 20, 2016).

190. 379 F.3d 1208 (10th Cir. 2004).

interest.”¹⁹¹ In upholding a teeth whitening licensing requirement challenged under the Fourteenth Amendment in *Sensational Smiles, LLC v. Mullen*,¹⁹² Judge Calabresi came to a similar conclusion for the Second Circuit, also finding “intrastate economic protectionism” a legitimate state interest.¹⁹³ Meanwhile, the opinions in *Craigsmiles, Merrifield*, and *St. Joseph Abbey* explicitly rejected that intra-state protectionism on its own could be a legitimate state interest that could justify licensing restrictions.¹⁹⁴

While the federal judiciary has struck down a relatively small number of occupational licensing requirements under the Fourteenth Amendment, libertarian organizations and others have used this jurisprudence to challenge a range of licensing restrictions. Combined with the federal courts’ interpretation of antitrust law and the First Amendment, the federal judiciary has placed significant limitations on both when occupational licensing restrictions can be used and how practitioners may regulate them.

III. THE MULTIPLE JUSTIFICATIONS OF OCCUPATIONAL LICENSING

As the last Part showed, in recent years the federal judiciary’s occupational licensing jurisprudence has embraced a view that is frequently skeptical of professional self-regulation and wary of restrictions on the market that do not protect the public from harm. While occupational licensing is frequently justified as a tool used to protect the public from harm, it has also been justified on other grounds. This part categorizes and explores four major justifications for licensing: (1) protecting the public from harm; (2) creating communities of knowledge and competence; (3) fostering relationships of trust; and

191. *Id.* at 1221.

192. 793 F.3d 281 (2d Cir. 2015).

193. *Id.* at 286 (“We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment.”). In his holding, Judge Calabresi cited to Justice Alito’s dissent in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015), where Alito explained that a court that is trying to sniff out improper protectionism will have little difficulty finding it, creating a slippery slope that could invalidate numerous state regulations. *Sensational Smiles, LLC*, 793 F.3d at 287.

194. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) (“[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose.”); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (“[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.”); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (finding that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose”).

(4) buffering producers from the market. These four justifications are not applicable in every context, nor will they necessarily trump concerns about the costs of licensing. The goal of detailing these justifications is instead to make clear that occupational licensing can promote different values or goals in the economy. Acknowledging these diverse justifications, as the next Part will show, should caution the courts against imposing an overly narrow economic vision of when and how occupational licensing should be used.

Before beginning, it is worth noting that the justifications for occupational licensing are not the same as those for professional self-regulation. Importantly though, as will be discussed in this Part, self-regulation can often contribute to supporting some of the possible goals of an occupational licensing regime.

A. *Protecting the Public from Harm*

The most commonly and widely invoked justification for occupational licensing is protecting consumers and the public from harm by ensuring that practitioners have a certain degree of expertise or competence.¹⁹⁵ Occupational licensing may be viewed as especially necessary where consumers are vulnerable because of asymmetries in information, capacity, or power, or if failure to competently provide a service can have particularly dire consequences. For example, a primary justification of licensing medical professionals is because of perceived information and capacity asymmetries and the potentially significant health consequences of improper care.¹⁹⁶ Occupational licensing is also often justified to protect third parties. Truck drivers, for instance, are licensed more to

195. The protection of consumers and the public has been articulated by the Supreme Court to justify occupational licensing. *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.”); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (“The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.”); *see also* CLEAR, *supra* note 84, at 1 (finding that generally the purpose of occupational licensing in the U.S. is to protect the “public’s health, safety, and/or welfare”).

196. Services like medical care are frequently needed during a time of distress and vulnerability, which limits the ability of consumers to choose amongst potential providers. *See* SHIMBERG, ESSER & KRUGER, *supra* note 72, at 11.

protect the public from poor quality drivers than to protect those who employ these drivers.¹⁹⁷

While most policymakers recognize the protection from harm as a justification for occupational licensing, there is disagreement about what type of harm might justify licensing. A libertarian may view licensing as only justified where it can be shown to protect the physical safety or health of third parties, but that licensing should not be used to protect consumers from willfully entering into an agreement with a service provider.¹⁹⁸ For example, a libertarian may argue an unlicensed medical practitioner should be able to treat a patient as long as the patient consents.¹⁹⁹ Others take a broader view, claiming, for instance, that licensing is justified to protect not only the physical wellbeing of the public or consumers but also their more general welfare—for instance, requiring licensing of a practitioner if it may help the consumer avoid significant financial loss.²⁰⁰

B. Communities of Knowledge and Competence

Since at least the 1960s, much of the academic literature has focused on the professions' perceived rent-seeking behavior,²⁰¹ but theorists of an earlier era celebrated the professions for their ability to help develop knowledge around an occupational field and ensure its competent implementation.²⁰² Writing in the 1890s, Emile Durkheim argued that professional associations were a place of human sociability that naturally sprung up around a particular occupation and in turn created ethical rules that then regulated the occupation and mediated the use of technical

197. For example, the mission of the Federal Motor Carrier Safety Administration (FMCSA), which creates national minimum standards for commercial driver's licenses, is to "reduce crashes, injuries and fatalities involving large trucks and buses." See *Our Mission*, FED. MOTOR CARRIER SAFETY ADMIN., <https://www.fmcsa.dot.gov/mission> [<https://perma.cc/CUE3-ZS88>].

198. FRIEDMAN, *supra* note 2, at 139–46.

199. *Id.* at 149–60 (arguing against even the occupational licensing of doctors).

200. See CLEAR, *supra* note 84, at 1 (finding that occupational licensing is often justified to protect the public's welfare).

201. For a brief overview of the academic literature on the professions, see ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 134–42 (1988) (describing how, among other effects, professions use their monopoly power to raise wages for practitioners); Tanina Rostain, *Professional Power: Lawyers and the Constitution of Professional Authority*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* (Sarat ed., 2004).

202. This focus on the regulation of knowledge has also been taken up by more recent authors. See ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 17 (1988) (focusing on the professions as agents for knowledge in the modern economy).

knowledge in the economy.²⁰³ A few decades later, Talcott Parsons claimed that the development of the professions was critical for the application of science and technology and that their development was one of the hallmarks of a modern society.²⁰⁴ More recently, Robert Post has claimed professional knowledge communities can only function effectively if there are institutions that are given the authority to determine what constitutes expert knowledge and judge competent practice.²⁰⁵

Occupational licensing requirements have helped spawn schools or training programs, as well as professional standards, in disciplines as varied as engineering and cosmetology.²⁰⁶ These institutions can help overcome market failures—developing and refining the use of occupational knowledge in ways that the market might not naturally promote. For instance, if entrants into an unrestricted occupational field faced constant low-quality competition from unlicensed practitioners, they might not devote adequate time or resources to their education or training.²⁰⁷ Not only may this underinvestment harm consumers, but it can reduce economic efficiency, especially in fields where consumers lack reliable information about practitioners or technical knowledge about the field. In this way, occupational licensing can provide a signal for competence that can lessen consumers' search costs—knowing that they can rely on a basic level of service from someone who is licensed to be a “doctor” or an “architect.”²⁰⁸

203. DURKHEIM, *supra* note 22, at 6–7 (arguing that since society has little interest in the ethics of particular professions, it is up to the professions to develop and enforce professional morality for the benefit of society).

204. PARSONS, *supra* note 22, at 34 (noting that “professions occupy a position of importance in our society which is, in any comparable degree of development, unique in history” and claiming that “the pursuit and the application of science and liberal learning are predominantly carried out in a professional context”).

205. See POST, *supra* note 138, at 29–33 (describing systems by which expert knowledge is created as being hierarchical and distinct from a freewheeling marketplace of ideas).

206. NAT'L SOC'Y PROF. ENGINEERS, *supra* note 57, <https://www.nspe.org/resources/licensure/what-pe> [<https://perma.cc/N3VL-RWKJ>] (noting that to become licensed, engineers must attain a four-year college degree).

207. KLEINER, *supra* note 1, at 7 (“Licensing creates greater incentives for individuals to invest in more occupation-specific human capital because they will be able to recoup the full returns on their investment if they do not need to face low-quality substitutes for their services.” (citation omitted)); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUDIES 843, 844 (1986) (finding that occupational licensing, by constraining low quality sellers, allows other sellers to invest in improving quality).

208. See KLEINER, *supra* note 1, at 47. Information economists have written about how information asymmetry can decrease efficiency in a market—they have promoted the benefits of market signaling more generally, including through government intervention, although not necessarily in support of licensing. See, e.g., George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 500 (1970) (arguing that in markets with information

By contributing to the standardization of training in an occupational field, Peter Cappelli has argued that licensing requirements can also create more efficient labor markets.²⁰⁹ Today, workers are likely to have a variety of employers during their career and, partly as a result, both employers and unions now spend fewer resources in developing workers' skills.²¹⁰ Standardized occupational licensing requirements can ensure that practitioners undertake a higher (and potentially more beneficial) level of training that multiple kinds of employers will value. The training and signaling that occupational licensing provides may then help facilitate labor movement in an occupational field.²¹¹

C. *Relationships of Trust*

Eliot Freidson famously described professional self-regulation as the “third logic.”²¹² He claimed that professions were traditionally guided by neither the consumerist logic of the market nor the management driven logic of bureaucracy, but instead expertise coupled with an internal code of ethics.²¹³ This understanding that practitioners aspire towards a higher occupational mission can encourage trust between practitioners and consumers, the public, government, and other professional colleagues. For example, the public has historically trusted doctors to give advice in a patient's best interest, not the doctor's financial interest (even if this trust has declined in the United States in recent decades).²¹⁴ Lawyers rely on other lawyers not to lie to them during discovery.²¹⁵ And the government

asymmetry, there is an incentive for sellers to market poor quality merchandise and so for there to be an under-investment in quality, and noting that licensing is one mechanism that has arisen to counteract the effects of this uncertainty in quality); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 471–72 (2002) (arguing that markets do not provide efficient incentive for market disclosure and that there is a role for government in correcting this problem).

209. See PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 163 (1999).

210. *Id.*

211. *Id.*

212. FREIDSON, *supra* note 24, at 1–16 (presenting professionalism as an alternative to the logic of consumerism or bureaucracy).

213. *Id.*

214. Robert J. Blendon et al., *Public Trust in Physicians—U.S. Medicine in International Perspective*, 371 NEW ENG. J. MED. 1570 (2014) (reporting on an International Social Survey Programme poll that found 73% of Americans “had great confidence in the leaders of the medical profession” in 1966 compared to 34% in 2012).

215. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1983) (stating that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”).

relies on architects to help enforce building codes²¹⁶ or doctors to help decide who qualifies for government programs like social security disability.²¹⁷ Importantly, professional communities frequently work to pass on this sense of social trusteeship to new practitioners as they meet their educational licensing requirements, and later, if this trust is seriously betrayed, these practitioners may have their occupational license revoked.²¹⁸

Since licensing provides a monopoly to practitioners to engage in an occupational activity, licensing can limit the ability of large corporations and other employers from exercising disproportionate control over either practitioners or their occupation. Michael Sandel has claimed that to further the ideals of republican self-governance, workers need to be empowered to have greater economic autonomy—freed from brute market forces that can distract citizens from their democratic duties and the concentration of power in large corporations that can undermine the public square.²¹⁹ While Sandel does not invoke professions specifically in his argument, occupational licensing, and the professions' self-regulation, provides one avenue for producers to exercise power over their work and employment market.²²⁰

Indeed, professional self-regulation, in particular, can reduce the potential for capture of regulation by large corporations. For example, in the United Kingdom, the Legal Services Board regulates the legal profession and is controlled by non-lawyers.²²¹ Commentators have raised concerns that these public regulators may be unduly influenced not by the

216. *Architects: Occupational Outlook Handbook*, U.S. DEP'T LAB., <http://www.bls.gov/ooh/Architecture-and-Engineering/Architects.htm#tab-2> [<https://perma.cc/7SEN-4SDF>] (“In developing designs, architects must follow state and local building codes, zoning laws, fire regulations, and other ordinances, such as those requiring easy access to buildings for people who are disabled.”).

217. SOC. SEC. ADMIN., *DISABILITY BENEFITS 5–6* (2015), <http://www.socialsecurity.gov/pubs/EN-05-10029.pdf> [<https://perma.cc/5TD7-N5GE>] (noting the role of the doctor in providing information to Social Security on the condition of an applicant for disability).

218. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1983) (stating grounds upon which a disciplinary board can find a lawyer committed misconduct).

219. *See* SANDEL, *supra* note 26, at 329–38.

220. Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 215, 222 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992) (arguing that “[t]he professional model is based on the democratic notion that people are capable of controlling themselves by cooperative, collective means and that in the case of complex work, those who perform it are in the best position to make sure that it is done well”).

221. Robinson, *supra* note 76, at 59–60 (arguing that in the U.K. a shift to regulators of the legal profession that are not lawyers, but come from a competition background, may bias regulation towards the interests of corporations that are investing in legal services and liberalizing the legal market).

bar, but instead by corporate interests that desire to liberalize the legal market to allow corporations to directly profit from providing legal services.²²²

Occupational licensing, and self-regulation, may also provide autonomy to members of an occupation to make unique contributions to the public square. For example, lawyers and bar associations have played a well-documented role in reforming government and state formation,²²³ doctors and psychologists take oaths not to torture (even at the demand of the government),²²⁴ and civil engineers rank the quality of the nation's roads and bridges to provide an independent assessment to the public of dangers posed by infrastructure.²²⁵ Alexander Hamilton went so far as to claim that those from the professions were particularly well-equipped to be political representatives in a democracy because they had relative occupational autonomy and so were not beholden to particular commercial interests.²²⁶ It is an argument continued, in modified form, today by commentators like Fareed Zakaria.²²⁷

Significantly, not all occupational groups that require a license promote social trusteeship or public-minded goals equally. Those that do are not always successful in furthering these goals,²²⁸ and, arguably, this social trusteeship role has decreased as the professions have become more

222. *Id.*

223. DAVID A. BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* 7 (1994) (describing the role of independent bar associations and French barristers in reforming the old regime in France); Terrence C. Halliday, Lucien Karpik & Malcom M. Feeley, *The Legal Complex in Struggles for Political Liberalism*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 1, 3–4 (Terrence C. Halliday, Lucien Karpik & Malcolm M. Feeley eds., 2007) (finding that in some contexts lawyers are active agents of the construction of political liberalism).

224. Julie Beck, 'Do No Harm': When Doctors Torture, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/health/archive/2014/12/do-no-harm-when-doctors-torture/383677/> [<https://perma.cc/XLJ6-LZJR>] (noting that doctors and psychologists take an oath not to torture).

225. AM. SOC'Y OF CIVIL ENG'RS, 2013 INFRASTRUCTURE REPORT CARD (2013), <http://www.infrastructurereportcard.org/> [<https://perma.cc/H2A3-74HN>].

226. THE FEDERALIST NO. 35 (Alexander Hamilton), http://avalon.law.yale.edu/18th_century/fed35.asp [<https://perma.cc/XT7V-XY5Q>] (“Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?”).

227. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 223–25 (2003) (arguing that an independent legal profession insulated from the pressures of the market has played a spirited role in promoting political liberalism in the United States).

228. Beck, *supra* note 224 (noting that the Senate Report on CIA Detention and Interrogation Program shows doctors and psychologists participated in designing torture).

commercialized.²²⁹ Despite these caveats, many occupations that require a license have had a long history of promoting public-spirited activity and social trusteeship among practitioners.²³⁰ Occupational licensing can play an important part in furthering this goal.

D. Buffering Producers from the Market

By limiting entry into an occupation and prescribing standards of practice, occupational licensing protects practitioners from at least some of the competitive forces of the larger market. Because of this effect, economists and others have often criticized licensing for being anticompetitive.²³¹ This anticompetitive effect may be justified because a licensing requirement protects consumers from harm or has some other social benefit, like fostering communities of knowledge or promoting social trusteeship.

Yet, this anticompetitive effect may itself serve the public interest in some contexts. For example, occupational licensing may protect producers from market instability in a market that the public relies on for needed goods or services. In *Nebbia v. New York*,²³² the U.S. Supreme Court rejected a Fourteenth Amendment challenge to a law that fixed the price of milk because it “prevent[ed] ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.”²³³ A similar argument can be made for using occupational licensing to protect certain occupations from price wars that may otherwise repel talented practitioners from the labor market or stop capable students from entering the occupation.

Such anticompetitive protectionism may also be used to explicitly stabilize the labor market for the benefit not of consumers, but of labor. Karl Polyani famously maintained that a key role of the state should be to

229. BRINT, *supra* note 158 (arguing that professions are becoming marketized and commercialized and as a result their rhetorical justifications have shifted from social trusteeship to expertise).

230. MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES* 594 (Keith Hawkins et al. eds., 2006) (noting that “[p]rofessions have persuaded hundreds and thousands of individuals to act in some kind of concert over generations, with only occasional reference to their economic self-interests, so it is unlikely that their collective institutions can be understood simply as an aggregate of self-interested actors”).

231. *See, e.g.*, KLEINER, *supra* note 1, at 59–62 (reviewing economic literature showing that, for select occupations, restricting entry through occupational licensing regulations results in higher prices for consumers).

232. 291 U.S. 502 (1934).

233. *Id.* at 530.

slow the churn of modern capitalism and its dislocating effects on members of society.²³⁴ Occupational licensing can be seen as one way of achieving this end. Although occupational licensing may increase the price of some services for the poor and middle class, it also provides those in an occupation that requires a license (a significant portion of the workforce) with a higher income and other benefits, like less chance of being unemployed and a greater probability of receiving a pension plan.²³⁵ Many in the poor and middle class aspire to be in an occupation that requires a license, as they once aspired to be in a union job, in the hopes of building their lives around the relative stability, prestige, and security licensing can bring.²³⁶ Like union jobs, these better-paid, more secure positions may provide broader positive externalities to society, such as creating a stable environment for families to prosper.²³⁷

In this way, occupational licensing may be viewed as an imperfect check against some of the harshness of the modern economy, whether this is volatile labor markets, wage stagnation or decline, or reduction in worker autonomy.²³⁸ Unlike alternative strategies to deal with economic volatility, such as resource transfers from winners to losers, licensing

234. One can view lobbying by professional associations for occupational licensing as a push for protective anti-free market laws. POLYANI, *supra* note 26 (arguing the state had a central role in creating the modern market economy, including markets in labor and land, and that this social dislocation then created a “double movement” in which society attempted to protect itself with anti-market laws).

235. GITTLEMAN, KLEE & KLEINER, *supra* note 5 (finding that those with a license earn higher pay, are more likely to be employed, and have a higher probability of retirement and pension plan offers); Kim A. Wedeen, *Why Do Some Occupations Pay More Than Others? Social Closure and Earnings Inequality in the United States*, 108 AM. J. SOC. 55, 91 (2002) (finding that both occupational licensing and credentialing have a strong effect on increasing the earnings in occupations that use this closure technique).

236. Marie R. Haug & Marvin B. Sussman, *Professionalization and Unionism: A Jurisdictional Dispute?*, in THE PROFESSIONS AND THEIR PROSPECTS 89, 89 (Eliot Freidson ed., 1973) (“Unionization and professionalization are two processes by which members of an occupation seek to achieve collective upward mobility.”); Pratap Bhanu Mehta, *Work Fatigue*, INDIAN EXPRESS (May 23, 2015, 12:38 AM), <https://indianexpress.com/article/opinion/columns/work-fatigue/> [https://perma.cc/4C4K-JU5V] (noting that in the Indian context “[t]he professions define middle class aspiration and are the structures through which the middle class exercises hegemony”).

237. GITTLEMAN, KLEE & KLEINER, *supra* note 5 at 21 (finding that compared to similarly placed non-union workers, union workers earn 18.2% more on average). Richard Freeman, for example, has argued that unions reduce turnover and increase worker savings, creating larger benefits to the economy and society. Richard B. Freeman, *What Do Unions Do? The 2004 M-Brane Stringtwister Edition*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 607, 619–22 (James T. Bennett & Bruce E. Kaufman eds., 2007).

238. POLYANI, *supra* note 26; David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 23 (2014) (describing how law will mediate conflict between excesses and inequalities engendered by free market capitalism and social forces reacting to these elements of capitalism).

provides a buffer that can allow those in these occupations to continue to build skills and work with dignity.²³⁹

Taken to the extreme, using occupational licensing to protect workers from the market could stifle all labor market change and pit the interests of fixed groups of workers against each other. Yet as James Whitman has argued, U.S. law has become increasingly focused on consumers (i.e., the demand side of the economy) at the expense of a focus of law on the interests of workers, unions, or small producers (i.e., the supply side).²⁴⁰ It may be time in the United States to create a new equilibrium between the interests of producers and those of consumers. Given its pervasiveness in the labor market, occupational licensing could be a central tool used in those efforts.

IV. EFFECT ON OCCUPATIONAL LICENSING JURISPRUDENCE

Currently, the federal judiciary risks furthering, and frequently constitutionalizing, an overly blunt libertarian, market-driven, understanding of occupational licensing. This Part takes examples from case law in the antitrust, First Amendment, and Fourteenth Amendment contexts to show how recognizing a broader set of justifications for occupational licensing should limit the judiciary from pushing such a narrow view.

A. *Antitrust Law and Occupational Autonomy*

The U.S. Supreme Court's antitrust jurisprudence in the occupational licensing context imposes the Justices' views of the dangers of regulatory capture, while discounting the potential benefits of professional self-regulation. Granted, unlike in the constitutional context, Congress, if it chooses, can overturn the Court's antitrust judgments through changing statutory law. However, in actual practice, major amendments or additions

239. Members of a number of occupations have sought licensing historically not just to protect consumers, but also to improve their well-being and gain social status. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 499-501 (1965) (noting that the movement to license barbers initially came out of the barbers' union, and that undertakers organized in part to gain professional prestige in an otherwise low status occupation).

240. Whitman, *supra* note 26, at 348 ("Despite all the global pressures to embrace economic consumerism, when continental Europeans gaze upon the modern marketplace, they remain much more likely than Americans to perceive rights and interests on the supply side, rather than on the demand side.").

to antitrust law have been relatively rare.²⁴¹ Courts should not assume that Congress would quickly overturn their interpretation of antitrust law through legislation even where Congress disagrees.²⁴² Further, state governments must abide by these judicial interpretations of federal antitrust law even where they disagree with the outcome.

As discussed in section II.A, while the U.S. Supreme Court long declined to aggressively apply antitrust law to occupational licensing boards, this changed in 2015 in *North Carolina State Board of Dental Examiners*.²⁴³ In the case, the Court found that anticompetitive actions of occupational licensing boards controlled by market participants (i.e., practitioners) would be subject to antitrust scrutiny unless these actions were actively supervised by the state.²⁴⁴ The Court's decision came directly out of the fear that practitioners on licensing boards are likely to take actions that benefit themselves rather than the public—in other words, from a concern about regulatory capture.²⁴⁵

Although the Court emphasized the perceived evils of capture, it did not explicitly consider the potential benefits of practitioners having substantial control over their own regulation. As Daniel Carpenter and David Moss have argued, policymakers are often too quick to claim the negative effects of regulatory capture and the literature shows much more mixed effects of interest groups' involvement with their own regulation.²⁴⁶ In the occupational licensing context, in particular, there are few empirical studies on whether having occupational licensing boards controlled by market participants actually leads to better or worse outcomes for consumers or society.²⁴⁷

241. *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/LJ42-4Q5D>] (noting that the three central antitrust acts had all been passed by 1914).

242. Some scholars have even called the Sherman Act a “super-statute” that should be considered to have quasi-constitutional status given its importance to the operation of the modern U.S. government. WILLIAM ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* 119–65 (2010) (arguing that the Sherman Act is a super-statute that helps lay the foundation for our modern market economy).

243. *See supra* section II.A.

244. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

245. *Id.* at 1114 (comparing agencies controlled by private trade associations and by market participants).

246. Daniel Carpenter & David A. Moss, *Introduction*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 1, 20–21 (Daniel Carpenter & David A. Moss eds., 2014).

247. The White House's 2015 report on occupational licensing found that “[t]here is little reliable empirical evidence regarding the effectiveness of [having public members on occupational licensing boards].” WHITE HOUSE REPORT, *supra* note 8, at 52.

Indeed, the control of licensing boards by practitioners may, in fact, have a number of benefits. As the previous Part described, these benefits include the development and implementation of professional standards by a community of experts and the encouragement of practitioners to develop trusteeship over the fields they work in and regulate.²⁴⁸ Additionally, relying on practitioners to staff occupational licensing boards can frequently provide occupational regulation at a lower financial cost to the state and with less chance of capture by corporate interests.²⁴⁹ While not all occupations can make equal claims to the potential benefits of self-regulation, the Court's sweeping approach in *North Carolina State Board of Dental Examiners* risks undercutting the self-governance and autonomy that has been a defining characteristic of many occupations.²⁵⁰

One way to ensure greater autonomy for licensing boards dominated by practitioners is for state government officials supervising them (to be in compliance with *North Carolina State Board of Dental Examiners*), to grant these boards wide discretion. Under antitrust law, the actions of occupational licensing boards controlled by practitioners can be explicitly anticompetitive if they are implementing a clearly articulated state policy and are actively supervised by the state.²⁵¹ In actively supervising licensing boards, state officials should allow licensing boards to take actions that are justified not only because they protect the public from harm, but also because they further other values identified in the last Part of this article.

The federal courts also have a critical role in protecting the potential benefits of professional self-regulation. They can do this in two primary ways in the antitrust context. First, they should be open to a wide variety of types of state supervision of licensing boards that meet the broad and

248. See *supra* sections III.B, III.C.

249. See WHITE HOUSE REPORT, *supra* note 8; Robinson, *supra* note 76.

250. Even scholars that have focused on prioritizing consumer (over worker or social) interest in antitrust law, such as Bork and Posner, have argued antitrust law should be based on what is best for consumers, not necessarily fixating on combatting monopolistic behavior, which only in some instances might be detrimental to consumers. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (arguing only anticompetitive behavior that hurts consumers should be found to violate antitrust law); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976) (making a similar argument that antitrust law should only focus on economic efficiency).

251. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111–14 (1980); FTC, *FTC STAFF GUIDANCE ON ACTIVE STATE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS 1* (2015) [hereinafter *FTC STAFF GUIDANCE*] (“In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated.”).

relatively ambiguous standard set out by the Court in *North Carolina State Board of Dental Examiners*.²⁵² Under this context specific standard, the state supervisor must at least actively review the substance of an anticompetitive decision of a licensing board and have the power to veto it.²⁵³ However, courts should not, for example, require licensing boards demand detailed information justifying the decision (which in any case may not be available or expensive to obtain).²⁵⁴ Having an overly aggressive interpretation of active supervision would dramatically reduce regulatory autonomy in many occupations.

Second, the federal courts should be restrained in striking down actions of unsupervised licensing boards as anticompetitive. As the U.S. Supreme Court suggested in *National Society of Professional Engineers*, “by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of competition in such services may vary.”²⁵⁵

Under the Court’s jurisprudence, explicit price fixing or restrictions on competitive bidding by an unsupervised practitioner-dominated licensing board would likely be deemed anticompetitive.²⁵⁶ Similarly, if licensing boards attempt to unilaterally expand the boundaries of the professional community they regulate, such as claiming that teeth whitening constitutes the practice of dentistry in *North Carolina State Board of Dental Examiners*, the courts are likely to find this to be anticompetitive conduct.²⁵⁷

On the other hand, after *North Carolina State Board of Dental Examiners*, both the federal courts and the FTC have indicated that an unsupervised licensing board will generally not attract antitrust scrutiny for disciplining a practitioner for not meeting mandated standards of

252. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. ___, 135 S. Ct. 1101, 1116 (2015). For a discussion of this case, see *supra* notes 109–123 and accompanying text.

253. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116.

254. Following the decision, the FTC issued staff guidance for its implementation. FTC STAFF GUIDANCE, *supra* note 251. The FTC found that relevant factors to determine whether there is supervision by the state include whether the state supervisor has obtained the information necessary to evaluate the action of the regulatory board (such as holding a public hearing and gathering data) or issued a written decision approving or disapproving of the regulatory action and explained the rationale of such a decision. *Id.* at 9–10.

255. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 696 (1978).

256. See, e.g., *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332 (1982) (finding that even price fixing that sets a maximum ceiling for price is a per se violation of competition law).

257. See, e.g., *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL401234 (M.D.N.C. Jan. 30, 2017) (mem.) (allowing for antitrust suit to proceed against acupuncture licensing board for warning physical therapists to not perform dry needling).

practice.²⁵⁸ Since a licensing board brings the action against an individual it is difficult to argue there is an adverse impact on competition in the market overall or that members of a licensing board are conspiring to restrain trade by simply sanctioning a single practitioner.²⁵⁹

Still, it is an open question if and when other actions by occupational licensing boards violate antitrust law. Since *Standard Oil Co. of New Jersey v. United States*,²⁶⁰ section 1 of the Sherman Act has been understood to allow “reasonable restrictions” on competition.²⁶¹ These reasonable restrictions have been interpreted as those whose procompetitive effects outweigh their anticompetitive effects.²⁶² So, for example, a licensing board may prohibit practitioners from engaging in deceptive business practices because doing otherwise could undermine the market, hurting competition.²⁶³

However, as Aaron Edlin and Rebecca Haw have noted, not all socially beneficial restrictions will necessarily be seen as procompetitive.²⁶⁴ Because one of the primary justifications of occupational licensing is to restrict competition to improve quality, Edlin and Haw advocate that

258. *Petrie v. Va. Bd. of Med.*, 648 Fed. App'x. 352 (4th Cir. 2016) (dismissing antitrust challenge by chiropractor who had been punished by Board of Medicine for offering services that required medical license because restraint on one practitioner not enough to account for restraint on trade and could not show agreement among board members to restrain trade); *Robb v. Conn. Bd. of Veterinary Med.*, 157 F. Supp. 3d 130 (D. Conn. 2016) (dismissing an antitrust challenge by a veterinarian who had disciplined by the state board for using a vaccination procedure not prescribed by the board); FTC STAFF GUIDANCE, *supra* note 251, at 6.

259. *Petrie*, 648 Fed. Appx. 352; *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (finding that hospital staff had not violated antitrust law when they revoked a doctor's staff privileges because the revocation of his privileges did not adversely affect competition in the market and there was no agreement among staff to create a monopoly).

260. 221 U.S. 1 (1911).

261. *Id.* at 66.

262. In *Board of Trade of the City of Chicago v. United States*, Justice Brandeis famously laid out the reasonableness test as:

[W]hether the restraint imposed is such as merely regulates, and perhaps thereby promotes, competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider . . . [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained . . .

246 U.S. 231, 238 (1918).

263. FTC STAFF GUIDANCE, *supra* note 251, at 6.

264. Edlin & Haw, *supra* note 94, at 1145. In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 685 (1978), the U.S. Supreme Court struck down a restriction by a professional association meant to limit price comparison that the association claimed limited bidding wars on engineering projects and so, they argued, improved quality and public safety. The Court explained that the restriction ran against the heart of the Sherman Act and that, as to whether the restriction actually improved public safety, that “the [antitrust] statutory policy precludes inquiry into the question whether competition is good or bad.” *Id.* at 679 (cited in Edlin & Haw, *supra* note 94, at 1145).

licensing requirements that improve quality be considered procompetitive, and therefore reasonable restrictions, under rule of reason antitrust analysis.²⁶⁵ They make a similar argument for licensing restrictions that improve consumer access to information.²⁶⁶ Doing otherwise would severely impair the ability of occupational licensing boards to perform their key regulatory functions.

Drawing on a similar logic, the federal courts should also find requirements that promote other justifications for licensing outlined in this article “reasonable restrictions” under anti-trust law. Take, for example, the goal of fostering a sense of trusteeship by practitioners over their occupation. The U.S. Supreme Court, in *Goldfarb v. Virginia State Bar*,²⁶⁷ stated that the “public service aspect, and other features of the professions, may require that a particular practice, which could be properly be viewed a violation of the Sherman Act in another context, be treated differently.”²⁶⁸ So, for instance, under this reasoning limitations on advertising by a licensing board should not necessarily be seen as anticompetitive, not only because such limitations may protect consumers from harm, but also because such restrictions can help foster an environment in which practitioners view their clients or patients as more than just mere customers.²⁶⁹ Similarly, requirements that lawyers undertake pro bono should not be considered anticompetitive even though they mandate practitioners offer some services at a set price (i.e., for free).²⁷⁰ These requirements not only help some clients access services they could not otherwise afford, but they also help practitioners develop a sense of social trusteeship over their occupation, helping counteract the commodification of interactions between practitioners and those they serve.

265. Edlin & Haw, *supra* note 94, at 1148 (“[C]ourts should accept arguments that a restriction improves consumer access to information or raises quality of service as procompetitive justifications.”).

266. *Id.*

267. 421 U.S. 773 (1975).

268. *Id.* at 788 n.17.

269. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (finding that the FTC has jurisdiction over a voluntary non-profit association, but that an assessment of whether the association’s restrictions on price and quality advertising violated antitrust law requires a rule of reason analysis, and not just a quick look analysis, as such restrictions do not obviously have an anticompetitive effect).

270. *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332 (1982) (finding that even price fixing that only sets a maximum ceiling for price is a per se violation of competition law); MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR. ASS’N 1983) (suggesting that lawyers should aspire to at least 50 hours of pro bono service per year).

B. Occupational Speech and the Market

The multiple justifications of occupational licensing should also shape the judiciary's First Amendment jurisprudence. The question of how the First Amendment should apply to occupational licensing requirements takes place within the larger expansion of free speech to protect commercial speech that began in the 1970s.²⁷¹ This evolving jurisprudence threatens many regulations of the modern regulatory state from labeling requirements to regulations regarding credit cards or prescription drugs,²⁷² prompting some to call the federal judiciary's commercial speech interventions a return to *Lochnerism*—using free speech to promote libertarian ideals about protecting a free market.²⁷³ Meanwhile, Justice Thomas's explicit doubts about the existence or reach of the professional speech doctrine in *NIFLA*, along with the Court's broader "weaponized" anti-regulatory use of free speech in cases like *Janus v. AFSCME*,²⁷⁴ raises the prospect of the First Amendment being used even further to limit occupational licensing requirements in the future.

271. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (laying out a four part test for determining whether a state action violates commercial speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); Weiland, *supra* note 150, at 1395, 1426–38 (describing how the Supreme Court developed a new approach to commercial speech starting in the 1970s).

272. Shanor, *supra* note 159, at 138 (describing a range of regulations threatened by the U.S. Supreme Court's expanding commercial speech jurisprudence).

273. *Id.* at 137 (“[A]dvocates of the new *Lochner* are forwarding a formal concept of liberty that has no apparent limiting principle. They contend that all speech is speech and equally subject to stringent constitutional scrutiny. Given the pervasiveness of speech and expression, taken to its logical conclusion, this contention would render democratic self-government impossible.”). Robert Post has noted that in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court claimed that restricting advertising undercut the efficient functioning of markets. POST, *supra* note 138, at 39–40. He argues this justification for striking down restrictions on advertising made market efficiency an independent constitutional value, resurrecting *Lochner*. POST, *supra* note 138; see also *Sorrel v. IMS Health Inc.*, 564 U.S. 552, 602 (2011) (Breyer, J., dissenting) (“At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.” (citation omitted)).

274. 585 U.S. ___, 138 S. Ct. 2448 (2018). In *Janus*, the Court, in a 5–4 decision, ruled that requiring non-union members pay fees to public unions violated the First Amendment. *Id.* In dissent, Justice Kagan argued that the opinion undercut the ability of local officials to make important decisions about workplace governance by “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” *Id.* at 2501 (Kagan, J., dissenting). For more on how this and other First Amendment judgments have been used to develop a “new *Lochnerism*,” see Jedidiah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018).

Robert Post and Amanda Shanor have warned that applying First Amendment scrutiny to professional speech would limit the ability of the state to require practitioners to convey accurate and reliable information.²⁷⁵ Courts would be constantly asked to weigh the free speech merits of a wide variety of licensing requirements (such as in medicine or law).²⁷⁶

To protect against this danger, the professional speech doctrine, as articulated in Justice White's concurrence in *Lowe*, holds that occupational licensing restrictions are immune from First Amendment scrutiny where a practitioner is offering tailored advice to a client.²⁷⁷ Acknowledging the multiple justifications of occupational licensing helps provide support for the merit of the professional speech doctrine. As the last Part showed, licensing can promote a bundle of values—protecting consumers from harm, creating communities of knowledge, fostering relationships of trust, and buffering producers from the market. The professional speech doctrine creates a bright line rule that protects most occupational licensing regulations (that do not involve commercial or political speech) from First Amendment scrutiny so that courts are not then tasked with having to weigh each of these individual justifications in a given context. In other words, one reason to create a categorical exemption for professional speech from First Amendment scrutiny is to avoid the messiness of having courts weigh each of these values in a given context.

Granted, in some instances where there is licensed occupational speech it is less than clear if such speech is “professional,” but acknowledging the broader values that licensing can promote should still help guide, and limit, the judiciary's approach.

For instance, in both *Edwards* and *Kagan*, a central issue was whether the speech of tour guides should be considered professional speech. Judge Brown in *Edwards* argued that a license to be a tour guide should not be considered an occupational license of the type Justice White had in mind in *Lowe*.²⁷⁸ He claims that tour guides are not engaged in the practice of a profession since they do not “exercise judgment on behalf of the client in

275. Post & Shanor, *supra* note 171, at 178, 181 (arguing against Paul Sherman that the First Amendment should apply indiscriminately to occupational speech, and that such an argument and “the libertarian reasoning advanced in a decision like *Edwards*” would lead to a dystopia where every practitioner would be entitled to their personal opinion while performing professional speech).

276. *Id.* at 179 (noting that “[t]aken to its logical conclusion, extending First Amendment scrutiny to every marketplace speech act would create a First Amendment question every time a lawyer is sued for malpractice for an incompetent opinion”).

277. See *Lowe v. SEC*, 472 U.S. 181, 232 (1985).

278. *Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014).

the light of the client's individual needs and circumstances"²⁷⁹ and instead "provide virtually identical information to each customer."²⁸⁰ This characterization of tour guides by Judge Brown is itself suspect. After all, tour guides often do provide tailored information to customers (for example, answering individual's questions or customizing tours to specific groups).

Yet even if we accepted that tour guides—or those in other occupations that require a license—did not engage in professional speech, and their licensing was then subject to free speech scrutiny, these regulations would be more likely to survive if the courts considered the full set of justifications for occupational licensing laid out in this Article. The judges in both *Edwards* and *Kagan* did acknowledge the protection of consumers as a potential rationale for licensing tour guides.²⁸¹ However, neither court addressed the three other possible justifications of licensing discussed in this Article. Each of these are plausible, if sometimes strained, justifications for licensing tour guides. For example, in licensing tour guides a locality may wish to encourage the development of a more robust knowledge community around giving tours. Alternatively, it may desire to promote a relationship not just of economic exchange between a tour guide and visitor, but also of trust.²⁸²

In the end, federal courts should recognize that when petitioners claim that the First Amendment prohibits an occupational licensing regulation they are frequently really arguing that the market should regulate the

279. *Id.*

280. *Id.* ("The District's brief suggests the tour-guide license, like licensing schemes for lawyers and psychiatrists, is merely an occupational license subject only to rational basis review. . . . The District is wrong. 'One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.' Appellants do no such thing. They provide virtually identical information to each customer. . . ." (citations omitted)).

281. *Kagan v. City of New Orleans*, 753 F.3d 650, 651 (5th Cir. 2014) (noting that the purpose of the tour guide licensing regime in New Orleans is to protect tourists); *Edwards*, 755 F.3d at 1009 (noting that a major declared purpose of licensing tour guides is to ensure that they do not engage in unfair or unsafe business practices).

282. Interestingly, available evidence does indicate a positive correlation between the performance of or trust in a tour guide and tourists' view of a destination location and their shopping behavior. *See, e.g.,* Kuo-Chien Chang, *Examining the Effect of Tour Guide Performance, Tourist Trust, Tourist Satisfaction, and Flow Experience on Tourists' Shopping Behavior*, 19 ASIA PAC. J. TOURISM RES. 219 (2014) (finding a relationship between tourist trust of a tour guide and their willingness to engage in local shopping); Alexandra Matos Pereira, *Tour Guides and Destination Images: Evidence from Portugal*, 3 J. TOURISM & HOSPITALITY MGMT. 129 (2015) (finding a positive relationship between tour guide performance and the image of a country as a destination location).

occupation.²⁸³ Judges should be critical of such *Lochner*-like claims that choose one ideological vision of what counts as valid justifications for regulating our economy through tools like occupational licensing.²⁸⁴

C. *The Fourteenth Amendment and “Protectionism”*

Finally, if courts acknowledged the varied justifications of occupational licensing in their Fourteenth Amendment jurisprudence they would be less likely to strike down licensing requirements. To survive scrutiny from the Fourteenth Amendment’s Equal Protection and Due Process Clauses, government action must not be unreasonable, arbitrary, or capricious.²⁸⁵ In other words, it simply has to fulfill some public value. As described in section II.C, there is currently a split between federal circuits over whether “intra-state economic protectionism” is a legitimate purpose for occupational licensing requirements under the Fourteenth Amendment.²⁸⁶ Understanding occupational licensing as a tool that can be used, among other justifications, to buffer practitioners from the market makes clearer the merits of viewing “intra-state economic protectionism” as a legitimate goal of the state in the licensing context.

In dismissing “protectionism” as a justification of occupational licensing and striking down licensing requirements under the Fourteenth Amendment, the judges in *Craigmiles*, *St. Joseph Abbey*, and *Merrifield* all argued that their actions should not be considered a resurrection of *Lochnerism* and instead be viewed as invalidating naked protectionism and “irrational” licensing requirements.²⁸⁷ Yet as Justice Calabresi notes

283. See, e.g., Weiland, *supra* note 150 (warning that the Supreme Court’s free speech jurisprudence has embraced a libertarian view of speech unmoored from either liberal or republican rationales for speech); POST, *supra* note 138, at 39–40 (similarly claiming the Court’s free speech jurisprudence has taken a turn towards embracing libertarian market ideals).

284. See Weiland, *supra* note 134; POST, *supra* note 138.

285. See *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (finding that due process under the Fourteenth Amendment “demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained”); Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689–90 (1984).

286. See *supra* section II.C.

287. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (“[T]he ghost of *Lochner* [is not] lurking about. We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. Nor do we doom state regulation of casket sales. We insist only that Louisiana’s regulation not be irrational . . .”); *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (“Although economic rights are at stake, we are not basing our decision today on our personal approach to economics, but on the Equal Protection Clause’s requirement that similarly situated persons must be treated equally.”); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (“Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies. . . . We are not imposing our view of a well-functioning market on the

in *Sensational Smiles, LLC*: “[A] court intent on sniffing out ‘improper’ economic protectionism will have little difficulty in finding it.”²⁸⁸ A bright line rule recognizing “intra-state economic protectionism” as a legitimate state interest provides protection against judges over-eager to strike down licensing regulations based on their preferred economic ideology.

Interestingly, libertarian leaning judges have not always found occupational licensing so suspect. During the *Lochner* era, with its focus on the liberty of contract, occupational licensing laws attracted only scant and mixed attention from the courts,²⁸⁹ despite these laws being on the rise during this period. The U.S. Supreme Court did not strike down any occupational licensing requirements during this era as unconstitutional.²⁹⁰ Occasionally, state supreme courts did strike down these requirements but generally only for lower class professions, like horseshoers.²⁹¹ This limited attention is perhaps not surprising. Scholars of the period, like Durkheim, saw the professions as an organic and welcome creation of the division of labor in a modern society, operating with as much natural self-organizing logic as the invisible hand of the market.²⁹² Judges also often came from a middle-class background and may have viewed the rise of occupational licensing as aiding workers like themselves, who were striving for professional status.²⁹³

Significantly, one does not have to agree that occupational licensing should be used to protect workers, or develop knowledge communities, or even protect consumers, to see the danger in constitutionalizing what counts as “reasonable” occupational licensing requirements. As Justice Holmes famously declared in dissenting in *Lochner* “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”²⁹⁴ If state or federal governments want to adopt policies that restrict free markets—whether it is to promote social welfare, a developmental state, or a vision of the economy that emphasizes professional communities created through occupational licensing—they should be able to do so.

people of Tennessee. Instead, we invalidate only the General Assembly’s naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.”).

288. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015).

289. Friedman, *supra* note 239, at 489 (noting that occupational licensing cases during the period “called down no pronouncements of doom and enlisted neither proponents nor opponents in high and academic places to argue validity and propriety on the basis of first principles”).

290. The U.S. Supreme Court did not strike down occupational licensing laws during the *Lochner* era even if judges did question their wisdom. *Id.* at 511.

291. *Id.* at 517–18.

292. For example, Emile Durkheim applauded the ability of the professions to create their own internal codes of ethics. DURKHEIM, *supra* note 22, at 6–7.

293. Friedman, *supra* note 239, at 521.

294. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

V. INTERVENTION BY CONGRESS AND THE EXECUTIVE

Just as the federal courts have expanded their interventions, Congress and the federal executive have also become significant actors in shaping occupational licensing in the country. This Part provides details some of the types of ways Congress and the executive are already involved in occupational licensing. It then discusses some of the goals these branches of government can further through these interventions. Compared to the courts, these branches of government have a wider range of interventions available to them, can more easily tailor their interventions to specific occupations, and they can take action while in explicit dialogue with state governments, licensing boards, professional associations, and other stakeholders.

A. *Types of Intervention*

Congress and the executive use a variety of tactics to shape occupational licensing in the country. In some fields, like transportation and finance, the federal government may license practitioners directly. For example, the Federal Aviation Authority (FAA) licenses commercial airline pilots as well as flight attendants and airline mechanics,²⁹⁵ the U.S. Coast Guard licenses those in the maritime industry,²⁹⁶ and the SEC, in conjunction with the Financial Industry Regulatory Authority (FINRA), licenses investment brokers and some categories of investment advisers.²⁹⁷

In other occupations, the states remain the actual implementing authority, but the federal government plays a significant role in creating licensing rules. For instance, starting in the 1980s the federal government

295. *Become a Pilot*, FED. AVIATION AUTHORITY, <http://www.faa.gov/pilots/become/> [<https://perma.cc/X4C6-YAGF>] (describing FAA regulations of pilots). The FAA also certifies aircraft mechanics. *Basic Requirements to Become and Airline Mechanic*, FED. AVIATION AUTHORITY, <https://www.faa.gov/mechanics/become/basic/> [<https://perma.cc/VQ4T-VVS3>].

296. *See generally National Maritime Center*, U.S. COAST GUARD, U.S. DEP'T OF HOMELAND SEC., https://www.dco.uscg.mil/national_maritime_center/ [<https://perma.cc/76VV-CVNW>] (providing application process for various maritime licenses).

297. For an overview of the complex regulatory environment of investment advisors and brokers, see JAMES J. ANGEL, ON THE REGULATION OF INVESTMENT ADVISORY SERVICES: WHERE DO WE GO FROM HERE? 8–12 (Ctr. for Fin. Mkts. and Policy, 2011); U.S. SEC. & EXCH. COMM'N, REGULATION OF INVESTMENT ADVISORS 2–11 (2013) (describing which investment advisors must register with the SEC and specific states). FINRA is a non-profit authorized by Congress to protect investors. *See About FINRA*, FIN. INDUS. REGULATORY AUTHORITY, <http://www.finra.org/about> [<https://perma.cc/DF3C-2F9J>]. FINRA administers exams for advisors and brokers, including at the state level. For a description of required exams, see *Qualification Exams*, FIN. INDUS. REGULATORY AUTHORITY, <http://www.finra.org/industry/qualification-exams> [<https://perma.cc/4J26-NQC4>].

mandated that states maintain a set of minimum requirements for commercial truck and bus drivers.²⁹⁸ Similarly, after reforms instituted in the wake of the Savings and Loan Crisis of the 1980s and the Subprime Mortgage Crisis of 2008, the federal government now plays a dominant role in mandating licensing standards for real estate appraisers, even if the actual licensing is still done by the states.²⁹⁹ Along the same lines, while accountants are licensed by the states, the Sarbanes-Oxley Act of 2002, which was passed after a series of accounting scandals in the 1990s, gives the Public Company Accounting Oversight Board (PCAOB), whose members are appointed by the SEC, a central role in setting standards for accountants.³⁰⁰

Scholars like Abbe Gluck have noted that it has become common for the federal government to use state governments to implement its

298. Before the 1980s, the Federal Highway Administration set standards and tests used by the driver's employer to certify them. This previous federal system was criticized as weak because it relied on carriers to self-enforce. SHIMBERG, ESSER & KRUGER, *supra* note 73, at 187–89. The Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. § 31308, established certain minimum standards for commercial drivers. Then under the Motor Carrier Safety Improvement Act of 1999, the Federal Motor Carrier Safety Administration (FMCSA) was established within the U.S. Department of Transportation (DOT), to “reduce crashes, injuries and fatalities involving large trucks and buses.” *Our Mission*, FED. MOTOR CARRIER SAFETY ADMIN., *supra* note 197.

299. After the Savings and Loan Crisis, the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) required states to establish licensing and certification requirements for real estate appraisers. Pub. L. No. 101-73, Stat. 183; EDWARD V. MURPHY, REGULATION OF REAL ESTATE APPRAISERS 1–4 (Congressional Research Service, 2012), <http://fas.org/sgp/crs/misc/RS22953.pdf> [<https://perma.cc/KT53-98WM>]. A federal agency, the Appraisal Subcommittee (ASC), regularly reviews the compliance of state appraiser boards and maintains a registry of licensed or certified appraisers. *Id.* FIRREA also created a nongovernmental organization, the Appraisal Foundation, that is funded by the ASC, which established and maintains the Uniform Standards of Professional Appraisal Practice. *Id.* at 4–5. After the Subprime Mortgage crisis, the Housing and Economic Recovery Act of 2008 included a provision designed to increase the independence of appraisers by limiting the ability of others with an interest in a real estate transaction from improperly influencing and appraisal with a federally related mortgage. *Id.* at 5; Pub. L. No. 110-289, 122 Stat. 2654. The Dodd–Frank Wall Street Reform and Consumer Protection Act mandated new standards to ensure the independence of appraisers and established requirements for appraiser professional education. Dodd-Frank Act, Pub. L. No. 111-203, §§ 1471–1473, 124 Stat. 1376, 2185–98 (2010).

300. Pub. L. 107-204, 116 Stat. 745. Accountants were traditionally a self-regulated profession that were licensed at the state level and over which the SEC provided some oversight. *See* L. Glenn Perry, *Regulation of the Accounting Profession and the Problem of Enforcement*, 7 J. COMP. BUS. & CAP. MARKET L. 291 (1985). PCAOB sets standards for the profession and can discipline both accountant firms and practitioners, even at state licensing boards still regulate entry into the accounting profession and can terminate licenses. *About the PCAOB*, PUB. CO. ACCOUNTING OVERSIGHT BD., <http://pcaobus.org/About/Pages/default.aspx> [<https://perma.cc/PN9W-E6CL>]; JAY D. HANSON, REFLECTIONS ON THE STATE OF THE AUDIT PROFESSION (2012), http://pcaobus.org/News/Speech/Pages/01132012_HansonAAA.aspx [<https://perma.cc/P8F9-29NC>] (discussing rigorous enforcement of accounting standards by PCAOB and criticism that it is too stringent).

policies.³⁰¹ Importantly, though, as the U.S. Supreme Court made clear in *Printz v. United States*,³⁰² the federal government cannot, without constitutional authority, compel the states to enact or administer a federal regulatory program.³⁰³

The federal government though may incentivize states to participate in other ways. In the case of occupational licensing, this has taken different forms. For example, the Commercial Motor Vehicle Safety Act of 1986 granted power to the Secretary of the Department of Transportation to write licensing requirements for drivers of vehicles.³⁰⁴ To implement these standards it also gave the Secretary power to withhold federal transportation funding to states that did not adopt these requirements.³⁰⁵ In a similar vein, but using a different tactic, the federal government mandated that all federally related real estate transactions—essentially any such transaction using a federally chartered or insured financial institution—had to hire real estate appraisers who complied with federal standards.³⁰⁶

The federal government has also used its treaty-making power to allow those licensed in other countries to work in the United States. For example, under an agreement the U.S. government first signed with Canada and then expanded to Mexico under the North American Free Trade Agreement, states must recognize the licenses of commercial truck drivers from these two countries.³⁰⁷

301. Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996 (2014) (arguing that many of the most significant state sovereign acts now occur in furtherance of implementing national law).

302. 521 U.S. 898 (1997).

303. *See id.* at 933 (finding that the federal government may not compel the states to enact or administer a federal regulatory program).

304. Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. § 31308 (2012) (authorizing Secretary of Transportation to write uniform standards for commercial drivers in consultation with states).

305. *Id.* § 31311(a)(1) (stating that to avoid having Department of Transportation funding withheld, the state shall implement minimum licensing standards created by the Secretary of Transportation). This tactic of incentivizing states to participate in a federal regulatory program has been upheld by the Court. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the constitutionality of a federal statute that withheld federal highway funds from states whose legal drinking age did not conform with federal policy).

306. *See* 12 C.F.R. §§ 323.3, 323.4 (2018) (setting minimum requirements for real estate appraisers and mandating that for federally related transactions all appraisers meet these requirements); MURPHY, *supra* note 299, at 2.

307. For a summary of the history and related regulations of this arrangement, see JOHN FRITTELLI, CONG. RESEARCH SERV., STATUS OF MEXICAN TRUCKS IN THE UNITED STATES: FREQUENTLY ASKED QUESTIONS 1 (2014), <http://fas.org/sgp/crs/misc/R41821.pdf> [<https://perma.cc/N6P4-CV7B>]; Luis de la Calle, *Better Late Than Never: Lessons Learned from Mexican Truck Drivers in the United States*, WILSON CTR. (Feb. 2, 2015), <http://www.wilsoncenter.org/article/better-late-never-lessons-learned-mexican-truck-drivers-the-united-states> [<https://perma.cc/VPZ2-9Z2S>].

Finally, the federal government may not mandate any standards, but rather push state and local governments, as well as occupational licensing boards, to adopt “best practices.” For example, the Departments of Defense and Treasury released a joint report in February 2012 on how different states licensing requirements created barriers for military spouses to find jobs as they move between states (particularly since many military spouses are nurses or teachers).³⁰⁸ When the report was released, only eleven states had legislation that eased the ability of military spouses to use their licenses in new states, but by June of 2012 twenty-three had such legislation³⁰⁹ and by 2016 all fifty states had taken some action.³¹⁰ This shift by states seemed in part a response to the joint report as well as efforts by First Lady Michelle Obama to push states to adopt such legislation.³¹¹

B. *Goals of Intervention*

Congress and the executive may attempt to achieve different types of goals through their interventions. For example, the federal government has frequently acted to limit what it sees as unnecessary state licensing requirements. The Obama Administration issued a report aimed at creating a framework to curb excessive licensing in the states³¹² and provided money to organizations to work with states to reduce overly burdensome licensing requirements.³¹³ Under the Trump Administration,

308. U.S. DEP’T OF TREASURY & U.S. DEP’T OF DEF., SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES (2012).

309. Brad Cooper, *23 States Have Now Passed Pro-Military Spouse License Portability Measures*, WHITE HOUSE (June 26, 2012, 4:32 PM), <https://www.whitehouse.gov/blog/2012/06/26/23-states-have-now-passed-pro-military-spouse-license-portability-measures> [<https://perma.cc/6S3Q-ZGLJ>].

310. Darlene Superville, *All 50 States Easing Licensing for Military Spouses*, MILITARY.COM (July 2, 2016), <https://www.military.com/daily-news/2016/07/02/all-50-states-easing-licensing-military-spouses.html> [<https://perma.cc/9J2S-K63B>].

311. Cooper, *supra* note 309 (noting that First Lady Michelle Obama had spoken to the nation’s governors in February 2012 about how they could ease licensing hurdles for military spouses). Similarly, after the White House released a report in 2015 calling on states to more narrowly tailor occupational licensing restrictions, several states adopted new laws in line with these recommendations, such as laws in Georgia and Illinois that prevent occupational licensing boards from using criminal convictions to deny a license unless the conviction was relevant to the license sought. For an overview of the measures states adopted, or proposed, see *FACT SHEET: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages*, WHITE HOUSE (June 17, 2016), <https://www.whitehouse.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting> [<https://perma.cc/3CPC-E9TD>] [hereinafter WHITE HOUSE FACT SHEET].

312. WHITE HOUSE REPORT, *supra* note 8, at 4–5.

313. For example, in 2016 the Department of Labor made \$7.5 million available for “organizations to work with groups of states to design and implement approaches that enhance the portability of

the FTC created an Economic Liberty Taskforce that has as a primary mission working with states to decide where occupational licensing is unnecessary to protect consumers.³¹⁴ In 2017, Senators Lee, Cruz, and Sasse introduced legislation that would give licensing boards antitrust immunity in states that agreed to accept a number of conditions, including that states adopt a policy that licensing restrictions will only be adopted if less restrictive alternatives are not available and that restrictions are only used to protect consumers from real, substantial threats to public health, safety, and welfare.³¹⁵

Congress and the Executive have also acted to harmonize licensing across states. This has included intervening to set national standards in some fields, such as for truck drivers.³¹⁶ It may also promote standardization between states. For example, the Trump administration is currently supporting efforts to create more multistate compacts between states to allow for licensing portability.³¹⁷ In other fields, harmonization can be achieved by nationalizing aspects of the licensing process.³¹⁸ For example, given complaints about how state-by-state licensing requirements create barriers for the movement of health care professionals,³¹⁹ the federal government could consider nationalizing the licensing of nurses, doctors, or other health professionals.

Significantly, Congress and the Executive can act to improve the use of licensing in furthering multiple types of goals. This could be shaping smarter licensing restrictions to protect the public from harm. It may also include fostering or refining licensing requirements that promote some of

licenses across states and reduce overly burdensome licensing restrictions in general.” WHITE HOUSE FACT SHEET, *supra* note 311.

314. Jared Meyer, *FTC Sets Its Sights on Occupational Licensing*, FORBES (April 17, 2017, 10:33 AM), <https://www.forbes.com/sites/jaredmeyer/2017/04/17/ftc-sets-its-sights-on-occupational-licensing/#47d10ba977ae> [<https://perma.cc/GT24-JNVZ>].

315. Restoring Board Immunity Act of 2017, S. 1649, 115th Cong. (2017).

316. *See supra* note 298 and accompanying text.

317. Alexandra Acosta & Dennis Daugaard, *Make It Easier to Work Without a License*, WALL ST. J. (Jan. 8, 2018, 7:30 PM), <https://www.wsj.com/articles/make-it-easier-to-work-without-a-license-1515457813> [<https://perma.cc/ZXW8-R7LJ>].

318. Most, if not all, occupational licensing impacts interstate commerce so the U.S. government could arguably intervene in its regulation. *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (finding that Congress has the authority to regulate intrastate activities if the activities have a significant effect on interstate commerce in the aggregate). It also may intervene where occupational licensing impacts other federal interests, like immigration policy. Jenessa Calvo-Friedman, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597, 1633–34 (2014) (arguing in the immigration context that federal law preempts states from excluding lawfully present noncitizens, but that states maintain the authority to determine occupational competencies).

319. U.S. DEP’T OF TREASURY & U.S. DEP’T OF DEF., *supra* note 308 (noting that licensing restrictions on nurses moving between states was particularly difficult for military spouses).

the other justifications for licensing explored in this article. For example, to further trust between practitioners and the public, the federal government may recommend that certain occupations mandate practitioners engage in a certain amount of pro bono each year. To increase the capacity of knowledge communities in certain occupations the federal government could work to require more robust continuing education requirements or increase federal funding for research at schools that train practitioners.

The examples of the types of licensing interventions the federal government can pursue or the goals it may attempt to achieve through these interventions detailed in this Part are not meant to be exhaustive. Rather, this brief cataloguing is meant to show that Congress and the executive have a wide range of tools to shape occupational licensing, many of which they already use.

These branches of government may choose to adopt an approach towards licensing that is economically libertarian or skeptical of professional self-regulation. That is their political choice. However, if they so decide, Congress and the federal executive can also promote alternative visions of licensing that support professional trusteeship, the use of licensing as a tool to develop occupational knowledge, or some other goal. The federal courts should not stand in their way. Nor should they impose a particular vision of occupational licensing on the states. If the federal government is to be involved in shaping occupational licensing policy in the country it is Congress and the Executive, not the courts, which are better positioned to take the lead.

CONCLUSION

This Article has shown that under its current jurisprudence the federal courts risk locking in a narrow view of when and how occupational licensing should be used in ways that cannot be easily changed. Occupational licensing should be understood as a regulatory tool that not only has a number of potential costs but also, as this Article has detailed, multiple justifications. Each of these justifications embodies distinct values that the state or federal government may legitimately wish to promote in the economy. The courts should acknowledge these multiple justifications for occupational licensing and limit their interventions accordingly.