"Testimony to the U.S. Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts: Opportunity Denied: How Overregulation Harms Minorities"

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The Most Precious Liberty That Man Possesses

The right to earn a living is, as Justice William O. Douglas said, "the most precious liberty that man possesses."[1] The right to get a job, or to start a business of one's own, in order to earn an honest living for oneself and one's family, is a fundamental human right.[2] The founding fathers called it "the right to pursue happiness." It is commonly considered a keystone of "the American Dream," and one of the major reasons why the "tired, the poor, the huddled masses yearning to breathe free" have sought American shores: the chance at economic independence is central to what it means to be free.

Sadly, that right is often stifled by laws that forbid people to practice certain trades unless they get government permission first. Occupational licensing laws of various sorts often impose such expensive and heavy burdens on people who want to start a business as to make those jobs virtually unreachable for those who cannot afford to undergo years of training and education and pass an expensive licensing exam. Occupational licensing is supposed to protect the public against dangerous, incompetent, or dishonest practitioners, but as Justice John Paul Stevens warned, "private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest."[3] Licensing laws are already pervasive and is becoming more so. Today, a third of all workers need some form of government permission to do their jobs.[4] And the more burdensome licensing requirements become, the more difficult it becomes for members of minority groups, who have fewer resources to get licenses, to obtain the permission necessary to practice their trade.

The fact that government restrictions on business have a disproportionately negative impact on members of racial minorities is no surprise. For decades, economists of the "public choice" school have explained that when government has the power to impose burdens on some people and grant benefits to others, that power itself becomes a valuable commodity. Groups within society will therefore invest time and money in obtaining the use of that power, in hopes of profit. Economists call this "rent seeking," ordinary people call it "lobbying." Those with less political influence will typically fail to obtain that power. Therefore any government program to redistribute wealth or opportunity will typically fall into the hands of the most politically influential—and the burdens of that program will typically fall on those who lack the political wherewithal to defend themselves in the democratic process. Usually this means the poor or members of minority groups.

Consider just one example: Florida requires people to have a college degree and pass a government exam before they can practice the business of "interior design."[5] In other words, a person must spend thousands of dollars, and study for two years, and then pass a difficult test, before that person can advise me on what color drapes to hang in my living room. This requirement has a racially disproportionate impact, and it is no surprise: black and Hispanic interior designers are about 30 percent less likely to have a college degree than are whites.[6] And because it costs $1,200 just to take the exam,[7] many poor people doubtless find it prohibitively expensive to get a license.

Similar patterns exist in most industries, and the effects are more severe toward the entry-level side of the spectrum. Thus one recent study showed that increasing the number of hours required to obtain a manicurist license by 100 hours reduced the number of Vietnamese

manicurists by 18 percent.[8] Other studies have shown that members of minority groups are significantly more likely to fail the written portion of a licensing exam than the practical portion—which indicates that failure is less attributable to an applicants' actual inability than to other factors, such as reading skills, which are skewed by the racial disproportion in overall educational attainment that is already well-documented nationwide.[9] In many cases, minority members are forced to respond to licensing requirements not by shutting down their businesses, but by simply operating illegally, and hoping not to get caught. One Maryland survey in 1953 found only two licensed black plumbers in the entire state—and 96 unlicensed ones.[10] Of course, people operating without licenses are vulnerable to abuse by organized crime or by corrupt government officials. In 2010, Florida police officers used licensing laws as a handy excuse to conduct armed raids of black- and Hispanic-owned barbershops, where they suspected drug deals were going down. (Apparently they found nothing, but arrested 37 suspects for unlicensed barbering.)[11]

The racially disproportionate impact of licensing laws is nothing new. In the 19th century, my home state of California sought to exclude Chinese immigrants from competing against whites for jobs. One common way of doing this was to use licensing to block the Chinese from engaging in their trade.[12] At the state's Constitutional Convention of 1879, some delegates were quite explicit about this. "I am willing to go as far as any gentleman on this floor," said one, "by way of police, sanitary, criminal, or vagrant regulations, or refusing to license this class of aliens to carry on any trade or business whatever, if we can in any way, by statute or otherwise, prevent the same. And I would go further and continue to hamper them in every way that human ingenuity could invent, so that the 'heathen Chinee' himself would see that it was getting too hot for him to attempt to try to make a living here, and would consequently leave for his own or some other more genial climate."[13]

In 1883, the Supreme Court struck down a San Francisco law that imposed a licensing requirement on laundry businesses in the city, because it was common knowledge that the law was used to exclude the Chinese from running laundry businesses. The Court declared that "the very idea that one man may be compelled to hold his…means of living…at the mere will of another" was "intolerable in any country where freedom prevails." Indeed, it was "the essence of slavery itself."[14] Nevertheless, states regularly used licensing laws to forbid economic competition from disfavored racial groups,[15] or immigrants,[16] or political undesirables.[17] In the South, of course, states regularly used licensing laws to restrict economic competition from former slaves and their descendants.[18] Licensing of barbers and cosmetologists, for example, was often used in the early 20th century for the express purpose of blocking minority entrepreneurs from competing for jobs.[19]

These disfavored minorities, unable to defend themselves at the ballot box, necessarily turned to the courts—and particularly federal courts—for protection, and they often received it, at first. During the period between about 1880 and 1940, federal courts were often attentive to protecting the right to earn a living, including the right of disfavored groups to pursue and occupation. Perhaps the best example is 1923's *Adkins v. Children's Hospital*,[20] in which the Supreme Court struck down a Washington, D.C., law that imposed a minimum wage for women. Such a law, which requires employers to pay women more than men, obviously encourages employers to replace their female employees with cheaper male labor. That is why

male-dominated trade unions supported these laws, as a way of barring their female competitors from the labor market.[21] The Court had, about 20 years previously, upheld an Oregon law that prohibited women from working overtime, on the theory that women were too shy and weak to decide for themselves what hours they were willing to work for.[22] But in *Adkins*, the Progressive feminist Justice George Sutherland overruled that prior case, declaring that women had every bit as much right as men to decide for themselves what wages and hours they were willing to work for, and did not need the government to "protect" them from themselves.[23]

Rational Basis Scrutiny: Judicial Abdication

Alas, federal courts today have today largely abandoned precedents like *Adkins*, as a consequence of the Supreme Court's invention of so-called "rational basis scrutiny." This is the legal test judges use when deciding whether a law unconstitutionally restricts a person's right to pursue an occupation.[24] The "rational basis" test holds that when a law is "rationally related to a legitimate government interest," it will be upheld, and any restriction on economic liberty is presumed to be constitutional unless the plaintiff can prove that no legislator could ever have believed it was a good idea. This is a truly extreme proposition. One judge has explained that the test requires judges "to cup [their] hands over [their]eyes and then imagine if there could be anything right with the statute."[25] The rational basis test requires plaintiffs to prove a negative: to prove that there cannot be any conceivable state of facts that would justify the law.[26] Justice John Paul Stevens rejected this idea, holding that it would be "tantamount to no [judicial] review at all," because "it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts.'"[27] And the Court has indeed backed away slightly from the most extreme form of the rational basis test,[28] but these steps have been uncertain, and its progress is much too slow. Today, thanks to the rational basis test, restrictions on economic liberty are upheld in all but the most extreme instances.

That test represents the judiciary's abdication of its constitutional obligation to fully and fairly guarantee economic liberty—a right "deeply rooted in this nation's history and tradition"[29]—against unjustifiable interference by the government.[30]

Such abdication has particularly harsh consequences for members of minority groups, because courts are typically where they look for protection against the tyranny of the majority—or against legislatures that arbitrarily deprive them of life, liberty, or property. As Justice Robert Jackson said, the "very purpose" of the Constitution is "to withdraw certain subjects from the vicissitudes of political controversy, to place [our rights] beyond the reach of majorities and officials."[31] But thanks to the rational basis test, federal courts have almost entirely forsaken the right to economic freedom. Thus Americans have virtually no meaningful protection against exploitation by legislatures or appointed government officials when it comes to this right.

Consider the Florida interior design law. If it were not already obvious that there is no justification for forcing people to get a government license before allowing them to advise consumers on interior decoration, there are plenty of comprehensive surveys that show no significant danger to the public from unlicensed interior designers.[32] Interior designer licensing

is a monopolistic privilege created by the American Society of Interior Designers, a nationwide lobbying group that has devoted millions of dollars to getting laws passed that make it illegal for people to practice the trade of interior design without government permission—not to protect the public, but to protect themselves against potential competitors.[33]

But when a would-be designer challenged the constitutionality of Florida's licensing law, the Eleventh Circuit refused to consider the evidence in the case, and applied the rubber-stamp rational basis test. It held that the state had "no obligation to produce evidence" showing that licensing interior designers was necessary,[34] and that the state could forbid people from practicing this business based purely on legislative "speculation unsupported by evidence or empirical data."[35] The court would uphold this prohibition on a person's ability to earn a living "even [though] it seems…illogical."[36]

Imagine if this were the way criminal law cases were decided: a person accused of a crime shows at trial that there is no evidence to prove his guilt—but the judge deprives him of liberty anyway, because, after all, he did not "disprove" the state's "speculation"! This Committee would be outraged by such a rule, and it would be outraged by a rule allowing states to deprive people of freedom of speech, or freedom of religion, or freedom of travel, on such a flimsy and biased pretext. But when it comes to economic freedom—even something as harmless as the right to run a business that recommends what color I should paint my kitchen—courts regularly allow states to arbitrarily deprive people of their liberty without any evidence that such deprivations are justified by the facts. Courts simply refuse to discharge their duty to consider the evidence. Instead, they "cup [their] hands over [their] eyes"[37] and allow federal and state legislatures or administrative agencies virtually unlimited power to deprive people of a central aspect of freedom.

D.C. Circuit Judges Brown and Sentelle have explained the point well. "The practical effect of rational basis review," they write, "is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions. The hope of correction at the ballot box is purely illusory…. Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more."[38]

Competitor's Veto Laws

There is one particularly insidious kind of occupational licensing law that deserves special notice: Competitor's Veto laws, also known as "Certificate of Public Convenience and Necessity" or "Certificate of Need" laws. Unlike ordinary occupational licensing, which requires people to satisfy certain education and training requirements, Competitor's Veto laws have no connection whatever to whether a person is honest or qualified. Instead, these laws forbid anyone, no matter how qualified, from practicing a trade unless that person first *gets permission from all of the businesses already operating*. Bizarre as that may seem, such laws are on the books in most states, regulating a wide variety of industries—everything from taxi and limousine businesses to moving companies, liquor stores, car dealerships, and even hospitals.

In all these industries, it is illegal to operate unless a person first gets permission from his own competitors.[39]

These laws were first invented to regulate public utilities such as railroads. But they remain on the books regulating even perfectly ordinary competitive industries such as moving companies. As I have shown in two recent articles, these laws are frequently used for the exclusive purpose of restricting competition against incumbent businesses.[40]

These laws are simply unconstitutional.[41] However lax the Supreme Court has been in protecting economic liberty, at least it has always held that licensing laws must relate in some way to a person's "fitness or capacity to practice" the business in question.[42] Competitor's Veto laws do not even pretend to relate to a person's fitness or capacity. Instead, they provide that even fully qualified applicants may be denied a license to operate simply because government officials believe that there are already "enough" businesses already pursuing that line of work. That is why the Supreme Court has struck down every Competitor's Veto law that it has ever reviewed.[43]

Competitor's Veto laws are routinely couched in extraordinarily broad and vague terms, which have the sole purpose of protecting established insiders against legitimate competition from newcomers. Consider, for example, the cases of my clients, Maurice Underwood, Steve Saxon, and Danelle Perlman. Maurice lives in Reno, where he wants to start a moving business.[44] Danelle lives in the Lake Tahoe area, where she runs a limousine business. Steve lives in Sacramento, California, where he runs a moving business that he'd like to expand into Nevada.[45]

Unfortunately, Nevada has a Competitor's Veto law on the books, which is the nation's most explicitly anti-competitive licensing law. Before Maurice or Steve can run their moving companies, and before Danelle can add a new limousine to her fleet, they must get permission from the Nevada Transportation Authority. To get permission is not easy. First they have to attend a hearing, which requires them to obtain legal representation—often a very costly proposition for a small business. At that hearing, existing businesses are allowed to object and testify that they don't want any more competition. Maurice, Danelle and Steve must then prove to the government that, among other things,

- "The granting of the certificate or modification will not unreasonably and adversely affect other carriers operating in the territory…"

- The granting of a new license will "foster sound economic conditions,"

- "The proposed operation . . . will benefit and protect . . . the motor carrier business in this State"

- "The market identified by the applicant as the market which the applicant intends to serve will support the proposed operation or proposed modification";

• "the potential creation of competition in a territory which may be caused by the granting of the certificate or modification, by itself, will [not] unreasonably and adversely affect other carriers operating in the territory"; and

• "The proposed operation or the proposed modification will be consistent with the legislative policies set forth in NRS § 706.151"—which itself says that one of these legislative policies is to "discourage any practices which would tend to increase or create competition."[46]

These criteria have nothing to do with whether Maurice Underwood is fit and qualified to operate a moving business, or whether Danelle Perlman is qualified to add another limousine to her fleet. Moreover, the Ninth Circuit Court of Appeals—which of course governs Nevada—has held that it is unconstitutional for the government to use licensing laws simply to protect some people against competition from others.[47] Yet the state continues to enforce these laws without regard to the constitutional right of all Nevadans to earn a living without unreasonable government interference. Note also how vague these standards are: even the head of the Nevada Transportation Authority testified at a state Senate hearing that he could not define what "sound economic conditions" means. "You know it when you see it," he said.[48]

Faced with restrictions like these, it's no wonder that most entrepreneurs simply abandon their efforts to get a license when they learn of these laws. When I litigated challenges to similar laws in Missouri and Kentucky, we found that applicants typically did not bother to go through the expensive, time-consuming hearing and licensing process, because they knew they were almost certain to be denied a license.[49] And, again, because Competitor's Veto laws privilege insiders against outsiders and impose expensive and time-consuming burdens on entrepreneurs in entry-level businesses, they also typically have a racially disproportionate effect. In 2009, Kentucky officials settled a lawsuit against them that alleged that the state's Competitor's Veto law had a racially disproportionate impact—by allowing the plaintiff to start a moving company.[50]

Competitor's Veto laws are unconstitutional, at least in ordinary competitive industries like moving companies or limousines, and should be entirely and immediately abolished.

What Can Congress Do?

Because most restrictions on economic liberty are imposed by state laws, I am often asked if there is anything that the federal government can do to protect this essential freedom. The answer is yes. Because this is a constitutional right of all Americans, the Fourteenth Amendment gives Congress a powerful tool to protect this right against federal interference. I have three initial recommendations for how Congress could act today to protect the right to earn a living.[51]

1. *Civil rights legislation to protect economic liberty.* Congress should use its Fourteenth Amendment powers to protect this long-neglected civil right against abridgment by states. Although today's civil rights laws would do this job if they were properly

enforced, courts have failed in that duty, in part because they believe Congress has acquiesced in the judiciary's neglect of this right. Further legislation is therefore essential to emphasize the importance of the right to earn a living, and ensure meaningful protection in the courts. I suggest language along the following lines: "All adult persons, except as a punishment for crime whereof the party shall have been duly convicted, shall be free, in every state and territory in the United States, to make and enforce contracts; to earn, purchase, sell, hold, and convey real and personal property; and to pursue lawful occupations, subject only to such restrictions as substantially protect the public health and safety…."

2. *Spending clause legislation that conditions federal grants to jobs and education programs on states abolishing unjustifiable restrictions on economic liberty*. Such legislation could be framed along the lines of the Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act. It makes eminent sense that if Congress is going to give states money to spend on job-training, states should reduce their barriers to economic liberty in exchange for those grants. I recommend language such as: "No government shall impose or implement a licensing requirement on a trade or occupation in a manner that imposes a substantial burden on the economic liberty of a person, unless the government demonstrates that imposition of the requirement on that person (a) furthers the protection of public health or safety; and (b) is the least restrictive means of furthering that protection…."

3. *Reducing or eliminating antitrust immunities for government regulatory agencies*.[52] In its recent decision in *North Carolina Board of Dental Examiners v. FTC*,[53] the Supreme Court made clear that states cannot exempt private parties from antitrust laws simply by deputizing them as government regulators. As the Court declared, "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy."[54] If, in fact, antitrust law exists to protect competition, and not competitors, then state governments—the entities best situated to create and maintain monopolies that harm consumers and block competitors from earning a living—should not only be liable to antitrust prosecution, but should probably be the prosecutors' first target. Under today's *Parker* immunity doctrine, unfortunately, they are usually immune from those laws. *Parker* immunity should be sharply limited to cases where it is actually necessary for states to restrict competition to protect the public safety. Congress could amend the antitrust laws to require as a condition for *Parker* immunity: (1) that the restrictions on competition at issue in a case be actually commanded by state law, (2) that the state actors at issue be actively supervised by individuals directly answerable to voters, and (3) that the state prove that its restriction on competition substantially advances an important government interest.

These are only initial suggestions. There is also much need to rein in the extreme discretion of administrative agencies at the state and federal levels;[55] for a coherent legal doctrine of free speech for business owners;[56] for protections against states banning convicted

felons from ever obtaining licenses;[57] and for an Office of Economic Liberty in the Civil Rights Division of the Justice Department. There should be at least some central clearinghouse to collect data and monitor the violations of this long-neglected civil right.[58]

If America is to be Land of Opportunity; if she is to be the refuge for the unfree people of the world, as she has been for generations of immigrants who found here the possibility of independence and success; if she is to be a place where the American Dream can become a reality, and the poor man or woman can rise prosperity and comfort through hard work instead of political favoritism; if she is to make good on her promise of life, liberty, and the pursuit of happiness—then her judicial system must give force to her constitutional guarantees. But while this nation's courts refuse to protect the right to earn a living, we all suffer—entrepreneurs and consumers alike. And those who need economic liberty the most—the poor and members of minority groups—also suffer the most.

Notes

[1] *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).
[2] *See generally* Timothy Sandefur, *The Right to Earn a Living* (2010).
[3] *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting).
[4] Dept. of Treasury Offc. of Econ. Pol'y, et al., *Occupational Licensing: A Framework for Policymakers* 3 (July 2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.
[5] Fla. Stat. §§ 481.207, 481.209.
[6] David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Designers Use Government Power to Exclude Minorities & Burden Consumers* 1 (Institute for Justice, Feb. 2009), https://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.
[7] Exam Fee Schedule, http://www.ncidqexam.org/exam/fees/.
[8] Kathy K. Krynski & David E. Harrington, *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 Am. Econ. Rev. 237-31 (2006), http://digital.kenyon.edu/cgi/viewcontent.cgi?article=1018&context=economics_publications
[9] Walter Williams, *Race and Economics: How Much Can Be Blamed on Discrimination?* 76-77 (Stanford: Hoover Institution, 2011).
[10] Daniel Klein, *et al., Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 Econ. J. Watch 210, 214 (2012), http://econjwatch.org/articles/was-occupational-licensing-good-for-minorities-a-critique-of-marc-law-and-mindy-marks.
[11] Jeff Weiner, *Criminal Barbering? Raids at Orange County Shops Lead to Arrests, Raise Questions*, Orlando Sentinel, Nov. 7, 2010, http://articles.orlandosentinel.com/2010-11-07/health/os-illegal-barbering-arrests-20101107_1_criminal-barbering-licensing-inspections-dave-ogden.
[12] *See* David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 Wm. & Mary L. Rev. 211 (1999).
[13] E.B. Willis & P.K. Stockton, *Debates And Proceedings of The Constitutional Convention of the State of California* 727 (1878) (Remarks of Mr. Thompson).
[14] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[15] *See, e.g, Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).
[16] *See, e.g., Truax v. Raich*, 239 U.S. 33 (1915).
[17] *Schware v. Board of Examiners*, 353 U.S. 232 (1957).
[18] *See generally* David E. Bernstein, *Only One Place of Redress* (2001).
[19] David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 San Diego L. Rev. 89, 99-103 (1994); Benjamin Shimberg, et al., *Occupational Licensing: Practices and Policies* 160-64 (1973); Even Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from The Progressive Era* (Oct. 19 2006) http://economics.ucr.edu/papers/papers06/06-05.pdf, which otherwise rejects the thesis that occupational licensing had deleterious effects on black entrepreneurs, acknowledges that such effects did occur in the barbering trade. Their study has been subject to some severe critiques. Daniel Klein, *et al., supra* note 10.
[20] 261 U.S. 525 (1923).
[21] *See* Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* 136-38 (2003).
[22] *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) ("woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence…. [W]oman has always been dependent upon man…. [S]he has been looked upon in the courts as needing especial care…. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.").
[23] *See* Hadley Arkes, *The Return of George Sutherland* ch. 3 (1994).

[24] Modern rational basis scrutiny essentially began with *Nebbia v. New York*, 291 U.S. 502 (1934), but it was not until several years afterward that the Court embraced the extreme form of deference today known by that name. *See generally* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 59 (2014).

[25] *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). Even more telling is the exchange between the Ninth Circuit and a Justice Department attorney recounted in Gideon Kanner, *"(Un)equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases,* 40 Loy. L.A. L. Rev. 1065, 1080 n.68 (2007).

[26] *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993).

[27] *Id*. at 323 (Stevens, J., dissenting).

[28] *See* Sandefur, *Rational Basis and the 12(b)(6) Motion, supra* note 24 at 59-60.

[29] This phrase, from *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)), purports to identify those rights considered "fundamental" under our Constitution. There can be no dispute that the right to economic liberty falls within this definition. *See* Sandefur, *Right to Earn A Living, supra* note 2 at 1-25; Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 984 (2013). Yet it has been almost entirely ignored by modern courts, which have relegated it by fiat to "non-fundamental" status.

[30] See further Timothy Sandefur, *Disputing the Dogma of Deference*, 18 Tex. Rev. L. & Pol. 121, 122 (2013).

[31] *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

[32] One of the most comprehensive was Colorado's 2000 "Sunrise Report" that found no need to establish a licensing requirement for interior designers in that state. *See* Interior Designers 2000 Sunrise Review, http://tinyurl.com/nfjamjt. *See also* Jared Meyer, *Interior Design Doesn't Kill, but Regulating It Does*, Manhattan Institute, Aug. 6, 2015, http://www.economics21.org/commentary/interior-design-occupational-licensing-Institute-Justice-08-06-15.

[33] David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Designers Use Government Power to Exclude Minorities & Burden Consumers* 1 (Institute for Justice, Feb. 2009), https://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.

[34] *Locke v. Shore*, 634 F.3d 1185, 1196 (11th Cir. 2011).

[35] *Id*. at 1196.

[36] *Id*. at 1196-97.

[37] *Arceneaux*, 671 F.2d at 136 n.3.

[38] *Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown and Sentelle, JJ., concurring), cert. denied, 133 S.Ct. 860 (2013). Although he chose not to join their opinion, Judge Griffith expressed sympathy with his colleagues' views. *See id.* at 483 (Griffith, J., concurring).

[39] *See generally* Timothy Sandefur, *CON Job,* Regulation (Summer 2011), http://object.cato.org/sites/cato.org/files/serials/files/regulation/2011/8/regv34n2-1.pdf.

[40] Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn A Living: Some Paths to Federal Reform*, 38 Harv. J.L. & Pub. Pol'y 1009 (2015); Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason U. Civ. Rts. L.J. 159 (2014).

[41] *See Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014).

[42] *Schware*, 353 U.S. at 239.

[43] *See New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Buck v. Kyukendall*, 267 U.S. 307 (1925); *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926). *See also Schaffer Transp. Co. v. United States*, 355 U.S. 83, 90-91 (1957) ("To reject a motor carrier's application on the bare conclusion that existing rail service

can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others.").

[44] Pacific Legal Foundation, *Moving Roadblocks to Competition And Free Enterprise in Nevada*, http://www.pacificlegal.org/cases/Moving-roadblocks-to-competition-and-free-enterprise-in-Nevada

[45] Pacific Legal Foundation, *Nevada is Sued for Stifling Competition in Transportation Industry*, http://www.pacificlegal.org/releases/release-2-19-15-wilson-perlman-15-307

[46] Nev. Rev. Stat. §§ 706.391, 706.151.

[47] *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.5 (9th Cir. 2008).

[48] Timothy Sandefur, *PLF Urges Court to Protect Maurice Underwood's Right to Earn A Living*, PLF Liberty Blog, June 3, 2013, http://blog.pacificlegal.org/plf-urges-court-to-protect-maurice-underwoods-right-to-earn-a-living/.

[49] *See* Sandefur, *State "Competitor's Veto" Laws, supra* note 40 at 1036-37; Sandefur, *A Public Convenience and Necessit*y, supra note 40 at 181.

[50] Sandefur, *State "Competitor's Veto" Laws, supra* note 40 at 1040-41.

[51] I explain in greater detail in *id.* at 1057-66.

[52] I explain this proposal in greater detail in Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism: North Carolina Board of Dental Examiners v. FTC*, Cato Sup. Ct. Rev., 2014-2015, at 195.

[53] 135 S. Ct. 1101 (2015).

[54] *Id*. at 1111.

[55] For one thing, administrative agencies should be restricted to enforcing existing rules instead of making new ones. Arizona has taken a step in this direction by enacting A.R.S. § 41-1038, which limits the ability of agencies to impose new rules that burden the right to earn a living. Agencies should also be required to comply with ordinary legal rules of evidence in all enforcement proceedings. At present, many states allow agencies to use, for example, hearsay evidence in enforcement proceedings. This is a plain violation of due process of law, particularly where—as in California—any subsequent judicial review of the agency proceeding is subject to rules of deference that forbid the litigants from introducing any new evidence or contradicting the "evidence" that was admitted at the administrative agency level.

[56] Particularly troubling is the legal doctrine of "professional speech"—a term the Supreme Court has never used, since it has never pronounced on the subject at all. This doctrine holds that First Amendment protections do not apply to speech by licensed professionals or persons acting within their profession. Thus medical doctors and others may have their speech rights overridden by legislative fiat. Given the absence of controlling Supreme Court precedent on this question, however, there is much confusion among the courts as to what sort of constitutional protections apply to this sort of speech. *See* Brief Amicus Curiae Pacific Legal Foundation in Support of Petition for Certiorari, *Hines v. Alldredge*, No. 14-1543, http://blog.pacificlegal.org/wp/wp-content/uploads/2015/07/HinesACCert.pdf.

[57] Such blanket prohibitions are unconstitutional, *Barletta v. Rilling*, 973 F. Supp. 2d 132, 137 (D. Conn. 2013), and have a racially disproportionate impact. *See* Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. Rev. 193, 201-05 (2004)

[58] To take one example of the neglect of this fundamental right: in February, 2013, I joined several other witnesses in testifying before the United States Commission on Civil Rights regarding the disproportionate burden that economic regulations have on racial minorities. In November, 2013, the Commission quashed the report that resulted from that hearing, because it considered the results "too one-sided."