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Timothy Sandefur

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INSIDERS, OUTSIDERS, AND THE AMERICAN DREAM: HOW CERTIFICATE OF NECESSITY LAWS HARM OUR SOCIETY'S VALUES

TIMOTHY SANDEFUR*

INTRODUCTION

In 2007, college student entrepreneur Adam Sweet and his brother co-founded a moving company called 2 Brothers Moving in Portland, Oregon. What they did not know at the time was that to get the mandatory state license, they would first be required essentially to get permission from the state's existing moving companies. Under a seventy-year-old state law, when a person applied for a license, the Oregon Department of Transportation ("ODOT") would notify existing movers of the application and give them the opportunity to object to the issuing of a license. Once the inevitable objection was filed, Sweet would be forced to prove to ODOT that there was a "public need" for a new moving company. The statute provided no definition of "public need"; nor did it set forth any standard of review or evidentiary or procedural rules for such a determination. Instead, ODOT informally relied on a set of guidelines prepared almost twenty years earlier by a different agency, the Public Utility Commission, which described in general terms the factors the Commission had previously considered when evaluating applications for licenses to operate public utilities.2

Sadly, Sweet's situation is typical of a type of licensing restriction called the "certificate of necessity" or "certificate of need" ("CON") requirement. Unlike traditional occupational licenses,

CON laws are not meant to protect consumers or the general public by requiring practitioners of a trade to demonstrate expertise or education.\(^3\) Instead, these laws exist to restrict competition and to boost the prices that established companies can charge. This cartel system prevails in most states and in a variety of industries, from moving companies to taxicabs,\(^4\) hospitals,\(^5\) and car lots.\(^6\)

CON laws restrict economic opportunity for entrepreneurs and raise costs for products and services that consumers need, simply to protect existing businesses against legitimate economic competition. They have accordingly been subject to powerful economic critiques.\(^7\) In particular, although originally devised to regulate markets that were considered public utilities or natural monopolies, CON laws quickly spread to encompass industries where healthy competition was the norm, leading to perverse economic consequences.\(^8\) In this Article, however, I want to

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8. Some excellent works on CON laws in other industries come to similar conclusions to those I address here. In particular, studies of CON requirements for hospitals have shown that they are "ineffective at controlling costs and enhancing access" because they "allow incumbent firms to maintain higher prices and higher costs." John E. Schneider & Robert L. Ohsfeldt, The Role of Markets and Competition in Health Care Reform Initiatives to Improve Efficiency and Enhance Access to Care, 37 Cum. L. Rev. 479, 501-02 (2007). See, e.g., Cordato, supra note 5; Patrick John McGinley, Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System, 23 Fla. St. U. L. Rev. 141, 167 (1995); Lauretta Higgins Wolfson, State Regulation of Health Facility Planning: The Economic Theory and Political Realities of Certificates of Need, 4 DePaul J. Health Care L. 261 (2001).
address a broader question: in addition to their economic havoc, I want to discuss the deleterious effects that CON restrictions have on citizenship values and social philosophy. I will address the moving industry in particular—a trade that differs from some of the other industries subjected to CON restrictions, because it has none of the features often taken as indicative of natural monopolies: it has relatively low start-up costs (a truck; insurance), low overhead, and it offers entry-level opportunities to unskilled laborers. But a similar critique could apply to any of the other industries subject to CON requirements. Whatever their justification when applied to alleged monopoly markets or public utilities, the use of CON laws in these competitive, entry-level industries imposes major social and moral costs—infringing the individual liberty of, and denying economic opportunity to, precisely those people who most need meaningful constitutional protection. Thus after a brief summary of the history of CON regulations in Part I, I explain in Part II why they violate critical social values of equality, publicness, and individual liberty. In Part III, I contend that CON restrictions are unconstitutional under the Fourteenth Amendment because they serve well-connected private interests and are thus "naked preferences"9 that violate the due process and equal protection clauses.10

I. THE HISTORY OF CERTIFICATES OF NECESSITY

A. Occupational Licensing

Occupational licensing traces its roots back to the Medieval guild system,11 but modern licensing came into its own in the immediate aftermath of the Civil War12 as reformers sought to protect consumers from incompetent or fraudulent practitioners or merchants. Yet these laws were also a handy means of restricting competition and favoring politically influential, established businesses. Then, as now, the demand for regulations restricting entry into trades often came from the practitioners of that trade, who claimed, with varying degrees of plausibility, that such laws

10. I do not discuss here the Privileges or Immunities Clause, which I would also argue prohibits the use of CON requirements. See generally Timothy Sandefur, Privileges, Immunities, and Substantive Due Process, 5 N.Y.U. J.L. & Liberty 115 (2009). I also do not address the question of whether CON restrictions violate the Sherman Antitrust Act. See Yakima Valley Mem’l Hosp. v. Washington State Dep’t of Health, 654 F.3d 919 (9th Cir. 2011).
11. See Young, supra note 3, at 9.
would protect the public health, safety, and welfare, but who just as often hoped to use the law to monopolize markets and protect their own private interests.13

Because licensing operates as a barrier to entry, it enables existing tradesmen to raise their prices above market rates, and reduces the pressure that existing firms feel to innovate or improve service.14 Yet this system also provides insiders with certain non-economic advantages. For example, throughout the nineteenth century, debates over licensing included a racial component; they would use white laborers to prevent competition from immigrants or minorities. In the South, blacks were often barred from legal trades,15 and in California, licensing was often advocated as a means of preventing the Chinese from entering trades where they might compete against white labor.16

The first U.S. Supreme Court case to address the constitutionality of occupational licensing restrictions was Dent v. West Virginia,17 which involved the licensing of medical doctors. Interestingly, Dent was written by Justice Stephen J. Field, whose reputation for advocating free markets and private property rights is well deserved.18 Field was extraordinarily sensitive to protecting the right to engage in a trade—a right, he observed, that was protected by common law courts since at least the seventeenth century.19 In such cases as Cummings v. Missouri,20 Butcher's Union v. Crescent City Livestock Landing & Slaughtering Corp.,21 and his famous dissents in The Slaughter-House Cases22 and Munn v. Illinois,23 Justice Field relied on the long history of com-

13. Id. at 340-56. Among the finest critics of the modern insensitivity to the importance of economic liberty is Michael J. Phillips, Entry Restrictions in the Lochner Court, 4 GEO. MASON L. REV. 405 (1996) (providing an exceptionally keen overview of the Supreme Court's jurisprudence regarding protectionist economic regulations).
14. See Young, supra note 3, at 49-57.
18. See generally Paul Kens, Justice Stephen Field: Shaping Liberty From the Gold Rush to the Gilded Age (1997).
19. See Sandefur, supra note 6, at 17-37.
22. 83 U.S. (16 Wall.) 36 (1872).
23. 94 U.S. 113 (1876).
mon law protections for the right to enter and pursue a lawful trade, arguing that the United States Constitution incorporated and protected this right. This freedom to earn a living as one chose was “the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all vocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.” While the government could, of course, “prescribe such regulations . . . as will promote the public health, secure the good order and advance the general prosperity of society,” those regulations must ensure that “the pursuit or calling [is] free to be followed by every citizen who is within the conditions designated.” This right was “the fundamental idea upon which our institutions rest.” The Constitution thus ensured that any person could enter a trade free of “disparaging and partial enactments”—that is, free of unreasonable government interference and favoritism.

Thus it might initially come as a surprise that Field upheld the constitutionality of occupational licensing in *Dent*. Yet in Field’s eyes, licensing the learned professions was a legitimate use of the state’s police power so long as it was done to protect the general public from untrained or dangerous practitioners. Because an incompetent doctor might kill or injure a patient in a way that could not be fully compensated after the fact, the state could legitimately try to prevent injuries by requiring practitioners to obtain the necessary training before entering the trade.

Nevertheless, Field was sensitive to the dangers of licensing. Restricting entry into professions would only be legitimate so long as the restrictions bore a genuine relationship to the practice of the trade in question. If, on the other hand, the state abused its authority to create a cartel immune from fair competition, such laws would “operate to deprive one of his right to pursue a lawful vocation” and violate the Constitution. Thus licensing laws could pass muster only if the licensing criteria were

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25. *Id.*
26. *Id.*
27. *Id.* at 109–10.
28. *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.”).
29. *Id.*
“appropriate to the calling or profession, and attainable by reasonable study or application.”

B. The Origins of Certificates of Necessity

Within a few years of the Dent decision, cities and states began implementing CON requirements. The first CON law, as William K. Jones explains, was adopted in 1892 in New York to regulate railroads. CON requirements, indeed, were designed to apply not to just any trade, but specifically to public utilities, and in the years that followed, Massachusetts and other states adopted such laws not only for railroads, but for gas, electric, and telephone companies.

Advocates of CON laws put forward a number of different rationales for implementing so-called “regulated monopolies.” Probably the most plausible argument was that such laws would encourage private investment in public utilities that would otherwise be deterred by the heavy restrictions and regulations that handicapped public common carriers in competition with less-regulated private firms. By giving them a monopolistic advantage, CON requirements would compensate investors for such costly regulatory burdens as the rules that required railroads to submit to rate regulation or to serve unprofitable or out-of-the-way routes. Such restrictions made it more expensive for railroads to operate—creating an incentive whereby competing roads might engage in “cream-skimming”: that is, serving only more profitable users. The risk of more efficient competition might deter private financiers from investing in a public railroad. As the New York Board of Railroad Commissioners explained in 1884:

When the State has undertaken the control of railroads by the creation of supervisory boards, and has determined to exact the highest standard of service at reasonable rates of freight and fare, it would certainly seem as if a corresponding obligation rested upon it to protect existing railroads from useless and disastrous competition by unnecessary new ones.

30. Id.
32. Id. at 447, 450, 454.
CON restrictions were thus seen essentially as subsidies for investment.

On the other hand, "cream-skimming" is just a self-serving dysphemism for "economic efficiency." The alleged negative effects of "cream-skimming" are imposed, not by competition, but by the regulation itself, and generally ought to make the regulator reconsider the fairness or efficiency of the regulatory burden rather than adding handicaps to more efficient competitors. For "cream-skimming" to occur in the first place means that some users of the service are being overcharged, and there is nothing unfair in providing these users with a lower cost service tailored to their needs. Forcing a business to serve out-of-the-way customers violates the rights of business owners, increases their cost of doing business, deters more productive investments, imposes a drag on innovation and improvements in customer service, and transfers wealth from customers in more convenient locations to customers in less convenient locations. Price discrimination, or other means by which providers can choose more profitable markets, will decrease costs, improve service, create incentives for customers to locate in more convenient locations—all while still allowing those in less convenient locations to obtain services from other providers—and, by lowering costs and improving efficiency, will even benefit out of the way customers.

Of course, the entire system of economic dynamism consists of "cream-skimming" of a sort: that is, a process of creative destruction in which new innovations in technology or business models attracts customers away from former methods of doing business, even though this detracts from the profits of incumbent


36. On the contrary, it is unjust to coerce businesses to provide unprofitable services or customers to subsidize less-profitable users. See also Dan W. Brock & Allen Buchanan, Ethical Issues in For-Profit Health Care, in FOR-PROFIT ENTERPRISE IN HEALTH CARE 224 (Bradford H. Gray ed., 1986).


38. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81 (1942) (popularizing the term "creative destruction").
firms. The most famous articulation of this principle came in Charles River Bridge v. Warren Bridge, in which the Court refused to interpret the corporate charter of an existing toll bridge as a monopoly prohibiting competition from another bridge: "Let it once be understood that such charters carry with them these implied monopolies . . . and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down . . . rail roads and canals." If existing businesses could prevent newcomers from entering the market because competition would threaten the viability of their investments, progress would come to a standstill, and the operators of established industries would enjoy privileges denied to other citizens who were supposed to enjoy equal rights before the law.

We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.

Thus, although the economic justifications of CON requirements in the realm of public utilities were dubious—resting on questionable economic assumptions that, taken to their logical extremes, would stifle innovation and prevent economic growth, and on vague notions of fairness that favored established businesses against more cost-effective alternatives—they were at least intended to address economic problems arising in monopolistic industries or among public utilities. The next step in the saga was the perverse application of such laws to normal, competitive industries.

39. Proponents of the "cream-skimming" theory do not deny this, but define "cream-skimming" as providing services at lower prices by "evading regulatory price or service requirements," Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 227 n.79 (2003), which is to say, that the industry in question fails to provide the inefficient services that the proponent herself believes ought to be provided. This is just another of the many ways in which people define "market failure" as the market failing to do what they want it to do. See generally Brian P. Simpson, Markets Don't Fail! (2005).
40. 36 U.S. (11 Pet.) 420 (1837).
41. Id. at 552-53.
42. Id. at 553.
C. Spread to Non-Public Utilities

The advent of the automobile bolstered advocates of CON laws in some ways. Jitney-cabs, for example, provided a new means of transportation that did not require heavy start-up costs, and they were much better suited to engage in "cream-skimming"—that is, they were able to efficiently get passengers to their destinations without stopping unnecessarily at fixed points on the way, as street cars or buses were required to. Streetcar and bus companies naturally saw new competition as unfair, and sought, successfully in many instances, to use CON restrictions to block cab services from starting up. In 1913, for example, New York enacted the first CON requirement for automobile buses, out of what the state’s Public Service Commission called “a sense of fairness to the private interests already engaged in these fields of work.” The Commission claimed it was not trying to prevent innovation and free enterprise, but its “sense of fairness” led it to do just that. In 1915, the commission refused to allow a jitney company to compete against a streetcar line, even while admitting that the streetcars were providing poor service. “Competing companies, operating in a single field,” it declared, “were never likely to achieve such secure financial standing as to enable them, collectively, to give as good service as a single well-regulated monopoly.”

Yet the automobile also radically altered markets and lifestyles, and whatever sense previous regulatory arrangements had made, the new technology rendered them obsolete in many ways. This is perhaps most obvious in the market for household goods movers. An automobile-based moving company may compete with a railroad freight hauler in some ways, but their competition simply is not analogous to the competition between, say, taxicabs and city buses. Railroads and household goods movers do not typically serve the same customer base: automobile movers provide door-to-door services to individuals or specific firms; they are not as well-equipped to carry extremely heavy or bulky freight as are railroads, and they do not serve a regular route between fixed points. These two industries are better seen as providing different, if overlapping, services, than as direct rivals—meaning that the alleged risk of “cream skimming” is minimal.

43. Jones, supra note 7, at 485.
44. Garnett, supra note 7, at 199–203.
47. See Gardner, supra note 7, at 700–01 (explaining how automobile-based movers differ from railroad freight haulers).
It is simply not reasonable to define the moving industry as either a public utility or a natural monopoly.48 Movers do not have a solid network structure or distribution system or regular routes; they do not have massive sunk costs, since a moving company can be started with a truck and an employee or two; they are not government-owned, and are certainly not a traditional government function.49 There are no inherent features of the business that make a single firm more efficient than multiple firms, or that limit competition so as to allow a single firm to extract monopoly profits.50

Yet states, and later the federal government, applied CON requirements to automobile-based moving companies, apparently without giving much thought to whether the economic arguments advanced in favor of CON laws for public utilities actually applied with equal force to an industry that is really a textbook case of a competitive market.51

Some advocates of CON requirements for automobile industries did recognize that cabs and moving companies were not public utilities or monopolies, but they advanced instead a different and flimsier justification: the idea of “excessive” or “destructive” competition. Under this theory, competition leads to a race to the bottom, in which service diminishes, prices fall, and ultimately businesses are driven out of the market altogether, leaving customers with no service. In a 1918 New York case, for

48. See Breyer, supra note 7, at 236.

49. See Rick Geddes, Public Utilities, in 3 Encyclopedia of Law and Economics: The Regulation of Contracts 1162–1205 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (describing characteristics of public utilities). One reason that railroads were defined as public utilities early in American history is that roads in general were a traditional government function, and a railroad was therefore seen as exercising a delegated sovereign authority to construct roads. See Timothy Sandefur, A Gleeful Obituary for Poletown Neighborhood Council v. Detroit, 28 Harv. J.L. & Pub. Pol’y 651, 654–60 (2005).


51. See Gardner, supra note 7, at 706–07 (“The absence of structural characteristics attributable to natural monopoly obliterates this argument for direct economic regulation of motor carriers. The classical free market model is much more descriptive of the competitive tendencies of an unregulated motor carrier industry.”).
example, the Public Service Commission explained that the reason that CON laws were used to prevent competition is that the business being divided between two carriers will be profitable to neither, and that in the long run the equipment of both will wear out in unprofitable service and neither will be able to continue. The result would be that the public would not be able to get any permanent service whatever.52

Such a statement demonstrates profound economic ignorance. In a competitive market, a firm’s investment in maintenance will be driven down, but only to an efficient level; once service suffers, consumers will shift their custom to a competing firm that provides better service. Likewise, prices will fall, but only to a level at which a firm can continue to pay its bills. The supply and demand curves will not collapse to zero unless consumers abandon the firm altogether—which they will only do if the service is so bad that consumers are better off without it.53 There is nothing wrong with this; as then-Professor Stephen Breyer wrote, “competition drives firms out of business because the survivors can do the same job better, more efficiently, or with fewer employees.”54

It is perverse to describe a process whereby consumers and producers non-coercively choose to allocate resources in a productive, mutually satisfactory way as “destructive.” Conversely, it is absurd to describe a legal regime that erects cartels of politically preferred firms against fair economic competition as “progressive.”55 Nevertheless, this is just what happened in the first three decades of the twentieth century, when the notion of

52. Jones, supra note 7, at 488 (quoting Flori Buschini, 7 N.Y. Pub. Serv. Comm’n 2d Dist. 299, 301 (1918)).
54. Breyer, supra note 7, at 30. The same reasoning, incidentally, reveals the logical fallacy inherent in the notion of “predatory pricing.” As Breyer noted, “predatory pricing” schemes only work if the so-called predator can bar re-entry into the market. See id. at 32. The Supreme Court endorsed this idea in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), when it held that a plaintiff can only state a cause of action for predatory pricing if she can demonstrate that the alleged “predator” was likely to recuperate the costs incurred by the temporary cost-cutting. Unfortunately, many states refuse to apply this rule, leading to anti-competitive public policy that simply prohibits low prices. See, e.g., Bay Guardian Co. v. New Times Media, LLC, 114 Cal. Rptr. 3d 392 (Ct. App. 2010).
"excessive competition" was quite popular.\textsuperscript{56} The result was a regulatory regime, with effects lasting to this day, in which entry into fully competitive markets is restricted by government agencies that act \textit{solely} as protectors of established cartels that exploit government for their private interests.

II. Citizenship Values and CON Barriers

As should be obvious, entry-restricting CON laws raise prices by increasing the cost for potential competitors to enter the market and generate dynamic competition. They reduce the incentives for improving service, lowering prices, or diversifying. They also inefficiently\textsuperscript{57} drive investment into unproductive activity; on the incumbent side, the rents available through such restrictions encourage existing firms to over-invest in policing rivals and tattling on unlicensed movers.\textsuperscript{58} As Breyer observed, "classical price and entry regulation is particularly unsuited to a competitively structured industry . . . [W]hen it is applied to such an industry, there are likely to be certain predictable effects: higher than competitive prices, a stable industry structure, uneconomic pricing rules, and inefficiency."\textsuperscript{59}

But worse than the increase in prices for consumers is the effect that barriers to entry have on newcomers. CON restrictions bar entrepreneurs and new workers from laboring productively and exercising their liberty to provide for themselves and their families.\textsuperscript{60} Aside from the economic consequences—destroying potential productivity before it is born—these restric-

\textsuperscript{56} Probably the leading judicial advocate of the idea was Justice Louis Brandeis. \textit{See generally Alpheus Thomas Mason, Brandeis and the Modern State} 81–89 (1953); \textit{Michael J. Phillips, The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s}, at 101–05 (2001).

\textsuperscript{57} I expressed some discomfort with the "inefficiency" in Timothy Sandefur, \textit{Does the State Create the Market—And Should It Pursue Efficiency?}, 33 \textit{Harv. J.L. & Pub. Pol'y} 779 (2010). My critique there was that the apparent moral neutrality embedded in most uses of the term "efficient" is illusory and misleading. My critique of the inefficiency of rent-seeking, as will be clear below, is therefore not based on abstract inefficiency, but on the idea that it is coercive and objectively wrong as a normative matter.

\textsuperscript{58} \textit{See James M. Buchanan & Gordon Tullock, The Calculus of Consent} 111 (1962) ("[B]argaining opportunities afforded in the political process cause the individual to invest more resources in decision-making, and, in this way, cause the attainment of 'solution' to be much more costly.") (emphasis omitted); Gordon Tullock, \textit{Rent Seeking as a Negative-Sum Game}, in \textit{Toward a Theory of the Rent-Seeking Society} 16 (James M. Buchanan et al. eds., 1980).

\textsuperscript{59} Breyer, supra note 7, at 238.

tions impose terrible social costs in terms of public philosophy. Legal protections for cartels sap industriousness, twist the productive, independent spirit of creativity and hard work into political manipulativeness and an us-versus-them mentality, quickly magnetize around racial or class poles, and send the message that social mobility is an illusion. They breed resentment and deny opportunity to those who need it most.61

Among the social values central to a free society are the principles of equality, publicness, and individual liberty, which provide the bare minimum for any polity that aspires to legitimacy and freedom. The people must enjoy at least relatively equal treatment before the law; the ruling authorities must govern in the public interest rather than in the private interest; and the laws must guarantee a sphere of freedom or individual autonomy in which each person can direct the course of his or her own life. To the degree that a society fails to abide by these principles, it is neither free nor lawful. CON restrictions that bar entry into the market in order to protect the interests of established firms violate all three of these principles.

A. Equality, Publicness, and Individual Liberty

Equality is the starting point of American political philosophy.62 The proposition that “all men are created equal” is not a mere rhetorical device—it is essential to the classical liberal political theory that motivated the founders of the American republic. It is because no human beings are marked out as inherently qualified to rule the lives of others and dictate their choices, that each person is free to run his or her own life, while respecting that same right in others. As Algernon Sidney observed, in words later paraphrased by Thomas Jefferson,

[L]iberty being only an exemption from the dominion of another, the question ought not to be, how a nation can come to be free, but how a man comes to have a dominion over it; for till the right of dominion be proved and justified, liberty subsists as arising from the nature and being of a man . . . . Man therefore must be naturally free, unless he be created by another power than we have yet heard of . . . . God only who confers this right upon us, can deprive us of it: and we can no way understand that he does so,

61. See also Timothy Sandefur, Can You Get There From Here?: How the Law Still Threatens King’s Dream, 22 Law & Ineq. 1 (2004); Robert L. Woodson, Race and Economic Opportunity, 42 Vand. L. Rev. 1017, 1041–43 (1989).
unless he had so declared by express revelation, or had set some distinguishing marks of dominion and subjection upon men; and as an ingenious person not long since said, caused some to be born with crowns upon their heads, and all others with saddles upon their backs.63

As this passage makes clear, the concept of equality is deeply connected to the idea of natural liberty, or what has lately been called the "presumption of liberty."64 The proposition all people are equally born free is not a subjective preference or an arbitrary postulate; rather, it is an inherent principle of logic: we presume that individuals are free to act unless good reason is given why they should not be.65 And each person equally enjoys this presumption of liberty; there is no \textit{prima facie} reason why one should rule over another. People equally have this liberty because each individual is presumptively responsible to choose his or her own actions, and to enjoy the rewards, and suffer the consequences. Nobody can alienate his or her responsibility—no person can truly lay the blame for a voluntary act on another—and therefore each person must enjoy the freedom to make choices of acting or not acting. Equality and individual liberty are thus deeply connected.66 And if people are presumptively free, then the onus of proof falls on the party who asserts a claim to rule over them, which means that people have the right to government by consent. The legitimacy of political rule is therefore not natural, but conventional—the product of agreement, even if only tacit. Yet the legitimacy of such an agreement depends on deeper principles which agreement cannot exceed; people cannot legitimately agree to commit an injustice against a third party, because that would contradict the more fundamental principle of the third party's equal rights.67

63. \textsc{Algernon Sidney}, \textit{Discourses Concerning Government} 510–11 (Thomas G. West ed., Liberty Classics 1990) (1698); \textit{cf.} Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), \textit{in Thomas Jefferson: Writings} 1517 (Merrill D. Peterson ed., 1984) ("The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.").


Equality is not only deeply related to liberty, but also to what I have called the publicness of the government's acts. Because political society is an association of basically equal, autonomous individuals who have the power of choice, a legitimate state cannot be oriented around exploiting the people for the ruler's private purposes, but must instead be organized around addressing the interests of all. Aristotle famously used this criterion to distinguish between corrupt and legitimate regimes, societies organized to serve the ruler's own interests he analogized to the rule of the master over the slave—these included the corrupt regimes of despotism, oligarchy, and democracy (using the word in its classical sense as meaning standardless mob-rule)—while legitimate regimes were, by contrast, communities of free people, in which legislation was directed toward accomplishing public goods. Into this category he put monarchy, aristocracy, and polity. Building on this framework, Roman political philosophers would use the word “res publica” to describe a healthy political society—a society that concerned itself with the “public things,” rather than the private interest of the powers that be.

Different types of political regime can be ascribed different fundamental values, but in the liberal political order established by the American Constitution, laws are organized around guaranteeing individual liberty. As Locke explained, this does not mean anarchy or chaos, but a society which protects individuals from the harms of others and also from the harms of the government:

\textit{where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, A Liberty for every Man to do what he lists: (For who could be free, when every other Man's Humour might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.}\textsuperscript{70}

Thus the polity is designed to maximize the individual's ability to pursue happiness by ensuring that citizens are protected


\textsuperscript{69.} See, e.g., I BARON DE MONTESQUIEU, \textit{The Spirit of Laws} bk. III (Timothy Dwight et al. eds., Thomas Nugent trans., Colonial Press, 1899) (1784); see also HANNAH ARENDT, \textit{The Origins of Totalitarianism} 467 (Harvest/HBJ 1973) (1966).

\textsuperscript{70.} LOCKE, \textit{supra} note 67, at 324.
from force or fraud committed by others and also from force or fraud committed by the government itself.\textsuperscript{71} Law exists to protect individual freedom, to ensure that each person is best able to apply his or her skills and knowledge to the problems and the joys of living.\textsuperscript{72} While law can also accomplish other public purposes and provide other public goods, such actions are legitimate only if they are consistent with the deeper purposes and principles established by the rule of individual rights and equality. This is why, for example, the government may take private property to devote to public uses but must provide just compensation to the owner. This rule (when it operates properly) reconciles the government's provision of public goods with the rights of the

\textsuperscript{71} See, e.g., \textit{The Federalist} No. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961) ("the protection of different and unequal faculties of acquiring property" is "the first object of government."); \textit{The Federalist} No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself."). It is sometimes said that modern political philosophy, and particularly the classical liberalism of Locke, "lowered the standard of virtue to make it attainable." See, e.g., \textbf{Leo Strauss}, \textit{What Is Political Philosophy?} (1959), reprinted in \textit{An Introduction to Political Philosophy} 3, 50-51 (Hilail Gilden ed., 1989).

Machiavelli's discovery or invention of the need for an immoral or amoral substitute for morality became victorious through Locke's discovery or invention that that substitute is acquisitiveness. Here we have an utterly selfish passion whose satisfaction does not require the spilling of any blood and whose effect is the improvement of the lot of all. In other words, the solution of the political problem by economic means is the most elegant solution . . . .

\textit{Id.} This seems simply a way of denigrating a great philosophical achievement: the articulation and constitutionalization of the bourgeois values—values of peace, productivity, and independence—that I discuss in more detail below.

\textsuperscript{72} This is what the Court was referring to when it declared that the liberty protected by the Constitution is essentially about "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992). Justice Scalia, among others, has ridiculed this statement, see \textit{Lawrence v. Texas}, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting), but liberty is not susceptible of any more precise definition. The word describes an unbounded field of operations in which an individual may inquire into herself and into nature, and seek those goals that she determines to be the most compelling, in general and in particular—whether that be a career, study, hobby, family, religion, social work, etc. In Jefferson's words, "rightful liberty is unobstructed action according to our will, within the limits drawn around us by the equal rights of others. I do not add 'within the limits of the law,' because law is often but the tyrant's will and always so when it violates the right of an individual." Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), in \textbf{Jefferson: Political Writings} 224 (Joyce Appleby & Terence Ball eds., 1999).
individuals who make up the society. As James Madison explained, the American regime reversed the order under which European despotisms had languished, in which individual rights were seen as privileges given to the people by the ruler; instead, the American system recognizes a more basic principle of individual rights by comparison to which government action is to be judged.

If equality, publicness, and individual liberty are social values, they are echoed in the private values of responsible citizenship: mutual respect, civic involvement, and personal industry. These "bourgeois virtues" received their most eloquent early expression in The Autobiography of Benjamin Franklin, the classic which became America's favorite work of business advice in its first century. The image of young Franklin, arriving penniless in Philadelphia with a loaf of bread under each arm, looking for a job—or pushing his wheelbarrow full of paper down the main street to build his reputation as an industrious printer, and devoting himself to good civic works and clever new ideas—like street-sweeping and lending libraries—was, and ought to remain, the image of the prototypical American citizen, devoting his honest industry to providing for himself and his family, thereby contributing to a healthy society and preparing the way for the next generation's progress. Only a few decades after Franklin's death, Alexis de Tocqueville observed that in America, all honest trades were considered dignified:

73. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 42 (1985) ("If the state obtains its authority only from the rights of those whom it represents, it can never claim exemption from the duty to compensate on the ground that it is the source of all rights. The natural rights theory behind the Constitution precludes that result.").

74. See James Madison, Charters, Nat'L Gazette, Jan. 19, 1792, reprinted in James Madison: Writings 502 (Jack N. Rakove ed., 1999) ("In Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty.").

75. I borrow this term from Deirdre N. McCloskey, The Bourgeois Virtues: Ethics for an Age of Commerce (2006). McCloskey identifies the bourgeois virtues as courage, justice, temperance, prudence, faith, hope, and love, but I believe that this list subsumes the virtues I list here, and any differences between our lists are not relevant to the argument I am making.


78. Id. at 1369.
Among democratic peoples where there is no hereditary wealth, every man works for his living, or has worked, or comes from parents who have worked. Everything therefore prompts the assumption that to work is the necessary, natural, and honest condition of all men.

Not only is no dishonor associated with work, but among such peoples it is regarded as positively honorable; the prejudice is for, not against it.

Equality makes not only work itself, but work specifically to gain money, honorable.\(^{79}\)

In contrast with aristocracies, where the principle of honor forces people to disguise the profitability of their labors, citizens in a democracy see work and profit as ennobling. “As the desire for prosperity is universal, fortunes are middling and ephemeral, and everyone needs to increase his resources or create fresh ones for his children, all see quite clearly that it is profit which, if not wholly then at least partially, prompts them to work.”\(^{80}\) It is, indeed, the “habits born of equality” that “naturally lead men in the direction of trade and industry.”\(^{81}\)

These industrial, bourgeois virtues are inherently democratic; they are the driving force behind a community of productivity, respect, and mutual encouragement, and they demand much of people. But the framework in which they operate is constructed of the political mores, and when those mores are twisted to different purposes, the private virtues suffer; they become counter-productive and wither into resentment, distrust, bitterness, and fear. In a political society where mutual respect, industry, and responsible citizenship are not rewarded, or even punished, people will come to follow the incentives around them, and transform themselves into anti-social, grasping creatures, seeking advantage at the expense of others, indifferent to social costs.\(^{82}\) When institutions deny people economic opportunity to benefit political insiders, those people will be less likely to

\(^{79}\) De Tocqueville, supra note 66, at 550.

\(^{80}\) Id. at 550-51.

\(^{81}\) Id. at 551.

\(^{82}\) There is no better literary depiction of this phenomenon than the famous “bum’s speech” in Ayn Rand, Atlas Shrugged 661–72 (1957). A more recent dramatic depiction of the same phenomenon appears in the HBO series, The Wire, particularly the first season, in which the conscientious detective Jimmy McNulty is repeatedly sabotaged and treated with resentment by his fellow police officers because he makes their lives difficult. See, e.g., Susan A. Bandes, And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System, 8 Ohio St. J. Crim. L. 435, 438 (2011).
take entrepreneurial risks with new ideas, but will seek instead to protect their own "turf."

In the American regime, equality, publicness, and individual liberty are not "vague ethico-political First Principles"; they are the basic boundaries of what qualifies as a legitimate exercise of government power under a social compact that aims at specified goals. These principles set the criteria for distinguishing genuine law from arbitrary exertions of power. In a despotism, where "law" is synonymous with "the will of the ruler," there is no basis from which to condemn the ruler's actions as "unlawful," since doing so would beg the question. But in the liberal polity, abstract principles establish the framework for legitimate government actions, so these principles serve as standards by which to determine whether a government action qualifies as legitimate—i.e., lawful—or whether they are arbitrary, unauthorized government acts; acts of mere force or fraud. Just as an agent has no authority to act contrary to the scope of the principal's grant of power, so a government act that violates the principles of equality, publicness, and individual liberty, is arbitrary, irrational, and unlawful.

This is what Justice Chase meant in his famous opinion in *Calder v. Bull*, where he wrote that "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." An attempt by the government to exercise power merely because it wished to do so, rather than by reference to the underlying values of the Constitution, would betray the entire normative framework from which the legislature draws its legitimacy—in just the same way that a bank robber, who chooses to rob the bank where he works, is acting against the principles underlying his authority and cannot therefore be said to be acting within the scope of his employment. Thus while the government may "enjoin, permit, forbid, and punish" and "command what is right and prohibit what is wrong," it may not use power merely to impose burdens on unpopular groups, obtain private benefits for rulers or cronies, or act arbitrarily just

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85. 3 U.S. (3 Dall.) 386 (1798).
86. Id. at 388 (opinion of Chase, J.).
because it feels like it.\textsuperscript{88} For legislation to be legitimate—to qualify as genuine law—in the American constitutional order, it must fall within the delegation of authority to the legislature, a delegation that is conditioned on certain principles, including equality, publicness, and individual liberty. In short, the American Constitution erects a wall around political actors—that wall is the law, and it protects individuals from the arbitrary violence of government officials in the same way that it protects citizens from each other.

These may seem like abstractions, but the reason that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one"\textsuperscript{89} is that these principles have real effect in the everyday workings of constitutional democracy. As the Supreme Court explained in cases like \textit{Loan Association v. Topeka},\textsuperscript{90} \textit{Hurtado v. California},\textsuperscript{91} and \textit{Lawrence v. Texas},\textsuperscript{92} the distinction between lawful government activity and arbitrary, unjustified assertions of power, is not merely a formalistic or ritualistic one; that distinction relies on the substantive values inherent in the constitutional order. Thus where a politically influential group uses government power for its own self-interest, in a way that burdens or dispossesses a politically disfavored group, or simply as an act of will, that power is an arbitrary act, and not genuine law: "Arbitrary power . . . is not law, whether manifested as the decree of [a] personal monarch or of an impersonal multitude." Thus "partial and arbitrary exertions of power under the forms of legislation" are not genuinely lawful; they "transcend[ the limits of lawful authority, even when acting in the name and wielding the force of the government."\textsuperscript{93}

\textbf{B. CON Restrictions and the Values of American Society}

How do these broad principles apply to something as mundane as a certificate of necessity requirement? There is probably nothing so easily identified with the American Dream as the freedom to try one's hand at a trade and earn a living for oneself. Yet CON laws and licensing requirements frequently restrict the economic opportunity of people who lack political influence, doing violence to the American Dream and to the principles of

\begin{thebibliography}{99}
\bibitem{88} \textit{Calder}, 3 U.S. (3 Dall.) at 388.
\bibitem{89} \textit{de Tocqueville}, supra note 66, at 270.
\bibitem{90} 87 U.S. (20 Wall.) 655 (1874).
\bibitem{91} 110 U.S. 516 (1884).
\bibitem{92} 539 U.S. 558 (2003).
\bibitem{93} \textit{Hurtado}, 110 U.S. at 536.
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equality, publicness, and individual liberty that are central to our society.

Consider, for example, the florist licensing law at issue in *Meadows v. Odom.* That law, first enacted in 1939, required any person wanting to practice the trade of floristry to first obtain a government license; to get a license, an applicant was required to pass a one-hour written examination and a four-hour practice exam. There was a $150 examination fee, and the exam was administered quarterly in Baton Rouge—meaning that applicants from other cities would also have to pay travel and lodging expenses. Worse, test takers were graded on such subjective factors as the “scale,” “harmony,” “accent,” and “unity” of their floral designs.

Sandy Meadows, a widow from Monroe, Louisiana, moved to Baton Rouge in 2000, where she found a job in the floral department at an Albertson’s supermarket. She was a high-school dropout with no training or degree. Indeed, she had taken the floral exam three times without success. But she had nine years experience working with flowers, and her floral arrangements were good enough that she was put in charge of the floral department—that is, until the state Horticulture Commission discovered she was arranging flowers without their permission. They issued a $250 citation against her, and notified Albertson’s that she could work only as a “floral clerk”—meaning that the store would also have to hire a full-time, licensed florist to “oversee” her work. Employing two workers to run the floral department was not economically feasible, and Meadows lost her job. She filed a civil rights lawsuit, arguing that the licensing law unreasonably deprived her of the right to earn a living at a lawful occupation. In defense, the government did remarkably little to conceal the protectionist nature of the law. Bob Odom, the state’s Commissioner of Agriculture and Chairman of the Louisiana Horticulture Commission, testified that he had “committed to the florists when [he] ran [for office] in 1980 that [he] would support their desires of either having or get[ting] rid of the [flo-

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97. See *Meadows,* 360 F. Supp. 2d at 823.
rist licensing] law—98—that is, that he would retain the law not to protect the public, but to advance the interests of established florists seeking to retain their cartel. Moreover, Louisiana was the only state to require professional licensing of florists. A 1939 Michigan case did invalidate a Detroit licensing requirement for selling flowers—a requirement the court found was “not [written] to protect the citizens of Detroit in their public health, safety, morals or general welfare, but . . . for the financial benefit of a few”—but it appears that no state had ever imposed such a burdensome educational and testing requirement on the simple trade of arranging flowers.

Nevertheless, the district court upheld the law, on the flimsiest of pretexts: florists often use wires and plastic sticks to hold floral arrangements together, so the licensing restriction served the public health and safety by ensuring that consumers would not scratch their fingers on the wires.100

The case was appealed, but in the meantime, Sandy Meadows, who suffered severe health problems, was left unemployed and unable to pay her utility bills. Her attorney, Clark Neily, recalled:

The last time I saw Sandy, she was lying on a couch in about 100 degree temperature in Baton Rouge, about 98 percent humidity, outside of her apartment in a common area with no air conditioning. . . . She had just had gall bladder surgery, so she was literally stapled with surgical staples . . . lying on a couch in 100 degree weather, barely able to breathe. I checked her into a Motel 6 so she could have some air conditioning. I went to the Piggly Wiggly grocery store and paid her utility bill so it could get turned back on. I went and took care of my business with the state, in the course of working on the case, and a few days later Sandy died. And that’s the last time I ever saw her. Sandy died because the state of Louisiana [took away] her economic liberty and put it in the hands of a bunch of special interest[s]. The Louisiana state florist association’s straight-up cartel had gotten that law passed that said that a woman like Sandy Meadows can’t make a living doing the

100. Meadows, 360 F. Supp. 2d at 823-24 (holding the law was “rationally related to the state’s desire that floral arrangements will be assembled properly in a manner least likely to cause injury to a consumer and will be prepared in a proper, cost efficient manner.”).
one thing she knows how to do . . . . And I hold them at fault, in part, for her death.  

This is only one particularly dramatic example of the deleterious effects that barriers to economic liberty can have on some of America's most vulnerable people: the uneducated poor, who lack the wherewithal to obtain training and undergo the expensive and time-consuming process of licensing. It is impossible to assess the economic costs that these restrictions impose, since they are what economists call "unseen": they take the form of the countless businesses that nobody ever starts, the productivity that is never begun, the wealth that is never created. But it is also impossible to assess the terrible damage that such restrictions inflict on a society that claims to be governed by principles of equality, publicness, and individual liberty. It is difficult for someone standing at the bottom of the economic ladder to believe she can climb it—or that our nation's professed values of opportunity and openness mean anything—when even such a trade as floristry is governed by licensing restrictions that politically entrenched interests use to prevent fair competition.

The law challenged in _Meadows_ was not a CON law, but if anything, CON laws impose even more severe strains on these values. While the florist licensing requirement at least purported to protect the public, CON restrictions exist for the explicit purpose of preventing competition and keeping the prices of existing businesses high. Like occupational licensing, these laws bar entrepreneurial opportunity, stifle the creativity and industry of those who might otherwise be productive innovators in our society, and lead to bitterness and resentment against the hypocrisy of a nation that claims to care about economic opportunity, social mobility, and the "natural aristocracy" of "virtue and talents," and which rewards merit instead of political influence.

Consider the situation of Adam Sweet, the entry-level laborer in Portland, Oregon, with little business experience, who wanted to open a moving company. Under state law, he was first required to obtain permission from ODOT. After he filed his

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application, however, ODOT was required to notify existing moving companies and give them the opportunity to object. 105 The statute only allowed existing moving companies to object—not members of the general public—and when an objection was filed, ODOT would convene a hearing at which Sweet would have to prove that a new moving company would serve the "public convenience and necessity." 106 Because no law or regulation defined these terms, ODOT relied instead on a 20-year-old order from a different agency, the Public Utilities Commission, which did not define these terms either, but which provided broad descriptions of factors the Commission had considered in the past. 107 It included such helpful phrasing as:

The three elements [for "address[ing] the issue of public convenience and necessity"] include:
1. Whether the proposed service would be responsive to a public need for transportation.
2. Whether the proposed service could better serve that need than the service provided by existing carriers.
3. If there are affirmative findings on the first two factors, whether a diversion of traffic from protesting carriers will occur which impairs the transportation services provided to the public. 108

What constituted "need" or "better serv[ice]" was unclear, and what sort of "diversion of traffic" was unacceptable was left to bureaucrats to determine. But the order did note that an applicant might demonstrate a public need by providing "testimony of shipper witnesses"—that is, of potential future customers—"who, after making reasonable and good faith efforts to hire motor carriers, have been unable to obtain consistent and adequate transportation service." 109 In other words, an applicant would have to enlist potential future customers—not actual customers—to attend a meeting of a public commission, which meets during the working day, and to testify that he or she had tried to hire an existing moving company and was unable to obtain consistent and adequate service—not just once, but repeatedly, and after "good faith" efforts (whatever that might mean). Just to clarify, the guidelines reiterated that even if such a person could be found willing to take time to testify on behalf of

108. Id. at 8.
109. Id.
an applicant who is not even yet running a moving business, that person's mere preference was not sufficient: “A shipper’s preference for the applicant over others who are available to provide service does not establish public need . . . .”

Worse, these guidelines incorporated explicitly protectionist elements. Aside from the rule against “diversion of traffic” from existing firms, the order observed that “the Commission typically does not give great weight to shipper support based on lower freight rates”—suggesting that the applicant’s ability to charge lower prices should not be a factor in granting him or her permission to compete. And the guidelines assured that “[t]he Commission will continue to determine whether adding another motor carrier will adversely affect protesting carriers . . . . The anticipated advantage from the new service will be weighed against actual or potential disadvantages which may impair the viability of the transportation system”—that is, draw business away from existing moving companies.

Aside from the vagueness of these protectionist criteria, the statute fostered a cartel structure by giving existing companies the exclusive power to object to new licenses. If the CON requirement existed to protect the public welfare, one would at least expect that members of the public would also be entitled to object to the issuing of a new license; yet ODOT was not required to notify the general public of a license application, or give members of the public any chance to object. Defenders of CON requirements have contended that enlisting existing firms in this way helps to ensure the public safety because existing firms are in a good position to ensure that applicants are qualified. But their conflict of interest in doing so is too obvious for this argu-

110. Id. (emphasis added).
111. Id. at 9 (emphasis added).
112. Id. at 11 (emphasis added).
113. The vagueness of these criteria is a separate ground for the unconstitutionality of CON laws. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court invalidated a licensing law that, through the use of vaguely worded criteria, vested officials with essentially unbridled discretion to prevent the opening of new businesses. Sadly, the Court has been reluctant to address the application of the vagueness principle within the realm of business regulation. See Harvey A. Silverglate & Monica R. Shah, The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute, 2009–10 CATO SUP. CT. REV 201 (2010).
115. See, e.g. Motion to Dismiss at 6, Munie v. Skouby, No. 4:10-CV-01096-DDN, (E.D. Mo. Sept. 23, 2010) (“Defendants assert there is no better method of insuring the consumer is able to select a ‘reputable household goods mover’ than by allowing established movers, the competition, to comment upon an applicant’s fitness and ability to perform the service.”).
ment to carry any weight. Nor does it explain why members of the general public are generally not permitted to invoke the hearing procedure. Another common argument in support of CON requirements for movers is that they allow the state to limit the use of roads and preserve them from deterioration. But such a goal is not served in any way by requiring the licensing agency to preserve the financial well-being of incumbent firms or to consider other blatantly protectionist factors, when deciding whether to grant a license. What the Supreme Court observed in a 1925 case invalidating a protectionist CON restriction applied equally to the Oregon statute:

Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner.

Rules like the Oregon CON requirement make it expensive and difficult for an unknown entrepreneur obtaining a certificate of public convenience and necessity. Imagine some penniless Ben Franklin, arriving unknown in Philadelphia, being forced to obtain a CON before he can open a new printing business. Existing printers are empowered to bar him from publishing Poor Richard until he obtains permission to compete from a group of government bureaucrats. To get permission he must persuade a potential, future customer to take a day off of work and testify at a hearing to prove that the state of Pennsylvania needs a new print shop. The witness must prove that he repeatedly made good faith efforts to obtain printing services and consistently failed; the fact that the customer is simply happier with the services this brash young Mr. Franklin would provide is not enough, and the rules require the government to give preference to Franklin’s established rivals. It is hard enough to believe that this unknown printer would get his chance—but it is nearly impossible to picture a working-class resident of the inner city, an immigrant, a member of a minority group, or a high-school drop-

116. See Tumey v. Ohio, 273 U.S. 510, 532 (1927) (“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.”).


out like Sandy Meadows, having any realistic chance to obtain permission to compete under such rules. Portland college student Adam Sweet was fortunate that when he challenged the Oregon mover law in a federal lawsuit, the state repealed it and replaced the restriction with a simpler, more even-handed requirement that applicants have certain basic levels of insurance and a safety record.\textsuperscript{119} Many would-be entrepreneurs in other states are not so lucky.

CON requirements violate the principle of equality because they give a privilege to politically favored insiders at the expense of their would-be competitors—not on the basis of merit, but on the basis of influence—and create classes of insiders and outsiders. They violate publicness because they exploit government power for private benefit without advancing the public health, safety, and welfare; as Sir Edward Coke once said of licensing laws, such laws \textit{pretend} public benefit, but \textit{intend} private.\textsuperscript{120} And they violate individual liberty by depriving entrepreneurs—America's would-be wealth-creators—of the liberty to use their skills to pursue happiness in a way that harms nobody else.

Taken to the extreme, these restrictions systematically bar the path of economic opportunity and entrench long-standing patterns of wealth and poverty, and the perception, if not the reality, of a caste system. On one hand, those who continue to run their businesses are often driven into the underground marketplace, operating illegally without a license.\textsuperscript{121} On the other hand, such restrictions also break down individual values: the idea of starting a job and working one's own way up becomes something that one reads about but never sees happen.\textsuperscript{122} Social mobility becomes something unimaginable to people who see themselves and their neighbors denied even the means to start what most would see as the most mundane of jobs. The society that prided itself on freedom of opportunity and promised that a person can rise on the basis of hard work becomes an artificial aristocracy of political power and incumbency, where economic success depends on personal connections and networks of influence. In turn, the culture of industry and social mobility

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\bibitem{121} \textit{See Bernstein, supra note 15, at 98.}

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degenerates, and becomes divided into a class of those for whom economic opportunity is a reality and another class, increasingly isolated, who lack those connections, and for whom a path out of poverty is just something that happens to other people—a class suffering from what sociologists call “learned helplessness,” the acquired passivity of one who sees no point to trying to improve one's situation. Obviously there are many different overlapping causes of poverty. But a society that increasingly distributes economic opportunity toward entrenched interests that already have political influence is going to become increasingly stratified and increasingly resistant to change. This, in turn, helps foster a sense of resentment and hopelessness that can lead to social disruption and violence. This is what Justice Field meant when he said that the right to earn a living free of government favoritism is so important that if it were not “adhered to,” the United States would be “a republic only in name.”

III. CON RESTRICTIONS AND THE CONSTITUTION

A. Serving Private Interests

As the Supreme Court recognized in Dent, licensing laws have a dangerous potential for abuse: they can arbitrarily restrict economic opportunity, excluding politically unpopular groups

123. See, e.g., Michael Argyle, The Psychology of Social Class 182-84 (1994) (peer groups have a powerful effect on the employment and educational choices of working-class teens).


from the market for unjustifiable reasons—such as the “excessive competition” theory—or for corrupt reasons. Dent made clear that courts could help prevent such abuses by applying realistic scrutiny to licensing standards—to ensure that they are appropriate to the trade, attainable by reasonable study, and not discriminatory—and courts took relatively good care to protect economic liberty against arbitrary licensing restrictions at first. But the advent of “rational basis scrutiny” in the 1934 case of Nebbia v. New York has encouraged courts to look the other direction and allow legislatures to arbitrarily restrict entry into trades and professions.

Early on, state and federal courts often regarded licensing laws with skepticism. For example, in a case decided the same year as Dent, the Michigan Supreme Court struck down a Detroit ordinance that gave a city commission power to prohibit street peddlers. This restriction, the court noted, “was simply an exercise of arbitrary and unauthorized class legislation for the benefit of a few shop-keepers, and an unjust discrimination against those who desired to sell from carts or wagons about the village.” The city could certainly regulate the sale of food in order to protect the general public, but this restriction was not a public health regulation, because it “does not prohibit the sale of fresh meats in the streets . . . and has no reference whatever to the character or condition of the meat sold.” The court observed that barriers to entry into the market were often disguised as protections for public health, but held that courts should meaningfully scrutinize such regulations to ensure that they were not merely attempts to protect established firms against fair competition:

128. See also Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting). The Court warned that [a] potential conflict arises . . . whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who may engage in a particular trade. In fact private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.

131. Contrary to the popular myth, however, courts during this period upheld economic legislation more often than not. See generally David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right 84-88 (2011).
133. Id.
It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts . . . .

Even the restrictions struck down in these cases, however, bore a more plausible connection to legitimate police powers than do CON laws, because the government at least contended that the restriction at issue was intended to prevent unqualified or fraudulent practitioners from entering a trade. CON restrictions, by contrast, do not purport to advance a public safety or efficacy goal, or to ensure that practitioners are educated or trained. Instead, these restrictions were designed for the sole purpose of restricting competition regardless of quality or skill. Such restrictions simply divide the market among a limited number of practitioners, rather than imposing any tests or proof of proficiency.

B. **CON Laws in the Supreme Court: New State Ice**

Of the few Supreme Court decisions involving CON laws, the most famous is *New State Ice Co. v. Liebmann*, which involved an Oklahoma law that restricted entry into the ice manufacturing and delivery business. Unlike the laws at issue in *Dent* and other cases, the Oklahoma Ice Act did not regulate the knowledge or skills of practitioners of the trade; instead, it barred entry into the trade unless the newcomer demonstrated to a government commission that there was a “public need” for a new ice delivery
business. The commission was bound to refuse a license if existing firms were "sufficient to meet the public needs."

Ernest A. Liebmann had been making and delivering ice for three decades in Texas and Oklahoma before the Ice Act was passed. But when he began constructing a new ice plant without first obtaining a license, two existing companies sought an injunction to stop him. Federal district Judge John C. Pollock refused the injunction. He had "no hesitation whatever in stating the true reason for the bringing of these suits is that plaintiffs may further their practical monopoly of the ice business." The existing firms were trying to veto the newcomer "because they did not invite and do not welcome . . . competition . . . whether [it] be beneficial to purchasers of ice . . . or not." Making and selling ice was a useful and honorable private business and calling in which any citizen so disposed has the undoubted right under our Constitution and laws to engage . . . [and] a project one would believe any such young, industrious, wide-awake growing city as Oklahoma City would welcome with outstretched arms and glad hearts.

While the state could regulate businesses to protect the public—and could regulate natural monopolies, even through the use of CON restrictions—it had no legitimate power simply to declare by fiat that a normal, competitive industry like ice distribution was a monopoly to be regulated by a CON restriction. The court of appeals unanimously affirmed, in a surprisingly thorough decision that even included statistics demonstrating that the law had increased the cost of ice in Oklahoma. This was not meant to demonstrate the economic folly of the law, but to show that it was not an attempt to regulate the price of a monopoly service that would otherwise be unaffordable; rather, it was imposing an "unreasonable and unnecessary" restriction

136. In The Right to Earn a Living, supra note 6, at 142–44, I erroneously stated that the ice commission was staffed by employees of existing firms. In fact, the commission was staffed by government officials. The law allowed existing firms to seek injunctions against unlicensed newcomers.
137. See Case Comment, Supreme Court Denies Right of State to Limit Competition, 34 Monthly Labor Rev. 1073, 1073 (1932).
139. New State Ice Co. v. Liebmann, 42 F.2d 913, 914 (W.D. Okla. 1930).
140. Id. at 918.
141. Id. at 917.
142. Sw. Util. Ice Co. v. Liebmann, 52 F.2d 349 (10th Cir. 1931).
143. Id. at 355.
on a private business by treating it as if it were a monopoly.\textsuperscript{144} Since the business was "not a privilege in the nature of a franchise, such as the right to maintain a public wharf, or to operate a railroad or a street railway," but was instead "a matter of common right open to all," there was no sense in imposing a CON restriction on it.\textsuperscript{145}

The Supreme Court agreed. "[A]ll businesses are subject to some measure of public regulation," the justices agreed, and the government could restrict competition with public utilities and could regulate natural monopolies.\textsuperscript{146} But the ice business was neither a utility nor a monopoly: it was "an ordinary business . . . as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor . . . "\textsuperscript{147} The state could not simply transform a normal, competitive market into a public utility by ipse dixit, and use CON restrictions to bar entrepreneurs from entering that market. Doing so violated individual liberty without any meaningful connection to protecting the general public; on the contrary, it harmed consumers by eliminating competition that would otherwise improve quality and drive down prices. The law's "practical tendency" was

to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.

\ldots

\ldots The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.\textsuperscript{148}

But while these economic consequences were significant, they were not the reason the Court held the law unconstitutional. On the contrary—and despite the later caricatures of the pre-New Deal Court as imposing the justices' idiosyncratic economic opinions\textsuperscript{149}—the \textit{Liebmann} decision rested on a legal proposi-

\textsuperscript{144} \textit{Id.} at 353.
\textsuperscript{145} \textit{Id.} (citations omitted).
\textsuperscript{147} \textit{Id.} at 277.
\textsuperscript{148} \textit{Id.} at 278–79.
\textsuperscript{149} This common canard figured prominently in Justice Holmes' dissent in \textit{Lochner v. New York}, 198 U.S. 45, 75 (1905) ("This case is decided upon an economic theory which a large part of the country does not entertain."), and was prominent at the time that \textit{Liebmann} was decided. See, e.g., Pendleton Howard, \textit{The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930–1931}, 80 U. Pa. L. Rev. 483, 485 (1932). In fact, neither the \textit{Lochner} nor \textit{Liebmann} majorities rested their opinions on economic theory. See generally Hadley Arkes, \textit{The Return of George Sutherland} 51–82 (1994).
tion, and ultimately a political principle: individuals have the right to exercise their economic freedom unless and until there is a good reason for limiting it—and establishing a private oligopoly protected by the state from fair economic competition is not a good reason, because it violates the principles of equality, publicness and individual liberty.\textsuperscript{151}

Justice Brandeis, an outspoken advocate of the theory of "excessive competition," wrote a dissenting opinion that has become more famous over the years than the majority opinion.\textsuperscript{152} In his view, states should be free to operate as "laboratories" to experiment with different legislative schemes. To impose uniformity on the nation restricted the potential of the federalist structure to find the most effective regulatory mechanisms. While this notion has captured virtually all of the attention in

\begin{quotation}
\textsuperscript{150} Justice Sutherland, who wrote \textit{Liebmann}, made this point more clearly in \textit{Adkins v. Children's Hosp.}, 261 U.S. 525, 546 (1923): "freedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." This is nothing more than a restatement of the staple constitutional principle of the "presumption of liberty." \textit{See supra} notes 64–65 and accompanying text. Nevertheless, progressive critics pounced on it. According to Professor Thomas Reed Powell, "[n]o such doctrine is stated in the Constitution . . . Whence, then, comes the rule that Mr. Justice Sutherland reveals? Needless to say, it comes from Mr. Justice Sutherland. It represents his personal views of desirable governmental policy." Thomas R. Powell, \textit{The Judiciality of Minimum-Wage Legislation}, 37 \textit{Harv. L. Rev.} 545, 555 (1924). In fact, as we have seen, the presumption of liberty was a staple of the American constitutional scheme since its founding, and was a basic premise in the thought of Locke, Sidney, Jefferson, Madison, and others, as well as being implicit in the language of the Constitution itself. \textit{See} Timothy Sandefur, \textit{Freedom and the Burden of Proof}, 10 \textit{Indep. Rev.} 139, 146 (2005).

\textsuperscript{151} \textit{Liebmann}, 285 U.S. at 278–79.

Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistently with the Fourteenth Amendment . . . . [I]t is beyond the power of a state, "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice . . . . There is no question now before us of any regulation . . . . to protect the consuming public . . . . It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary.

\textit{Id.} (quoting Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924)).

\textsuperscript{152} \textit{Liebmann}, 285 U.S. at 280 (Brandeis, J., dissenting). Justice (later Chief Justice) Harlan Stone joined this dissent.
subsequent years,"158 hardly anyone seems to remember Justice

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Sutherland’s devastating response—states may not “experiment” in ways that violate constitutional rights:

It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. 154

Sutherland noted that “[t]his principle has been applied by this court in many cases,” and followed this statement with a list of cases, all written or joined by Justice Brandeis, in which the Court had invalidated state laws restricting constitutionally protected liberty. 155 Most notably, Sutherland pointed out that in Near v. Minnesota, 156 written by Justice Brandeis only a year earlier, the Court had not allowed “the theory of experimentation in censorship” to “interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one’s labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.” 157 Brandeis did not respond to this point in his dissent.

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155. See id. In addition to Near v. Minnesota, 283 U.S. 697 (1931), Justice Brandeis wrote Dorchy v. Kansas, 264 U.S. 286 (1924), which invalidated a state law that prohibited labor strikes. He joined the decisions in Chas. Wolff Packing Co. v. Ct. of Indus. Relations, 262 U.S. 522 (1923) (invalidating a Kansas law that fixed wages and other prices), Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (striking down state laws prohibiting private schools), Nixon v. Herndon, 273 U.S. 536 (1927) (striking down a Texas state law prohibiting blacks from voting), Tumey v. Ohio, 273 U.S. 510 (1927) (invalidating a state law under which judges were given a direct financial interest in convicting defendants brought before them), Manley v. Georgia, 279 U.S. 1 (1929) (invalidating a Georgia law under which presidents of banks that went insolvent were presumed guilty of fraud), Washington v. Roberge, 278 U.S. 116 (1928) (striking down an Oregon zoning law which allowed neighbors to veto a property owner’s use of land), Chicago, St. P., M. & O. Ry. Co. v. Holmberg, 282 U.S. 162 (1930) (striking down a state law allowing a commission to force railroads to create special crossings even without evidence that existing tracks were dangerous), and Stromberg v. California, 283 U.S. 359 (1931) (striking down a California law that prohibited the display of communist flags).
156. 283 U.S. 697 (1931).
C. The Rise of Rational Basis Scrutiny

Liebmann has never been overruled, but the legal framework drastically shifted two years later in *Nebbia v. New York*, when the Court replaced the long-standing “affected with a public interest” test with the theory of “rational basis scrutiny.” Under this theory, states would be “free to adopt whatever economic policy may reasonably be deemed to promote public welfare.” This rule did not require that the legislation actually be reasonable in economic terms, but only that the legislation in question be “seen to have a reasonable relation to a proper legislative purpose.” As later decisions have elaborated, this type of scrutiny is satisfied even if there are no facts to substantiate the purported rationality; so long as a government official could have believed the law would accomplish some legitimate objective, that law survives rational basis scrutiny. Indeed, in *FCC v. Beach Communications*, the Court pronounced the rational basis test in the strongest terms imaginable, holding that the test presumes a law constitutional unless a plaintiff “negative[s] every conceivable basis which might support it,” and that it is “entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . [T]he absence of legislative facts explaining the distinction on the record has no significance . . . .”

Taken to its logical conclusion, this would mean the elimination of all judicial review. But the Court has never actually

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159. The “affected with a public interest” test was adopted in *Munn v. Illinois*, 94 U.S. 113, 126 (1876). Justice Field dissented in *Munn*, pointing out that this test was originally devised to cover natural monopolies, and that the grain elevators at issue in that case were not natural monopolies. See id. at 139–40 (Field, J., dissenting). Thus, as with CON restrictions themselves, we see a theory devised to address one purported economic issue being spread without justification to another type of market entirely.
161. Id.
162. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015, n.18 (1984) (“The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.”) (emphasis added).
164. Id. at 315 (citations and internal quotation marks omitted).
165. As Justice Stevens observed, “this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a ‘reasonably conceivable state of facts.’ Judicial review under the ’conceivable set of facts’ test is tantamount to no review at all.” Id. at 323 n.3 (Stevens, J., concurring).
gone that far, and the relationship of the rational basis test to economic exclusion is actually more complicated and confusing.\textsuperscript{166} In fact, in both \textit{Nebbia} and the cases that followed soon after, the Court indicated that the courts would still police some limits on legislative discretion. For example, the \textit{Nebbia} Court held that economic restrictions would be held invalid “if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty”\textsuperscript{167}—although it did not define these terms. Shortly thereafter, in the famous \textit{Carolene Products} footnote, the Court held that in some cases—including those in which “discrete and insular minorities” were singled out for legislative burdens—a higher degree of scrutiny should apply.\textsuperscript{168}

What this meant for \textit{Liebmann} is still unresolved. On one hand, the law in \textit{Liebmann} seems clearly to qualify as an example of “discriminatory” regulation, which allowed politically privileged insiders to bar fair competition by newcomers in the market. Yet Justice Brandeis, at least, viewed the Oklahoma Ice Act as a rational attempt to deal with what he perceived as the danger of “excessive competition,” and if the rational basis test indeed requires only a potential belief on the part of a lawmaker that a statute could remedy some perceived economic problem, the statute in \textit{Liebmann} should survive such scrutiny. In short, the two precedents, \textit{Nebbia} and \textit{Liebmann}, left open—and to this day still leave open—the question of whether the state may adopt protectionist measures for the purpose of propping up businesses against the pressures imposed on them by free competition. Is the type of protectionism embodied in CON laws a legitimate state interest?

Although no decision directly answered this question in the decades after \textit{Nebbia}, the Supreme Court did indicate that the rational basis test would not allow states to use licensing laws for the sole purpose of preventing disfavored groups or political outsiders from entering a trade. Most notably, in the 1957 case of \textit{Schware v. Board of Bar Examiners},\textsuperscript{169} the Justices confronted a licensing restriction it considered unjustifiable, when the state of New Mexico prohibited any person from taking the bar examination if that person was a member of the Communist Party. The state argued that its licensing powers included the authority to

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\item \textsuperscript{166} See also Timothy Sandefur, \textit{Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries}, \textit{14 WM. & MARY BILL RTS. J.} 1023 (2006).
\item \textsuperscript{167} \textit{Nebbia v. New York}, 291 U.S. 502, 539 (1934).
\item \textsuperscript{168} \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 153 n.4 (1938).
\item \textsuperscript{169} 353 U.S. 232 (1957).
\end{itemize}
police the moral character of attorneys, a position the Court accepted, but it held that there was no basis for finding that Schware had bad moral character. Instead, the state was trying to use the licensing restriction to exclude a politically unpopular minority from the profession of law, which was not a legitimate use of the licensing power. The Court made clear that while a state “can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”

Thus even using the rational basis test, Schware reaffirmed the rule in Dent that licensing laws must be appropriate to the profession and attainable by reasonable study and application, rather than being used to prevent unpopular individuals or groups from entering a trade or profession. Indeed, the Ninth Circuit has concluded that Schware requires something more than anything-goes rational basis scrutiny; a licensing requirement “must be rationally related, not merely to a legitimate state interest, but more specifically to ‘the applicant’s fitness or capacity to practice’ the profession itself.”

Only a month after deciding Schware, the Court decided Morey v. Doud, invalidating an economic regulation that discriminated in favor of a single business. That case involved an Illinois law that imposed various restrictions on the sale of money orders, but exempted the American Express company. The state’s contention that American Express’ reputation as an old and well-respected firm justified this exception was not enough to satisfy the rational basis test because the exemption would remain in place even if American Express were to abandon “its present characteristics” by engaging in abusive or wrongful activity. Meanwhile, newcomers were still forced to comply “even though their characteristics are, or become, substantially identical with those [of] the American Express Company.” In other words, there was no meaningful connection between the purpose of the law (protecting consumers) and the exception carved out for one established firm.

170. Id. at 239.
171. Id. at 244, 246.
172. Id. at 239.
173. Dittman v. California, 191 F.3d 1020, 1030 (9th Cir. 1999) (quoting Schware, 353 U.S. at 239).
175. Id. at 467.
More significantly, the Illinois law created a CON requirement for money order sales establishments, and because American Express was exempted from this law, any new company hoping to compete with American Express was likely to be denied a CON and be barred from the market "because the unregulated American Express Company had already established outlets in the community."\textsuperscript{176} Considering all these factors, the Court found that the Illinois law gave a privilege to American Express that was not warranted by any reasonable connection to public health, safety and welfare, and was therefore unconstitutionally discriminatory. While the rational basis test allows legislatures wide discretion to treat different businesses differently, such "distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.'"\textsuperscript{177}

Yet the Supreme Court showed little concern with such discrimination in \textit{City of New Orleans v. Dukes,}\textsuperscript{178} when it overruled \textit{Doud} and upheld an ordinance that barred the sale of food from vending carts in the French Quarter of New Orleans, but grandfathered in existing sellers. The court of appeals had invalidated the ordinance as a protectionist measure that unreasonably favored a single established firm. In some cases, grandfathering existing businesses "may have a legitimate government rationale,"\textsuperscript{179} but that was not the case here because the grandfather provision bore no relationship to the ordinance's purpose. There was simply no suggestion that eight years' experience in the pushcart hot dog business . . . is necessary or helpful to better hot dog salesmanship, or that it instills in the licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the Quarter's tradition that would move them to refine their methods of operation.\textsuperscript{180}

Nor did the ordinance require grandfathered sellers to maintain the current appearance of their vending stands or stay in the same location.\textsuperscript{181} Worse, since only a single vendor operator—Lucky Dogs, Inc.—qualified for the grandfather exception, the ordinance was simply singling out a single vendor for special

\textsuperscript{176} Id. at 468.
\textsuperscript{177} Id. at 466 (quoting Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 463 (1937)).
\textsuperscript{178} 427 U.S. 297 (1976) (per curiam).
\textsuperscript{179} Dukes v. City of New Orleans, 501 F.2d 706, 711 (5th Cir. 1974).
\textsuperscript{180} Id. at 712.
\textsuperscript{181} Id. at 712 n.6.
It "imposed economic and organizational burdens" on newcomers into the market, thereby creating a "monopoly for the favored class member."\textsuperscript{183}

None of this mattered for the Supreme Court, which unanimously reversed. In a peculiarly extreme decision, it classified the New Orleans ordinance as "solely an economic regulation"\textsuperscript{184}—as if that removed the ordinance from serious constitutional concern—and followed up with a series of irrelevant or wholly speculative justifications. For example, the city might have "ma[de] the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of a historic area," and might have sought to curtail them\textsuperscript{185}—a point which was not in dispute. Rather, the question was whether the city could enforce aesthetics laws that barred newcomers while having grandfathered in a single existing business without imposing any aesthetic regulations on it. To answer this, the Court indulged in pure fantasy, imagining that the city might have taken this as a first step toward a gradual elimination of all street vendors,\textsuperscript{186} or that the grandfather provision was intended to compensate Lucky Dogs for its sunk costs in hot dog vending\textsuperscript{187}—a proposition that not only lacked any support in the record, but which was irrelevant, since newcomers in a market are more in need of such compensation than a longstanding vendor that has already recouped its original investment. Yet the Court was not satisfied to "conjure[ ] up . . . the flimsiest reasons"\textsuperscript{188} in support of the ordinance; it also adopted these fictions while consciously ignoring the actual facts in the record, never even addressing the issues raised by the court of appeals opinion. As one article noted shortly after the case was decided, \textit{Dukes} is "the kind of case that gives economic regulation a bad name."\textsuperscript{189} Indeed, it is the most extreme kind of formalism—essentially abandoning any realistic evaluation of the facts when-

\textsuperscript{182} \textit{Id.} at 712 & n.7.
\textsuperscript{183} \textit{Id.} at 712-13.
\textsuperscript{184} City of New Orleans \textit{v.} Dukes, 427 U.S. 297, 303 (1976) (per curiam); \textit{see also id.} at 306 (describing the ordinance as "exclusively [an] economic regulation").
\textsuperscript{185} \textit{Id.} at 304.
\textsuperscript{186} \textit{Id.} at 305.
\textsuperscript{187} \textit{Id.}
\textsuperscript{189} Clifford L. Weaver \& Christopher J. Duerksen, \textit{Central Business District Planning and the Control of Outlying Shopping Centers}, 14 URB. L. ANN. 57, 68 (1977).
ever the government puts its legislation in the form of “solely an economic regulation.”

And yet Dukes did not overrule or discuss Schware, and it was followed by a series of cases that invalidated economic regulations discriminating against outsiders and in favor of insiders for no legitimate purpose, or that invalidated other laws under the rational basis test because they discriminated for no valid public reason. In Metropolitan Life Insurance v. Ward, for example, the Court struck down a state law discriminating against insurance companies from out of state—not under the commerce clause, which has long contained an anti-protectionism doctrine—but under the Fourteenth Amendment, because the state’s aim to promote domestic industry [was] purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there . . . . [This] constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.

Thus the Supreme Court has never fully explained whether economic regulations that exclude newcomers from the market in order to protect the interests of existing firms are the sort of arbitrary discrimination that even according to Nebbia fall outside the bounds of the rational basis test, or whether, following Dukes, courts should indulge in fact-free formalism to uphold such laws.

D. Protectionist Licensing Laws Today

In the past decade, lower courts have struggled with this question in a series of cases involving protectionist occupational licensing laws. In the Sixth Circuit case of Craigmiles v. Giles, the court struck down a Tennessee law that prohibited anyone

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190. See, e.g., Allen D. Boyer, Samuel Williston’s Struggle with Depression, 42 Buff. L. Rev. 1, 20 (1994) ( “Existing [formalist] rules were elevated into the category of self-evident verities . . . . [T]he law turned a blind eye to social and economic concerns—thereby setting itself, deliberately or unwittingly, against social change.”).


194. Id. at 878.

195. 312 F.3d 220 (6th Cir. 2002).
but a licensed funeral director from selling coffins. This meant that a person hoping to sell a coffin would be forced to undergo years of training, learning skills like embalming, at the expense of tens of thousands of dollars, even though that person was not officiating at funerals or dealing with bodies in any way, but wanted only to sell a box. After holding a week-long trial to determine what relationship the law might have to protection of public health, safety, and welfare, the district court found the law unconstitutional,\textsuperscript{196} and the court of appeals affirmed. The rational basis test does not allow a state to abuse its licensing laws to establish a monopoly that bears no true connection to public values: “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”\textsuperscript{197}

Shortly thereafter, however, the Tenth Circuit disagreed in a shocking and unprecedented decision.\textsuperscript{198} In Powers v. Harris,\textsuperscript{199} that court upheld a virtually identical law prohibiting the sale of funeral merchandise by anyone who did not have a funeral director’s license. The court rejected the reasoning of Craigmiles, holding that mere economic protectionism—\textit{even when a law bears no connection to public health, safety, or welfare}—was constitutional under the Fourteenth Amendment: “absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.”\textsuperscript{200} Citing to a slew of rational basis cases, the court held that the legislature’s decision to “dish[ ] out special economic benefits”\textsuperscript{201} to politically influential insiders and to bar entrepreneurs from economic opportunity was \textit{ipso facto} legitimate—even if that favor bore no connection to any public health, safety, or welfare concern. In short, it is constitutional simply because the legislature chose to do it. The Ninth Circuit exacerbated this split of authority in Merrifield v. Lockyer,\textsuperscript{202} when it took the side of the Sixth Circuit. “[T]here might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review,” it held. “However, economic protectionism for its own sake, regardless of its relation to the

\begin{footnotes}
\footnotetext[196]{Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D. Tenn. 2000).}
\footnotetext[197]{Craigmiles, 312 F.3d at 224.}
\footnotetext[198]{See also Sandefur, Economic Exclusion, supra note 166, at 1033–35.}
\footnotetext[199]{Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004), cert. denied, 544 U.S. 920 (2005).}
\footnotetext[200]{Id. at 1221.}
\footnotetext[201]{Id.}
\footnotetext[202]{547 F.3d 978 (9th Cir 2008).}
\end{footnotes}
common good, cannot be said to be in furtherance of a legitimate governmental interest.\textsuperscript{203}

As this history shows, even the cases applying the most lenient level of scrutiny to government action have almost always required that the government serve \textit{public-oriented} goals—generally referred to as the protection of public health, safety, and welfare—rather than for private interests. Almost thirty years ago, Cass Sunstein described what he called “naked preferences”: the “distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”\textsuperscript{204} Several Constitutional provisions were written to prohibit these exercises of arbitrary power, and to delegate to the government the power to use coercion only on the condition that it serves the public good. In other words, the prohibition on naked preferences is an expression of our social values of equality, publicness, and individual liberty. The Supreme Court reinforced this proposition in \textit{Romer v. Evans},\textsuperscript{205} when it declared that even under the rational basis test “we insist on knowing the relation between the classification adopted and the object to be attained” so as to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”\textsuperscript{206}

\textsc{Con} restrictions fail this test. At least when applied to competitive industries like private moving companies, they advance no legitimate government interest. They serve solely to disadvantage the group burdened by the law and grant an advantage to those who already enjoy the opportunity to practice their trade.\textsuperscript{207} They do not protect the public from dangerous, incompetent, or fraudulent practitioners, and they do not—as \textit{Dent} and \textit{Schware} require—\textsuperscript{208} regulate the market in a way that relates to a person’s fitness or capacity to practice the relevant trade. Instead, such laws bar newcomers from the market regardless of their competency or training. They foster a protectionist market whereby private entities can prevent their own competition with minimal public oversight. They do not ensure equality, but to

\textsuperscript{203} Id. at 991 n.15.
\textsuperscript{204} Sunstein, supra note 9, at 1689.
\textsuperscript{205} 517 U.S. 620 (1996).
\textsuperscript{206} Id. at 632–33.
\textsuperscript{207} In \textit{Metropolitan Life Ins. Co. v. Ward}, 470 U.S. 869, 882 (1985), the state argued that its protectionist law was not intended to burden outsiders, but only to benefit insiders, which it claimed was a legitimate government interest. The Supreme Court rightly rejected this as “a distinction without a difference.”
\textsuperscript{208} Dent v. West Virginia, 129 U.S. 114, 122 (1889); Schware v. Bd. of Bar Exam’rs, 353 U.S. 232, 293 (1957).
advance the interests of insiders at the expense of outsiders. They harm consumers, deprive entrepreneurs of the opportunity to earn a living, and violate the fundamental values of equality, publicness, and individual liberty embedded in our constitutional and social system. They are arbitrary and discriminatory and ought to be abolished.

Yet the major obstacle to serious reform is the murky twilight zone of the rational basis test, which invites courts to invent their own justifications for challenged laws, ignore actual facts in the record, shrug at violations of individual rights, and "cup [their] hands over [their] eyes and then imagine if there could be anything right with the statute."\(^{209}\) The extreme language of judicial deference used in some rational basis cases, combined with the more serious analysis applied in others, allows courts a scope of power that is said to be confusing to litigants and convenient to judges. On one hand, facts are "irrelevant" under the rational basis test, and plaintiffs like Adam Sweet, who want to defend their economic freedom, are forced to undertake the impossible task of negativing every conceivable rational basis for the challenged law.\(^{210}\) On the other hand, the rational basis test does not allow government to enact "arbitrary" or "discriminatory" restrictions,\(^{211}\) and obliges courts to meaningfully review laws to ensure that they are not used simply to exclude political outsiders and reward insiders.\(^{212}\) On one hand, states may regulate markets to grant exclusive monopolies to single businesses, with no genuine connection to the state's asserted goals, as in *Duke*\(^{213}\) or *Power*\(^{214}\)—but on the other, economic protectionism is not a legitimate government interest.\(^{215}\) In the Tenth Circuit, the legislature may exploit its police powers for the sole purpose of giving economic favors to politically favored groups without any genuinely public justification, while in the Sixth and Ninth Circuits, government may only exercise its broad latitude to regulate so long as there is some sensible connection between those regulations and the public health, safety, and welfare.

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209. Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).
214. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).
215. Merrifield v. Lockyer, 547 F.3d 978, 991 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).
This problem cannot be fixed so long as the legal community refuses to take individual economic liberty seriously.\textsuperscript{216} We would never tolerate a law that restricted the total number of Catholics or Democrats by allowing Protestants or Republicans the power to block any newcomers from joining these groups. Yet because of the persistent denigration of economic liberty by legal elites, courts refuse to extend to economic freedom the same protection they extend to religious or expressive freedoms. Thus entrepreneurs who wish to pursue happiness by opening a business to provide for themselves and their families are subjected to just this type of legal absurdity. The anything-goes attitude that some courts have used in rational basis cases—but which other rational basis cases have rejected—fosters legal formalism and ignores the way special interests exploit government power for their own private ends.\textsuperscript{217}

And that is ultimately a question of social values, not of economic theory. Just as the Liebmann Court was concerned not with economic theory, or the interactions of supply and demand, but with protecting the individual liberties at the heart of the American classical liberal constitution, so defenders of economic liberty today are not concerned with the operation of markets, but with the individual’s right to pursue happiness—a right courts ought to protect as an essential element of the Constitution’s promise of liberty.

\textbf{IV. Conclusion}

CON laws limit economic opportunity, not to protect the public against fraudulent or incompetent practitioners, but to restrict competition to a level that political authorities consider appropriate. These laws were originally devised to apply to natural monopoly or public utility markets, not to normal, competitive markets like moving companies or taxicabs. The application of such laws to these markets has serious deleterious effects in terms of economics—but they have at least equally severe consequences in terms of public mores. They do violence to the American Constitution’s fundamental principles of equality,

\textsuperscript{216} See also Phillips, supra note 13, at 447–54.
\textsuperscript{217} See also Simpson, supra note 4, at 191:
A more serious consequence of the rational basis test is its institutional effect. Extreme deference to legislatures prevents the courts from enforcing constitutional limitations and places legislatures in charge of determining the extent of their own power. This would be bad enough in any area of life, but it is particularly problematic in the realm of economic affairs given the obvious conflicts and temptations that legislatures are likely to face in this area.
publicness, and individual liberty—values that under the Constitution mark the difference between genuine law and arbitrary exercises of government power. The rational basis test that courts use to evaluate the constitutionality of economic regulations masks these problems, allowing courts to ignore their obligation to enforce these values. And the damage is not only social, but personal—it punishes our most industrious, entrepreneurial citizens precisely for those individual values we ought to reward. Sadly, until courts reappraise the rational basis test, and bring some sense to the often conflicting descriptions of that test’s parameters, hardworking Americans will continue to suffer under rules that benefit the politically influential at the expense of those who have no political power—and who can therefore only rely on the Constitution for protection.