
Civil Rights

BOTTLENECKERS: THE ORIGINS OF OCCUPATIONAL LICENSING AND WHAT CAN BE DONE ABOUT ITS EXCESSES

By Dick M. Carpenter II

Note from the Editor:

This article critically discusses economic regulation in general and occupational licensing in particular. It goes on to discuss Professor Randy Barnett's theory that the Constitution should be interpreted to protect economic liberty, then proposes one way legislatures can protect economic liberty without sacrificing the public good.

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• Mark Pulliam, *Libertarian Judicial Activism Isn't What the Courts Need*, AMERICAN GREATNESS (Jan. 3, 2017), <http://amgreatness.com/2017/01/03/libertarian-judicial-activism-isnt-courts-need/>.

• Ian Millhiser, *The Plan To Build The Yuugest, Classiest, Most Luxurious Constitution You've Ever Seen*, THINK PROGRESS (Apr. 28, 2016), <https://thinkprogress.org/the-plan-to-build-the-yuugest-classiest-most-luxurious-constitution-youve-ever-seen-f92107c90cee>.

• ELIOT FRIEDSON, PROFESSIONALISM: THE THIRD LOGIC (2001), <https://www.amazon.com/Professionalism-Third-Logic-Practice-Knowledge/dp/0226262030>.

At this moment, a campaign is being waged in America's state capitals. Its purpose? To protect the public from the menace of unregulated music therapists. A music therapist "directs and participates in instrumental and vocal music activities designed to meet patients' physical or psychological needs."¹ Whatever one thinks of this work, it is difficult to imagine what threat it could possibly pose.

Indeed, the push to license music therapists is coming not from harmed or concerned consumers, but from industry insiders. The American Music Therapy Association (AMTA) has been lobbying state legislators coast to coast, demanding licensure.² As a result, nine states now regulate music therapists, some with requirements that eclipse those required for many medical professions. Georgia, for example, requires aspiring music therapists to earn a bachelor's degree or higher from an AMTA-approved music therapy program, complete 1,200 hours of clinical training, pass the \$325 examination for board certification, pay various fees to the state, attain 18 years of age, and pass a criminal background check.³

These requirements restrict the flow of workers into the occupation and result in higher prices for consumers. Indeed, consumers in states that license music therapists could pay as much as 15 percent more for music therapy,⁴ without any evidence that the bottleneck on new practitioners will make it better or safer.

Similar stories abound in the annals of licensing, a fact that will come as no surprise to those familiar with public choice theory. However, the action by which industries seek government protection from competition is less well understood by the general public. Public choice theory, for all its merits, has not produced an accessible and suitable shorthand. There is rent-seeking, of course, but the term is obscure and its meaning difficult to intuit, making it a less than ideal tool for explaining the concept.

In this article, I discuss a new term for entities like the AMTA that lobby for anticompetitive licenses and other regulations, and for the government officials that create those licenses: bottleneckers. A bottleneck is a person or thing that "retards or halts free movement and progress."⁵ Drawn from the physical properties of the neck of a bottle, the metaphor is vivid and has proven useful for describing obstructions in contexts as disparate as road traffic and project management. It is also equally

1 *Music Therapist*, DICTIONARY OF OCCUPATIONAL TITLES, <http://www.occupationalinfo.org/07/076127014.html>.

2 *State Recognition*, CERTIFICATION BD. FOR MUSIC THERAPISTS, <http://www.cbmt.org/advocacy/state-recognition>.

3 *Examination*, CERTIFICATION BD. FOR MUSIC THERAPISTS, <http://www.cbmt.org/examination>.

4 Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676 (2010).

5 *Bottleneck*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/bottleneck>.

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well suited for describing those who seek to impede the free flow of workers into occupations and the process by which they do it. This handy and economic coinage makes it possible, in one word, to describe those who seek to co-opt government for their own ends. But limiting the monopolistic activities of bottleneckers requires an understanding of how they work. Indeed, one of the great prevailing myths about occupational licensing schemes is that they are created because of some presumed need, that legislators hear from harmed consumers or concerned citizens or perhaps take notice of some threat to public health and safety that a license could supposedly mitigate. The true genesis of licensing laws, however, is nothing like that idealized narrative, and this article will explore some of the history of such laws.

I. HOW BOTTLENECKERS ARE INVOLVED IN CREATING LICENSES

Workers have long understood the advantages to be gained by restricting the flow of entrants into their occupations. Already in 1776, Adam Smith had observed that trades conspired to reduce the availability of skilled craftspeople in order to raise wages.⁶ At the time, workers accomplished this by forming exclusive organizations—guilds—that granted them monopoly rights to their trade under the auspices of the civil authorities.⁷

Modern-day licensing schemes typically arise in similar fashion. People already at work in an occupation organize into professional associations and lobby legislators for licensure, the effect of which is shutting out competitors who have not completed the designated requirements. To support their requests, industry bottleneckers often raise the specter of hyperbolic threats to public health and safety from unregulated practice and little to no empirical evidence. To make it easy for legislators to give them what they want, bottleneckers often provide sample licensing legislation they wrote themselves. Since occupational licensing is primarily handed out at the state level, this process repeated in one state capitol after another, usually as part of a deliberate campaign. The AMTA's current push for music therapy licensing is a textbook and real-time example.

Another quintessential example of a license's birth comes from the death industry. Funeral directors began forming city and state trade associations in the late 19th century.⁸ In 1882, these coalesced into the National Funeral Directors Association (NFDA).⁹ One of the funeral directors' goals in organizing was, in the NFDA's words, to "protect themselves from excessive and therefore harmful competition from within their own ranks."¹⁰ Throughout the late 19th and early 20th centuries, the NFDA successfully lobbied legislators to pass laws licensing funeral directors and embalmers in all 50 states and the District of

Columbia. By requiring a minimum amount of schooling (often one year), an apprenticeship, and a licensing examination, these laws restricted competition among providers of funeral goods and services. These bottlenecks emboldened funeral directors to significantly inflate casket prices—by as much as 600 percent¹¹—and engage in questionable business practices like “bundling,” that is, requiring purchase of a casket as a precondition to providing services that they alone could legally offer. In 1984, the Federal Trade Commission reined in bundling, among other practices.¹² No longer able to require grieving families to buy caskets before selling them other exclusive services, funeral directors returned to their state legislatures to demand new bottlenecks to protect their surplus profits. A dozen states went on to adopt laws allowing only licensed funeral directors to sell caskets and other funeral merchandise.

After Prohibition's repeal, the liquor industry helped design the regulations that would govern it, providing yet another example of how licensing schemes come to be.¹³ As a result, most states require that much of the alcohol produced for consumers pass through a wholesale distributor before becoming available for retail purchase¹⁴—supposedly to prevent overconsumption of alcohol. While there is little evidence that this “three-tier system”—which inspired the term bottleneck—produces any such public benefit, there is plenty of evidence that it produces surplus profits for the liquor industry. Estimates put the distributor markup on alcohol as high as 30 percent,¹⁵ and analysts cited by the FTC have concluded that the liquor industry has “the most expensive distribution system of any packaged-goods industry by far, with margins more than twice those in the food business.”¹⁶ Bottlenecking, clearly, is big business. Bottleneckers will therefore go to great lengths to maintain and even grow their advantage.

II. HOW BOTTLENECKERS PROTECT AND EXPAND THEIR PRIVILEGES

Bottleneckers fight hard to protect their licensing schemes when they come under threat: coordinating letter-writing

6 ADAM SMITH, *THE WEALTH OF NATIONS* (Modern Library 1937) (1776).

7 Heather Swanson, *The Illusion of Economic Structure: Craft Guilds in Late Medieval English Towns*, PAST AND PRESENT, Nov. 1988, at 29.

8 ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *THE HISTORY OF AMERICAN FUNERAL DIRECTING* (7th ed. 2010).

9 *Id.*; Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. CONSUMER AFF. 150 (2007).

10 Rebecca A. von Cohen, *The FTC Assault on the Cost of Dying*, 27 BUS. & SOC'Y REV. 49-50 (1978).

11 *Craigmiles v. Giles*, 110 F. Supp. 2d. 658, 664 (E.D. Tenn. 2000).

12 Elizabeth Howell Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149 (2013); Kopp & Kemp, *supra* note 9; Jean Rosenblatt, *Funeral Business under Fire*, in EDITORIAL RESEARCH REPORTS 1982, at 813-28 (1982), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1982110500>; Ruth Darmstadter, *Blocking the Death Blow to Funeral Regulation*, 42 BUS. & SOC'Y REV. 32 (1983); Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC's Funeral Rule*, 7 J.L. & POL'Y 1 (1990).

13 John E. O'Neill, *Federal Activity in Alcoholic Beverage Control*, 7 L. & CONTEMP. PROBS. (1940); Pamela E. Pennock & K. Austin Kerr, *In the Shadow of Prohibition: Domestic American Alcohol Policy since 1933*, 46 BUS. HIST. 383 (2005).

14 *See, e.g.*, WASH. STATE LIQUOR CONTROL BD., BEER AND WINE THREE-TIER SYSTEM REVIEW TASK FORCE REPORT (2006), http://leg.wa.gov/JointCommittees/Archive/SCBW/Documents/6-10-2008_LCB.pdf.

15 GARRETT PECK, *THE PROHIBITION HANGOVER: ALCOHOL IN AMERICA FROM DEMON RUM TO CULT CABERNET* (2009).

16 FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 22 (2003); *see also* Alix M. Freedman & John R. Emschwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL STREET J. (Oct. 4, 1999), <https://www.wsj.com/articles/SB93899247467779565>.

campaigns, crowding legislative hearing rooms, paying personal visits to legislators, holding industry days at state capitols, giving special awards to legislators, making campaign contributions, and delivering testimony to legislative committees full of alarming anecdotes and unsubstantiated facts.

For example, in 2000, when an Oklahoma legislator proposed a bill to allow casket sales without a funeral director's license, industry bottlenecks warned legislators that the bill would mean dead bodies would have to be propped in a corner while awaiting a casket purchased over the internet, completely ignoring the reality of next-day delivery.¹⁷ The bill subsequently failed. As of this writing, Oklahoma's casket bottleneck remains intact, having withstood a half dozen legislative challenges and a constitutional lawsuit.¹⁸ In another example, when the Florida legislature in 2011 considered repealing its licensing law for interior designers,¹⁹ a battle raged for weeks in the state capitol, with licensed designers—represented in force by their professional association—predicting epic cataclysms should the license be eliminated.²⁰ “What you're basically doing is contributing to 88,000 deaths every year,” one licensed designer warned.²¹ When the legislative session's final gavel fell, the license remained standing.

But bottlenecks are not purely reactive. They often spent a good deal of time and money currying favor with legislators even before a challenge arises. The National Beer Wholesalers Association (NBWA), for example, boasts about a presence in every community and state legislature, and distributors visit every member of the U.S. Congress annually, with the stated intent of shoring up the three-tier system.²² And through its political action committee (PAC) the NBWA has consistently been one of the largest contributors to state and federal political candidates. From 1990 to 2014, its PAC contributed more than \$32 million to candidates and spent more than \$11 million in lobbying,

including expenses associated with more than 20 lobbyists just at the federal level.²³ Such activities are key to understanding why legislators are so often willing to acquiesce to bottlenecks' demands: In obliging them, legislators gain an identifiable, energized, and moneyed base of support.²⁴

The dividends for such spending can be significant. In 2013, Texas alcohol bottlenecks successfully pushed for a law to further enhance their profits. The law forced alcohol producers to give away the territorial distribution rights for their products for free.²⁵ It also allowed distributors to sell these valuable rights, acquired at no cost, to other distributors at a profit. This bottlenecking victory came on the heels of \$7 million in contributions to state legislators between 2009 and 2012.²⁶

Bottlenecks also protect and expand their licensing schemes by becoming members of and ultimately dominating the licensing boards that govern their own occupations. The process—called regulatory capture—allows bottlenecks to police their own occupations and to sweep competing occupations into their domain.²⁷ The latter phenomenon is known as license creep,²⁸ and this vehicle has been used by bottlenecks to, among other things, regulate eyebrow threaders²⁹ (who use a single piece of cotton thread to remove unwanted facial and body hair) and African-style hair braiders (who style hair without heat, chemicals, or sharp objects) as cosmetologists and regulate teeth-whitening entrepreneurs as dentists.³⁰ Through regulatory capture,

17 Ray Carter, *Casket Seller Sues Okla. in Federal Court over Licensing Act*, J. REC., Mar. 15, 2001; Ray Carter, *Casket Sales Bill Dies in Oklahoma House Committee*, J. REC., Feb. 20, 2003.

18 Carter, *Casket Seller Sues*, *supra* note 17; Carter, *Casket Sales Bill Dies*, *supra* note 17; Ray Carter, *Casket Sales Proposal Attracts New Allies*, J. REC., Feb. 19, 2002; Will Kooi, *Oklahoma State Rep. Paul Wesselhoff: Tribes Should Be Allowed to Sell Caskets*, J. REC., July 29, 2010.

19 Zac Anderson, *Legislative Session Renews Debate on Jobs*, HERALD-TRIB. (Jan. 14, 2012), <http://politics.heraldtribune.com/2012/01/14/legislative-session-renews-debate-on-jobs/>; Arian Campo-Flores, *In Florida, Interior Decorators Have Designs on Deregulation*, WALL STREET J. (Apr. 15, 2011), <https://www.wsj.com/articles/SB10001424052748703551304576260742209315376>; Tami Luhby, *States Look to Repeal 'Job-Killing' Regulations*, CNN MONEY (Mar. 4, 2011), http://money.cnn.com/2011/03/04/news/economy/state_regulation_repeal_governor/; Janet Zink, *Fewer Professions on List for Deregulation Proposal*, ST. PETERSBURG TIMES, May 3, 2011.

20 Katie Sanders, *Business Group Says Florida Is One of Three States That Regulates Commercial Interior Designers*, ST. PETERSBURG TIMES, Mar. 18, 2011; Zink, *supra* note 19.

21 Campo-Flores, *supra* note 19 (quoting Michelle Earley, a licensed interior designer).

22 See NAT'L BEER WHOLESALERS ASS'N, 2015-2016 REPORT, at 4, 9, 18 (2016), https://www.nbwa.org/sites/default/files/NBWA-Annual-Report-2015-2016_1.pdf.

23 *National Beer Wholesalers Assn*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/summary.php?id=D000000101&cycle=A>.

24 Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73 (1991).

25 TEX. ALCO. BEV. CODE §102.75(a)(7) (“[N]o manufacturer shall . . . accept payment in exchange for an agreement setting forth territorial rights.”).

26 *Big Beer Drowns Small Competitors*, LOBBY WATCH (Mar. 7, 2013), <https://web.archive.org/web/20130323012326/http://info.tpi.org/Lobby-Watch/pdf/AlcoholContribs.pdf>.

27 ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986); Jason Potts, *Open Occupations—Why Work Should Be Free*, 29 ECON. AFF. 71 (2009); Robert A. Rothman, *Occupational Roles: Power and Negotiation in the Division of Labor*, 20 SOC. Q. 495 (1979); Sandra K. Schneider, *Influences on State Professional Licensure Policy*, 47 PUB. ADMIN. REV. 479 (1987); Howard G. Schutz, *Effects of Increased Citizen Membership on Occupational Licensing Boards in California*, 11 POL'Y STUD. J. 504 (1983).

28 DICK M. CARPENTER II, LISA KNEPPER, ANGELA ERICKSON & JOHN K. ROSS, *LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING* (2012), <http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>; ANGELA C. ERICKSON, *WHITE OUT: HOW DENTAL INDUSTRY INSIDERS THWART COMPETITION FROM TEETH-WHITENING ENTREPRENEURS* (2013), <http://ij.org/wp-content/uploads/2015/03/white-out1.pdf>.

29 Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014).

30 WHITE OUT, *supra* note 28.

bottleneckers become government officials. But sometimes the reverse happens and government officials become bottleneckers.

III. HOW GOVERNMENT OFFICIALS BECOME BOTTLENECKERS

Government officials typically play a supporting, albeit essential, role in bottlenecking. But government officials bottleneck for their own reasons, which are not primarily about protecting private profits. This is not to say that such schemes bestow no benefits on industry insiders, only that such benefits are not the schemes' primary purpose.

For example, tour guide licenses, which exist in a handful of U.S. cities, do benefit licensed guides by restricting their competition, but this is not primarily why cities promulgate them. Instead of creating licensing schemes to protect a specific group of constituents, cities create them purportedly to protect their reputations among tourists and thus their economies. Since repealed, Savannah, Georgia's tour guide license traced back to the city's desire to ensure "quality" tours.³¹ New Orleans' license, still in force, was also created for this purpose.³² And the prevailing justification for Philadelphia's license, which is not currently enforced but remains on the books, was protecting the city's tourism interests.³³ Quality, however, is a more tenuous justification for regulation than health and safety and one that research has cast doubt on. For instance, a recent study of the District of Columbia's now-defunct tour guide license found that it had no effect on tour quality.³⁴

Vending licenses represent a similar case. Once recognized as a respectable way by which the poor could earn a living,³⁵ vending fell into disrepute in the latter half of the 20th century when cities began taking steps to curtail it.³⁶ Even now, with street food enjoying renewed cultural prominence, many cities disapprove of vending, considering it "tacky" or conjuring myriad poorly substantiated health and safety rationales to justify regulations. Other rationales offered for vending bottlenecks go to cities' conceptions of vending businesses as somehow illegitimate. Believing—incorrectly—that vendors do not pay taxes and are thus parasitic on brick-and-mortar businesses, cities seek to

protect the latter businesses from "unfair" competition. Brick-and-mortar businesses help the process along by appearing at city council meetings, demanding laws to ban vending, or at least keep vendors sufficiently far away from storefronts. Repression of vending ignores empirical evidence suggesting that street food is safe³⁷ and that, far from "stealing" business from them, food trucks may actually complement restaurants.³⁸ It also ignores the plethora of taxes that vending businesses pay—including property taxes through any of their business rents—to say nothing of vendors' many other economic contributions and the opportunities vending presents for upward mobility and entrepreneurship. Note that food safety laws are not included as an example of bottlenecking in this context. As discussed in greater detail below, regulation of food vendors—just like their restaurant competitors—in the form of inspections to ensure food safety may be a reasonable government function and, when applied uniformly and judiciously, does not act in the same anti-competitive manner as proximity laws and other such restrictions.

When it comes to defending their licensing schemes, government bottleneckers are just as fierce as industry bottleneckers. It took a First Amendment lawsuit for Savannah and Philadelphia to repeal and suspend their respective tour guide licenses, while New Orleans' license withstood a similar legal challenge. On the vending front, after a court struck down Atlanta's vending ordinance for creating an unconstitutional monopoly in 2012, the mayor responded by refusing to issue or renew vendors' licenses, claiming that the ruling had left the city without a vending ordinance. It took a looming contempt hearing against the mayor to persuade the city council to adopt a new vending ordinance.³⁹

IV. BREAKING OPEN BOTTLENECKS

Breaking open bottlenecks is frequently difficult, but it is possible, as the defeat of Atlanta's vending license proves. Some bottlenecks have been broken open in state capitols or city councils. For example, in 2005, African-style hair braider Melony Armstrong defeated Mississippi cosmetology bottleneckers at their own game when they introduced a bill to make state cosmetology regulations explicitly encompass braiding. Melony responded with a bill of her own that exempted braiders from cosmetology regulations. Due to Melony's determined lobbying and grassroots organizing, her bill passed.⁴⁰

Recent reform efforts suggest elected officials are increasingly aware of problems of excessive occupational licensing and are seeking ways to remedy them. Indeed, once almost the exclusive

31 Eric Curl, *City: Washington Court Ruling Won't Impact Savannah Tours*, SAVANNAHNOW (Jul. 15, 2014), <http://savannahnow.com/news/2014-07-15/city-washington-court-ruling-wont-impact-savannah-tours>.

32 Christopher Tidmore, *First Amendment Lawsuit Filed by Local Tour Guides*, LA WEEKLY (Dec. 19, 2011), <http://www.louisianaweekly.com/first-amendment-lawsuit-filed-by-local-tour-guides/>.

33 Kathy Matheson, *Philly to Tour Guides: Yo! Get It Right*, FOX NEWS (May 27, 2007), http://www.foxnews.com/printer_friendly_wires/2007May27/0,4675,TestingTourGuides,00.html.

34 ANGELA C. ERICKSON, PUTTING LICENSING TO THE TEST: HOW LICENSES FOR TOUR GUIDES FAIL CONSUMERS—AND GUIDES (2016), <http://ij.org/wp-content/uploads/2016/10/Putting-Licensing-to-the-Test-3.pdf>.

35 David Ward, *Population Growth, Migration, and Urbanization, 1860–1920*, in NORTH AMERICA: THE HISTORICAL GEOGRAPHY OF A CHANGING CONTINENT 285 (Thomas F. McIlwraith & Edward K. Muller eds., 2d ed. 2001).

36 Christine Gallant, *A Defense of City's Street Vendors*, ATLANTA J.-CONST., Aug. 11, 2011; Alfonso Morales, *Peddling Policy: Street Vending in Historical and Contemporary Context*, 20 INT'L J. SOC. & SOC. POL'Y (2000).

37 Angela C. Erickson, *Food Safety Risk of Food Trucks Compared to Restaurants*, 35 FOOD PROTECTION TRENDS 348 (2015).

38 *Food Trucks Primarily Replace a Quick Service Restaurant Visit*, SAYS NPD, NPD GRP. (Aug. 19, 2013), <https://www.npd.com/wps/portal/npd/us/news/press-releases/food-trucks-primarily-replace-a-quick-service-restaurant-visit-says-npd/>.

39 Dion Rabouin, *City Council Vending Ordinance Delays Contempt Ruling Against Mayor Kasim Reed*, ATLANTA DAILY WORLD (Nov. 5, 2013), <https://atlantadailyworld.com/2013/11/05/11th-hour-ordinance-delays-contempt-ruling-against-mayor-kasim-reed/>.

40 Dick Carpenter, *The Power of One Entrepreneur: A Case Study of the Effects of Entrepreneurship*, 4 S.J. ENTREPRENEURSHIP 19 (2011).

province of the political right, licensure reform now also has proponents on the left. In 2015, the Obama administration released an 80-page report that cast a critical eye on the costs associated with licensing and the vast inconsistencies in licensing schemes across states and also made recommendations for state policymakers on how to reform licensing.⁴¹

Nonetheless, new bottlenecks continue to appear in the creation of new licenses and the perpetuation of existing ones. Consequently, reform efforts are underway in courts of law and in the court of public opinion. In response to lawsuits brought by the Institute for Justice, for example, courts have struck down licensing requirements for casket sellers in Tennessee⁴² and Louisiana,⁴³ threading in Texas,⁴⁴ braiding in California,⁴⁵ Texas,⁴⁶ and Utah,⁴⁷ and even Texas' scheme making it illegal for alcohol producers to receive compensation for distribution rights.⁴⁸

Lawsuits have also spurred elected officials to change their laws, even before a ruling has been handed down. For example, in 2015, Savannah repealed its tour guide license in the face of the license's expected defeat in court. Of the move, a council member said, "I . . . realize that when you come up against the U.S. Constitution, you lose."⁴⁹

But even in the courts, bottlenecks frequently prevail. For every bottleneck the courts have eliminated, they have preserved countless others. Indeed, the judiciary has a long history of deferring to the supposed will of the people in the form of legislatures. And this is not out of ignorance about the activities of bottlenecks or the willingness of elected officials to create licenses at their request. As the 10th U.S. Circuit Court Appeals famously observed as it upheld a bottleneck in *Powers v. Harris*, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local

governments."⁵⁰ Owing to significant precedent such as that in *Powers*, constitutional challenges to economic regulation were once thought to be all but unwinnable. From that perspective, any legal victories on behalf of economic liberty are noteworthy; they are a sign that the courts are still sometimes willing to scrutinize licensing systems to determine whether they achieve the necessary balance between protecting the public and respecting economic liberty—and to strike down any that appear unbalanced.

Georgetown University law professor Randy Barnett has argued that the U.S. Constitution requires a "presumption of liberty" that would lead to this kind of balancing in constitutional challenges to economic regulations. In his analysis of the original meaning of the Commerce Clause, the Necessary and Proper Clause, the Ninth Amendment, and the Fourteenth Amendment's Privileges or Immunities Clause, Barnett argues that these provisions have been ignored, distorted, or excised entirely by judges, resulting in what he calls the "lost Constitution." Consequently, two opposing constructions have arisen concerning the Constitution:

Are all restrictions on the liberties of the people to be presumed constitutional unless an individual can convince a hierarchy of judges that the liberty is somehow "fundamental"? Or should we presume that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper? The first of these is called "the presumption of constitutionality" The second of these constructions may be called the Presumption of Liberty.⁵¹

The construction that prevails at a given time has significant implications for how the courts and legislators interpret the powers the Constitution delegates to government officials. With regard to occupational regulations, the presumption of liberty supposes that when government officials consider whether to create or perpetuate a license, their starting point should be recognition of the freedom of practice. Under that construction, courts and legislators alike should presume that individuals have the right to practice their chosen occupation, free from government interference, unless and until those seeking licensure show with systematic evidence that it is needed to protect the public.⁵²

Even then, full occupational licensure is unlikely to be necessary. In a recent article for *Regulation* magazine, my co-author and I discuss numerous regulatory options short of

41 DEP'T OF THE TREAS. OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISERS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

42 *Craigmiles v. Giles*, 312 F.3d 220, 224–25 (6th Cir. 2002).

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

44 Nick Sibilla, *Texas Supreme Court Strikes Down Useless Eyebrow Threading License*, INST. FOR JUSTICE (June 26, 2015), <http://ij.org/press-release/texas-supreme-court-strikes-down-useless-eyebrow-threading-license/>.

45 John Kramer, *Victory for Economic Liberty: California Decision Untangles Regulatory Nightmare for African Hairstyling*, INST. FOR JUSTICE (Aug. 19, 1999), <http://ij.org/press-release/california-hair-braiding-latest-release/>.

46 J. Justin Wilson, *Texas Hair Braiders Win Right to Open Braiding Schools*, INST. FOR JUSTICE (Jan. 7, 2015), <http://ij.org/press-release/texas-hairbraiding-instruction-release-1-7-2015/>.

47 J. Justin Wilson, *Federal Judge Strikes Down Utah's Hairbraiding Licensing Scheme*, INST. FOR JUSTICE (Aug. 9, 2012), <http://ij.org/press-release/utah-hairbraiding-release-8-9-2012/>.

48 Shira Rawlinson, *Victory for Texas Craft Brewers*, INST. FOR JUSTICE (Aug. 25, 2016), <http://ij.org/press-release/victory-texas-craft-breweries/>.

49 Russ Bynum, *Savannah Prepares Retreat in Speech Fight with Tour Guides*, ASSOCIATED PRESS (Oct. 14, 2015), <http://bigstory.ap.org/article/285b921fbbfa42748670f6eb1940a134/savannah-prepares-retreat-speech-fight-tour-guides>.

50 379 F.3d 1208, 1226 (10th Cir. 2004).

51 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 5 (2013).

52 Of course, most licensing laws are adopted by states, and Professor Barnett is discussing the federal Constitution, but his argument about the presumption of liberty applies to state licensing laws under one of the very amendments at the center of his treatise—the 14th Amendment, which, among other things, applies federal constitutional rights to the states. For a brief overview of how the Supreme Court has used the 14th Amendment to apply the Bill of Rights to the states, see *Incorporation Doctrine*, WEX LEGAL DICTIONARY, <https://www.law.cornell.edu/wex/incorporationDoctrine>. Professor Barnett argues that, were the Privileges or Immunities Clause of the 14th Amendment to be understood according to its original meaning, rights protected by the federal

licensing that can provide many of the presumed benefits of licensing without restricting entry into occupations or triggering the demonstrable costs of licensing.⁵³ This menu can be thought of as a hierarchy, with the least intrusive forms of regulation at the top and the most restrictive—licensing—at the bottom. The top five options can be thought of as voluntary and include the following:

- *Market competition/no government regulation.* It is a foundational principle of free-market economics that markets generally work better than regulations, not only to allocate resources efficiently, but also to protect consumers.⁵⁴ In today's communications environment, consumers have at their fingertips copious amounts of information, the most basic of which is providers' reputations, that provides them with insight into the quality of providers' services, often making regulations superfluous. Thanks to social media, advice blogs, and websites such as Angie's List and Yelp, consumers can easily find recommendations on effective service providers and tips on which to avoid. Because of consumers' ready access to such information, market forces can often weed out incompetents and fraudsters more quickly and effectively than regulatory schemes.
- *Alternative dispute resolution and private litigation.* Alternative dispute resolution, which includes mediation and arbitration, has seen growing acceptance among consumers, business professionals, and the legal community in recent years.⁵⁵ Many courts require would be litigants to try this avenue before proceeding with formal litigation. In addition, the maximum financial threshold for many small-claims courts has risen appreciably for consumers. These options provide a low-cost alternative to formal private litigation for both consumers and occupational practitioners. However, if mediation and arbitration prove ill-suited, private rights of action that allow for litigation after injuries, even in small-claims courts, give consumers a means to seek compensation and compel providers to adopt standards of quality to avoid litigation and loss of reputation. The cost to consumers of obtaining the remedy could be reduced by allowing them to collect court and attorneys' fees if they prevail.
- *Quality service self-disclosure.* Virtually all occupational practitioners have websites, so linking to third-party evaluation sites provides consumers with an important competitive signal that practitioners are open to disclosure regarding the quality of their service. This is a market-based

incentive that helps consumers differentiate highly competent, price-competitive occupational practitioners from mediocre ones. Even firms without websites can use this option by providing prospective customers with lists of references and past customers who can provide information about the firm.

- *Third-party professional certification and maintenance.* The National Commission for Certifying Agencies was created by the Institute for Credentialing Excellence in 1987. It has accredited approximately 300 professional and occupational programs from more than 120 organizations over the past three decades. These occupational certification programs cover nurses, automotive occupations, respiratory therapists, counselors, emergency technicians, and crane operators, to name just a few. Such occupational certifications, to be maintained, often require continuing education units. Most importantly, many organizations make such certifications a requirement for employment.
- *Voluntary bonding.* Voluntary bonding—a guarantee of protection against losses from theft or damage by a service provider—is common among general contractors, temporary personnel agencies, janitorial companies, and companies having government contracts. Some occupations carry with them more risks to consumers than others, and bonding essentially outsources management of risks to bonding companies.

The remaining elements of the hierarchy are forms of government intervention, listed from those forms of regulation with the lightest touch to those with the heaviest:

- *Inspections.* Inspections are commonly used in some contexts but could be applied more broadly as a means of consumer protection without full licensure. For example, municipalities across America adopt inspection regimes to ensure the cleanliness of restaurants. In such cases, inspections are deemed sufficient consumer protection over a more restrictive option of licensing food preparers, wait staff, and dishwashers. Inspections could also be applied to other professionals, such as barbers and cosmetologists, where the state has a legitimate interest in cleanliness of instruments and facilities. Similarly, periodic random inspection could replace the licensing of practitioners of various trades, such as electricians, carpenters, and other building contractors, where the application of skills is repeated and detectable to the experienced eye of an inspector.
- *Mandatory bonding or insurance.* For some occupations, states may find that voluntary bonding is not enough and instead require mandatory bonding or insurance. In particular, states may prefer this option when the risks associated with the services of certain firms extend beyond just the immediate consumer. For example, the state interest in regulating a tree trimmer is in ensuring that the service provider can pay for repairs in the event of damage to the home or other property of a party—a neighbor, for instance—not involved in the contract between the firm and the consumer. Tree trimming itself is a relatively safe

Constitution would affect the scrutiny of economic rights, including those affected by state licensing laws.

53 Thomas A. Hemphill & Dick M. Carpenter, *Occupations: A Hierarchy of Regulatory Options*, REGULATION, Fall 2016, at 20.

54 MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980).

55 THE ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE 402 (Joseph A. Demkin ed., 14th ed. 2008) ("Within the last ten years, mediation has emerged as another alternative dispute resolution method that has received widespread acceptance."); JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997).

profession that presents few other threats, making extensive state-mandated training, experience, testing, or other licensing requirements unnecessary. This means the state interest in protecting consumers and others from potential harm associated with tree trimming and other similar occupational practices can be met through bonding and insurance requirements, while allowing for basically free exercise of occupational practice.

- *Registration.* Registration requires providers to notify the government of their name, their address, and a description of their services. Because registration often includes a requirement that providers indicate where and how they take the service of process that initiates litigation, registration often complements private civil actions. The simple requirement of registration with the state may also be sufficient in and of itself to deter potential fly-by-night providers who may enter a state after a natural disaster or similar circumstances.
- *State certification.* State certification differs from voluntary, third-party certification in that the certifying body is the state rather than a private association, and in that it restricts the use of a title rather than the practice of an occupation. Under state certification, anyone can work in an occupation, but only those who meet the state's qualifications can use a designated title, such as certified interior designer, certified financial planner, or certified mechanic. Certification sends a signal to potential customers and employers that practitioners meet the requirements of the certifying boards. Certification is less restrictive than occupational licensing and presents few costs in terms of increased unemployment and consumer prices. Certification also overcomes a frequently cited basis for regulation—the problem of asymmetrical information, which is when service providers have more or better information than their customers.⁵⁶ The concern is that asymmetrical information creates an imbalance of power that service providers can use to their advantage (potentially to take advantage of customers). A related concern is specialized knowledge,⁵⁷ which is when a field is so complex that consumers cannot know enough to differentiate between good and poor service. Both concerns are used to justify full licensure, but certification can fulfill the same function of licensure—namely, signal sending⁵⁸—without the costs. Certification provides consumers with information that levels the playing field without setting up barriers to entry that limit opportunity and lead to higher prices.
- *Occupational license.* Finally, licensing is the most restrictive form of occupational regulation. The underlying law is

often referred to as a “practice act” because it limits the practice of an occupation to only those who meet the qualifications established by the state and remain in good standing. Because less restrictive types of regulation can often protect consumers just as effectively as licensing, but without licensing's costs in terms of lost employment and higher consumer prices, legislators should view licensing proposals with great skepticism. To the extent that they consider licensure, they should demand that proponents of creating or perpetuating a license establish the need for it with empirical evidence, not just anecdotes and speculation.

Indeed, my *Regulation* co-author and I argue that active consideration of the market-based mechanisms at the top of the hierarchy should always precede consideration of government regulation.⁵⁹ Ideally, policymakers would use the hierarchy to produce regulations that are calculated to meet demonstrated needs. They should do this by first identifying the problem, then identifying and quantifying the risks, then seeking solutions that get as close to the problem as possible; they should focus on the outcome (particularly on prioritizing public safety), use regulation only when necessary, keep things simple, and check for unintended consequences.

This hierarchy of options is now captured in model legislation promoted by the American Legislative Exchange Council. Versions of this legislation (although not the exact text) have been enacted into law by two states (Mississippi and Utah), five states are considering similar bills, and the U.S. Congress will soon consider a bill with this menu of regulatory options.

If this or similar legislation is adopted by other states and implemented as intended, this menu of options could help to block the well-worn pathway to licensure that bottlenecks have enjoyed during the past several decades. Indeed, given the growth of licensing—the percentage of the U.S. workforce needing a license has grown five-fold since the 1950s⁶⁰—the need to uphold economic liberty is more essential and urgent today than ever before.

56 George A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

57 ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* (2001); David Brain, *Practical Knowledge and Occupational Control: The Professionalization of Architecture in the United States*, 6 SOC. FORUM 239 (1991).

58 Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973).

59 Hemphill & Carpenter, *supra* note 53 at 23.

60 Kleiner & Krueger, *supra* note 4.

