UCLA LAW REVIEW

License to Uber: Using Administrative Law to Fix Occupational Licensing

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ABSTRACT

This Article explores courts' ability to restrict occupational licensing regulations at the state and local level. In recent years, governments have extended licensing requirements well beyond their traditional boundaries. The literature criticizes these requirements as protectionist measures that stifle new entry, entrench inequality, and threaten the emerging sharing economy. The harder question, however, is whether these new requirements are illegal. This Article argues that they are, but that challengers should be using different doctrines to confront them. Current legal challenges depend on constitutional and antitrust law doctrines, both of which have doctrinal and normative limitations. Constitutional doctrines require a revival of *Lochner* to be effective, while antitrust law is doctrinally limited and expensive to enforce. Accordingly, I make the novel claim that courts should apply administrative law doctrines to scrutinize and strike down irrational licensing regulations. Administrative law principles are more likely to succeed and are more easily reconciled with both current doctrine and legislative supremacy. The Article therefore provides courts with a viable doctrinal toolkit to scrutinize licensing regimes without resorting to a local *Lochner* approach that is less practically effective and that raises concerns about courts' democratic legitimacy. Because administrative law doctrines provide more credible legal threats, they are also more likely to generate political pressure for reform.

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Professor of Law, Loyola University New Orleans College of Law. I would like to thank participants of the Mid-American Jesuit Law School Workshop at Loyola University Chicago and the summer faculty workshop at Tulane University for helpful comments. I would also like to thank the Kauffman Foundation for its generous support for the research of this Article.

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INTRODUCTION

In New Orleans, some of the best barbeque in town is served up at a restaurant called Boucherie.[1] It started as a food truck, and its success illustrates the innovation and social mobility that could be unleashed by reforming occupational licensing laws. In 2006, Chef Nathaniel Zimet began operating a food truck around the city. He initially parked near popular bars and sold a unique style of barbeque pork and boudin sausage to late-night revelers.[2] His hard work and late-night shifts paid off. His successful food truck paved the foundation for his eventual brick-and-mortar restaurant Boucherie, which won recognition as the best new restaurant in New Orleans in 2009.[3] Boucherie continues to be successful, and it expanded into a larger building in the past year.[4]

Given New Orleans's cooking talent, one might think that the municipal government would try to cultivate aspiring food entrepreneurs like Chef Zimet.[5] His success, however, was largely in spite of the city's licensing laws. For years, municipal ordinances stifled food trucks with transparently protectionist and irrational restrictions. For instance, prior to the 2014 reforms, the city arbitrarily capped the number of mobile vendor permits (not merely food trucks) at one hundred.[6] It also required food trucks to operate at least six hundred feet away from an existing restaurant and to move after thirty minutes in one loca-

1. *Cf.* Todd A. Price, *Food Trucks Beginning to Find a Place to Call Home in New Orleans*, TIMES-PICAYUNE (Nov. 18, 2010, 1:30 AM), http://www.nola.com/dining/index.ssf/2010/11/food_trucks_beginning_to_find.html [https://perma.cc/7NKP-MADE] (noting Boucherie's success was due in part to the chef's previous venture in gourmet-style food trucks where he first served his famous Southern dishes).
2. *Id.*
3. *Id.*; The Red Streetcar, *Boucherie: The Purple Truck Grows Up*, GONOLA (June 17, 2011), http://gonola.com/2011/06/17/boucherie-the-purple-truck-grows-up.html [https://perma.cc/83NV-7XVL].
4. *See* Sarah Baird, *Boucherie Reopens Today in Former Cafe Granada Space*, GAMBIT (Feb. 19, 2015, 11:59 AM), http://www.bestofneworleans.com/blogofneworleans/archives/2015/02/19/boucherie-reopens-today-in-former-cafe-granada-space [https://perma.cc/7LUR-BL32].
5. *See* Shaila Dewan, *New Orleans Restaurant Scene Rises, Reflecting a Richer City*, N.Y. TIMES (Dec. 2, 2013), http://www.nytimes.com/2013/12/03/business/rebuilding-new-orleans-one-meal-at-a-time.html?pagewanted=1&_r=1&ref=business (detailing the effects of New Orleans's "restaurant boom" beginning in the mid 2000s); Kim Severson, *The New Orleans Restaurant Bounce, After Katrina*, N.Y. TIMES (Aug. 4, 2015), http://www.nytimes.com/2015/08/05/dining/new-orleans-restaurants-post-hurricane-katrina.html?_r=1.
6. Todd A. Price, *Food Trucks Thrive Under New City Laws*, TIMES-PICAYUNE (Apr. 1, 2014, 3:26 PM), http://www.nola.com/dining/index.ssf/2014/04/food_trucks_thrive_under_new_c.html [https://perma.cc/B475-BEUE].

tion.[7] In densely populated urban neighborhoods, these laws effectively prohibited food trucks altogether from wide swathes of the city. In fact, the rules expressly prohibited food trucks from busy downtown neighborhoods such as the French Quarter and Central Business District.[8] To its credit, the city liberalized its licensing regime, but only in the shadow of legal threats.[9] Unsurprisingly, food trucks are now thriving in the city.[10] Food entrepreneurs with limited capital resources can now enter the market and try to replicate Boucherie's path to success and upward mobility.

This story is not unique to New Orleans. Occupational licensing—or permission-to-work—laws have grown rapidly in the past few decades in both quantity and scope. While professions such as law and medicine have long required government permission, today's licensing regimes extend to a wider range of businesses, such as ride sharing, interior design, cutting hair, teeth whitening, casket selling, eyebrow threading, animal massages, floristry, craft beer distribution, home food production, house sharing, and food trucks, to name a few.[11] Aspiring entrepreneurs in these markets face increasingly onerous requirements before they can begin offering services.

The economic and legal literature sharply criticizes this expansion, which often results in protectionist measures that shield incumbents from new competitors.[12] Interestingly, these critiques are also becoming bipartisan. While libertarians have challenged licensing laws for years, political progressives (including the Obama administration) are joining the calls for

7. *See* Micheline Maynard, *Why It's So Hard to Be a Food Truck in New Orleans*, CITYLAB (June 12, 2012), http://www.citylab.com/design/2012/06/why-its-so-hard-be-food-truck-new-orleans/2250 [https://perma.cc/X85A-8KUM]; Robert Morris, *Owen Courreges: One Large Order of New Food-Truck Laws, Please*, UPTOWN MESSENGER (Jan. 28, 2013, 11:39 AM), http://uptownmessenger.com/2013/01/owen-courreges-one-large-order-of-new-food-truck-laws-please [https://perma.cc/5H2V-MVUF].

8. Maynard, *supra* note 7.

9. *See* Bruce Eggler, *Expansion of Food Trucks Gets OK From New Orleans City Council*, TIMES-PICAYUNE (July 25, 2013, 7:02 PM) [hereinafter Eggler, *Expansion*], http://www.nola.com/politics/index.ssf/2013/07/expansion_of_food_trucks_gets.html [https://perma.cc/685L-YYBN] (chronicling the political struggle leading up to the 2014 New Orleans ordinance limiting food trucks); Bruce Eggler, *New Orleans City Council Authorizes Additional Food Trucks, but With Many Restrictions*, TIMES-PICAYUNE (Apr. 18, 2013, 7:24 PM) [hereinafter Eggler, *Additional Food Trucks*], http://www.nola.com/politics/index.ssf/2013/04/new_orleans_city_council_autho.html [https://perma.cc/9NLL-RZME].

10. *Cf.* Nora McGunnigle, *New Orleans Hottest Food Trucks*, EATER NEW ORLEANS (Aug. 23, 2016, 9:30 AM), http://nola.eater.com/maps/food-truck-roundup-summer-2016 [https://perma.cc/WM2U-PAHG]; Price, *supra* note 6.

11. *See* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 216–18, 216 n.28 (2016) (detailing a non-exhaustive list of the "102 occupations requiring a license" in 2012).

12. *See infra* Part I.

reform.[13] For them, overbroad licensing is not merely a denial of freedom. It also reinforces inequality and disproportionately harms groups such as immigrants, minorities, and military families who are more itinerant and have less access to capital.[14] Excessive licensing also threatens the emerging sharing economy that allows people to share their existing assets to supplement their incomes (for example, through Uber or Airbnb).[15] In short, no one is all that happy about the current expansion of licensing laws. The harder question is what to do about it.

This Article explores *courts*' ability to reform occupational licensing laws. I begin with judicial challenges rather than legislative reform because occupational licensing laws are paradigmatic examples of laws that public choice theory predicts would be extremely resistant to legislative reform. Specifically, occupational licensing is difficult to reform because it provides concentrated benefits to an organized few, while imposing costs diffusely on the public.[16] My Article therefore departs from proposals that depend on new legislation as the initial step toward reform.[17]

The central problem with judicial challenges, however, is that the current legal doctrines are inadequate. The most recent legal challenges to occupational licensing regimes rely primarily on constitutional and antitrust law.[18] Both doctrines, however, have doctrinal and normative limitations. Constitutional challenges have been relying on economic liberty doctrines that are very similar to

13. *See* Eduardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. TIMES, Jan. 28, 2015, at B1 ("[P]rofessional licensing . . . reduces employment by up to 2.8 million jobs. The trend worries the Obama administration. The president's budget . . . will include $15 million for states to analyze the costs and benefits of their licensing rules, identify best practices and explore making licenses portable across state lines."); *see also* Jonathan Chait, *Obama Budget Attacks Big Small Government*, N.Y. MAG. (Jan. 28, 2015, 9:12 AM), http://nymag.com/daily/intelligencer/2015/01/obama-budget-attacks-big-small-government.html [https://perma.cc/5Z9G-X3EZ]; Matthew Yglesias, *Obama's Economics Team Is Taking on One of America's Most Underrated Economic Problems*, VOX (July 28, 2015, 10:00 AM), http://www.vox.com/2015/7/28/9052179/cea-report-occupational-licensing [https://perma.cc/ZC4C-8QHB].

14. *See* U.S. DEP'T OF THE TREASURY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 4–5, 35 (2015) (finding that "[t]he costs of licensing fall disproportionately on certain populations," particularly affecting veterans, immigrants, and criminal convicts). Some of these groups are largely comprised of people of color. *See id.* at 35.

15. For an overview of the sharing economy, see Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 909–13 (2015).

16. *See infra* Part III.A.

17. *See, e.g.*, Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 455 (2014) (proposing a "statutory reform that would preserve states' roles as primary regulators of occupations subject to limited FTC oversight" as the solution for the shortcomings of the current occupational licensing regime).

18. *See infra* Part III.

those used in the *Lochner* era.[19] Since the New Deal, those doctrines are largely toothless. If courts follow precedent, these constitutional challenges pose little credible threat to most licensing laws. If, however, courts choose to use them, they risk reviving the problems of the *Lochner* era.[20] In short, constitutional law is either far too weak or far too strong. Antitrust law, by contrast, is better suited to addressing the anticompetitive aspects of occupational licensing.[21] Recent antitrust challenges have also enjoyed some success in the U.S. Supreme Court.[22] Despite this progress, though, antitrust doctrines remain too limited and expensive to be a viable remedy in most cases.[23]

Accordingly, I argue that courts should apply administrative law doctrines to challenges of irrational licensing provisions.[24] These doctrines strike a better balance by enabling courts to apply a stricter standard of review while simultaneously respecting legislative supremacy. Administrative law doctrines are also a better doctrinal fit. They have evolved over decades to address the specific types of public choice and statutory interpretation concerns present in occupational licensing cases. My proposal is also practical because it does not require changing a single law to initiate litigation. Instead, challengers can use existing laws and doctrines to create credible judicial threats that can, in turn, lead to political reform.

To apply these principles, the Article first proposes a novel classification system for occupational licensing laws.[25] It groups them into three categories depending on their positive source of legal authority: (1) municipal licensing, (2) licensing via agency interpretation, and (3) licensing by express statute. Courts can then apply administrative law doctrines to each of these three categories.

The first category is municipal licensing requirements. In these cases, I propose that courts adopt a simplified hard look review to ensure that municipal ordinances are not arbitrary and capricious protectionist schemes.[26] In terms of theory, hard look review is more democratically legitimate because it reviews the process of decisionmaking rather than its substantive result. Under

19. *See infra* Part III.A.
20. *See infra* Part III.B.2.
21. *See infra* Part III.B.
22. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (denying state-action immunity in antitrust challenge to state dental board licensing regulations).
23. *See infra* Part III.C.
24. *See infra* Part IV.
25. *See infra* Part IV.
26. *See infra* Part IV.A. Hard look review is another term for the judicial review of agency policy decisions to ensure they are not arbitrary and capricious. *See infra* Part IV.A.

this approach, a court would accept the government's purpose at face value, and instead review whether a rational link exists between the regulations and their alleged purposes. For instance, New Orleans would be free to adopt public health as the reason for food truck proximity requirements from existing restaurants. Ultimately, though, it would have to establish a rational link between public health and parking six hundred feet from incumbent restaurants.

The second category is state restrictions that result from agency interpretations of licensing statutes.[27] In many states, legislatures adopt broad licensing statutes that do not explicitly address the activity at issue. State agencies then interpret this broad language as applying to these activities. For instance, in Arizona, the state veterinarian board construed "veterinary medicine" to include animal massages, even though the statute does not explicitly contemplate this activity.[28] As a result, the agency prohibited parties from offering these services unless they first went to veterinary school.[29]

In this second category, I propose that courts apply statutory interpretation principles to invalidate overbroad protectionist interpretations.[30] Specifically, courts should give little to no deference (under the logic of *Mead*[31] and *Skidmore*[32]) to state agencies' interpretations of broad licensing statutes. In effect, I propose a clear statement rule that requires state legislatures to explicitly contemplate regulating the activity in question. While this lack of deference seems inconsistent with *Chevron* principles, I argue that the logic of *Chevron* deference does not apply to these contexts—and indeed, many states reject *Chevron* altogether.[33]

The third category consists of restrictions that are expressly defined by state statute.[34] In this category, for instance, the statute above might explicitly define "veterinary practice" to include animal massages. Administrative law doctrines are more limited here. Under my proposal, courts could not invalidate these statutes using administrative law doctrines—even if those requirements were irrational. In short, state legislatures—not courts—always have the last word.

27. *See infra* Part IV.B.
28. *Arizona Animal Massage*, INST. FOR JUST., http://ij.org/case/azmassage [https://perma.cc/5FXM-4GWA]; *see also* ARIZ. REV. STAT. ANN. § 32-2231(A) (Supp. 2015).
29. *See* J. Justin Wilson, *Arizona Animal Massage Entrepreneurs Head to Court in Challenge to Anti-Competitive and Unconstitutional Occupational Licensing Law*, INST. FOR JUST. (July 15, 2014), http://ij.org/press-release/arizona-animal-massage-media-advisory-7-15-14 [https://perma.cc/5H7N-B49Q].
30. *See infra* Part IV.B.
31. United States v. Mead Corp., 533 U.S. 218 (2001).
32. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
33. *See* Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *infra* Part IV.B.
34. *See infra* Part IV.C.

As I will illustrate, however, many "clear" statutory restrictions are not as clear as they seem.[35]

My proposal has several practical and normative benefits. The most important is that many legal challenges will be more likely to succeed. Courts would feel more comfortable invalidating irrational laws if they could use doctrines that did not require them to reanimate *Lochner*'s ghosts or to perform complicated market analyses for antitrust purposes. As the legal doctrines become stronger and more credible, they would also create greater leverage for political reform. Indeed, many reform-minded politicians may welcome a more credible judicial threat to provide leverage to enact reforms they already support.[36] My proposal would also raise the costs and political salience of irrational protectionism. Municipal governments and state agencies would have to consider potential court challenges when they create or enforce licensing laws.

There are even benefits to my proposal's limits. Ironically, these limits are the key source of the proposal's strength. If state legislatures retain the power to overrule courts, then courts would be free to apply an even stricter standard of review knowing that democratic checks remain in place. In this respect, my proposal strikes a more appropriate balance between intensifying judicial scrutiny and respecting legislative supremacy. Further, the clear statement rule would force legislatures—the most politically salient and accountable entity—to do their own dirty work by being explicit before adopting irrational protectionist laws.

This Article also contributes to the existing academic literature in several ways. Most importantly, it is the first to propose using administrative law principles to challenge overbroad licensing regimes. Both the literature and current litigation efforts have largely ignored these options. This Article is also the first to categorize licensing regulations based on their source of law. This conceptual clarity will help both courts and scholars better understand and analyze the legal questions involved, even if they ultimately disagree with my proposals. Finally, this Article adds to the normative critiques of irrational licensing requirements by incorporating recent theories of innovation from the communications and Internet law literature.

Part I provides an overview of occupational licensing laws, and examines their costs and benefits. Part II proposes a novel classification system for the three categories of occupational licensing laws. Part III examines the costs and benefits of using constitutional and antitrust law doctrines to challenge these

35. *See infra* Part IV.C.

36. For instance, the councilperson and mayor in New Orleans both cited potential litigation to justify reforming food truck laws. *See* Eggler, *Expansion*, *supra* note 9; Price, *supra* note 6.

regimes. Part IV proposes and defends the use of administrative law principles to review these licensing restrictions.

I. AN OVERVIEW OF OCCUPATIONAL LICENSING REGULATIONS

This Part provides an overview of occupational licensing laws, and examines their costs and benefits. As background, American jurisdictions regulate entry into many professions. These occupational permission-to-work regulations generally fall into one of three categories.[37] The first, and least restrictive, is registration requirements. These laws merely require parties to publicly disclose their services. They may also require filing fees, posting bonds, or sharing identification information.[38] The second category is certification requirements. Sometimes called right to title laws, they establish criteria a party must meet to use a specific occupational title.[39] The requirements do not prevent parties from performing the duties of the profession—but only from using a certain title. For instance, under a certification regime, anyone could potentially cut hair, but only certified parties could call themselves "barbers" or "cosmetologists." Certification regimes are generally open to any party who can satisfy the predefined criteria, which often include passing examinations or fulfilling educational requirements.[40]

The third and most aggressive restraint is licensing. The key difference with occupational licensing is that parties must obtain government permission before they can begin practicing their occupation.[41] Licensing regimes are diverse and impose a wide variety of eligibility requirements. Some of the most common include educational and training requirements, examinations, fees, and character and fitness tests.[42] In many states, boards composed of current practitioners develop and enforce these eligibility and scope of practice requirements.[43]

37. *See* Larkin, *supra* note 11, at 210 ("Licensing is one of three basic forms of occupational regulation."); *see also* Morris M. Kleiner, *A License for Protection*, REG., Fall 2006, at 17, 17; Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676–77 (2010); *cf.* U.S. DEP'T OF TREASURY, *supra* note 14, at 43–44.

38. *See* Kleiner, *supra* note 37, at 17.

39. *See* U.S. DEP'T OF TREASURY, *supra* note 14, at 44. In contrast to the licensing regime, a person may "perform the duties of the profession . . . whether or not they have been certified." *Id.*

40. *See* Kleiner & Krueger, *supra* note 37, at 677.

41. *See* Kleiner, *supra* note 37, at 17 ("Under licensure laws, working in an occupation for compensation without first meeting state standards is illegal."); Kleiner & Krueger, *supra* note 37, at 677.

42. *See* U.S. DEP'T OF TREASURY, *supra* note 14, at 25 (noting some eligibility requirements for licensing can take up two years to complete); Larkin, *supra* note 11, at 213.

43. *See infra* note 69 and accompanying text.

Occupational licensing has grown significantly in recent decades.[44] Two leading economic experts on occupational licensing, Morris Kleiner and Alan Krueger, have described it as "[o]ne of the fastest-growing . . . institutions in the US labour market"[45] In the 1950s, less than 5 percent of American occupations required a license.[46] Today, by contrast, licensing requirements cover 25 to 29 percent of American occupations according to labor economists' most recent estimates.[47]

Controversially, this expansion increasingly covers occupations not traditionally subject to licensing requirements. The government has long regulated entry into certain professions, such as law and medicine.[48] The more recent wave of licensing requirements, however, extends to occupations in which health and safety rationales are more difficult to discern. In many states, for instance, licensing requirements extend to professions such as barbers, cosmetologists, florists, hair braiders, bartenders, animal masseuses, interior decorators, and auctioneers.[49]

There are, however, several traditional justifications for occupational licensing requirements. The most common is protecting consumer safety.[50] Occupational licensing aims to ensure that practitioners have the proper training and expertise to provide quality services. By signaling quality, occupational licensing also provides a trademark-like function that reduces information costs.[51]

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44. *See* Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL STREET J. (Feb. 7, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703445904576118030935929752 (noting an 18 percent increase of occupations requiring a license from 1950 to 2008); *cf.* Maury Gittleman et al., *Analyzing the Labor Market Outcomes of Occupational Licensing* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 20961, 2015).

45. Kleiner & Krueger, *supra* note 37, at 676; *see* Larkin, *supra* note 11, at 211 ("[L]ines of work requiring an occupational license are among the fastest growing types of employment in the United States.").

46. Kleiner & Krueger, *supra* note 37, at 678.

47. *See id.* at 678–79 (noting 29 percent of workers reported needing a license to perform their jobs); U.S. DEP'T OF TREASURY, *supra* note 14, at 6–7 (finding 25 percent of workers required licenses).

48. *See* Larkin, *supra* note 11, at 216.

49. *See id.* at 216–18 (listing several of the over one hundred occupations requiring a license); *cf.* Editorial, *A License to Be a Florist? How Occupational Rules Can Be a Burden on Workers*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com/opinions/a-license-to-be-a-florist-how-occupational-rules-can-be-a-burden-on-workers/2015/08/06/212ad5b6-3abb-11e5-9c2d-ed991d848c48_story.html [https://perma.cc/BDE2-J3DM].

50. *See* Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1085 (2013) ("The most common public justification for imposing licensing requirements on a profession is to provide protection to consumers against 'unethical or incompetent practitioners.'" (quoting Michael J. Phillips, *Entry Restrictions in the* Lochner *Court*, 4 GEO. MASON L. REV. 405, 411 (1996))).

51. *See* Kleiner, *supra* note 37, at 18.

These protections are especially important when information asymmetries exist that could result in serious economic or physical harm to a consumer.[52]

Law and medicine, for instance, are two fields characterized by high-stakes information asymmetries. Incompetent doctors can threaten your physical health, while incompetent lawyers can threaten your property, family, freedom, or even (in extreme cases) life. In both fields, it is difficult for a lay consumer to obtain enough information to evaluate competence and quality. Licensing thus ensures safety by requiring minimum competence and by providing a signal of quality that lowers consumers' information costs.[53] These minimum protections can also increase demand for the services.[54]

Another justification of licensing is that it fuels the professionalization of many occupations, which provides both private and public benefits.[55] For individual practitioners, economists have found that licensing increases both wages and nonwage benefits, such as the likelihood of having health insurance.[56] These advantages not only increase the prestige and job security of a given profession, but they also generate benefits for the public. By excluding low cost competitors, licensing also creates incentives for the profession to invest in training and higher standards.[57] Licensing requirements thus provide the conditions for a more cohesive professional community, which in turn can provide expertise to policymakers and lobby more effectively for legislative or regulatory reforms.[58] Finally, licensing also can generate revenues for the public through membership and admission fees.[59]

Despite these potential benefits, there are even stronger critiques of the recent expansion of occupational licensing. These critiques have grown louder and more bipartisan in recent years.[60] Libertarian organizations such as the

52. *See* Larkin, *supra* note 11, at 222 ("The classic justification [for occupational licensing] is information asymmetry. Consumers lack the knowledge and expertise required to judge the [provider's] qualifications . . . . Licensing requirements compensate for that shortcoming . . . .").
53. *See* Kleiner, *supra* note 37, at 18 ("Licensing filled some of [the] informational gap on quality.").
54. U.S. DEP'T OF TREASURY, *supra* note 14, at 22; *see* Larkin, *supra* note 11, at 223 ("[T]he exclusion of quacks, crooks, and charlatans from a particular line of work . . . increases its attractiveness not only to consumers but also to future members of that trade.").
55. *See* U.S. DEP'T OF TREASURY, *supra* note 14, at 21 (noting the potential private benefits of "achiev[ing] greater legitimacy, cultural authority, and income" as well as the public benefits of "improv[ed] quality and public safety").
56. *See id.* at 61–64 (finding that occupational licenses on average increase wages by 5 to 10 percent); Kleiner & Krueger, *supra* note 37, at 681–85; Gittleman et al., *supra* note 44, at 21–22, 32–33.
57. U.S. DEP'T OF TREASURY, *supra* note 14, at 7, 11.
58. *Id.* at 11.
59. Kleiner, *supra* note 37, at 18; Larkin, *supra* note 11, at 223 (noting that "licensing requirements raise revenue" among several other benefits).
60. *See* Sanderson, *supra* note 17, at 459–61.

Institute for Justice and the Pacific Legal Foundation have opposed licensing regulations for years.[61] More interestingly, however, political progressives are increasingly joining the fight as well. Progressives focus more on distributional concerns, such as how occupational licensing entrenches inequality and stifles upward social mobility.[62] In 2015, the White House issued a report from its top economic advisors that sharply criticized the irrational scope of many occupational licensing regimes.[63] The Federal Trade Commission echoed these concerns in recent congressional testimony.[64] A recent budget from former President Obama also targeted unnecessary licensing requirements.[65] And progressive writers such as *Vox*'s Matthew Yglesias and *New York Magazine*'s Jonathan Chait have also recently criticized these restrictions from the left, with Chait chastising them as "Big Small Government."[66]

The heart of these economic critiques is that licensing imposes excessive and anticompetitive barriers to entry to certain professions.[67] To function properly, occupational licensing regimes must assume the existence of both unbiased gatekeepers and eligibility requirements that rationally relate to the profession.[68] Both assumptions, however, are problematic. In many contexts, the gatekeepers—those responsible for determining eligibility and enforcing scope of practice standards—are often private practitioners who have a financial interest

61. Lana Harfoush, Note, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 148 (2011) ("[Institute for Justice and The Pacific Legal Foundation] have unearthed many industries where protectionist occupational licensing requirements are the norm."); Sanderson, *supra* note 17, at 459–60.

62. Sanderson, *supra* note 17, at 459–60.

63. *See generally* U.S. DEP'T OF TREASURY, *supra* note 14, at 4–5 (noting current practices of the regime and detailing what the White House sees as "best practices" for future implementation).

64. *Competition and the Potential Costs and Benefits of Professional Licensure Before the Comm. on Small Bus.*, 113th Cong. 1–2, 5–7 (2014) [hereinafter *2014 Hearing*], https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf [https://perma.cc/B4CZ-YZ6D] (statement of Andrew Gavil, Director of the Office of Policy Planning, Federal Trade Commission).

65. *See* Robert Litan, *In Obama's Budget, an Effort to Rein in Occupational Licensing*, WALL STREET J. (Feb. 9, 2015, 11:16 AM), http://blogs.wsj.com/washwire/2015/02/09/in-obamas-budget-an-effort-to-rein-in-occupational-licensing (noting that the $15 million proposal by President Obama would "assess the costs and benefits of existing and new licenses, with a view toward eliminating licensing where it doesn't make sense").

66. Chait, *supra* note 13; *see also* Yglesias, *supra* note 13.

67. *See, e.g.*, Larkin, *supra* note 11, at 235–37 (detailing some of the critical responses to licensing requirements including the loss of jobs, higher prices and taxes, and bolstering anti-competitive economic regimes).

68. Gittleman et al., *supra* note 44, at 5 ("A simple theory of occupational licensing envisions a costless supply of unbiased, capable gatekeepers and enforcers.").

in suppressing competitive entry.[69] In North Carolina, for instance, the state dental board consisted of private dentists elected by other private dentists.[70] While these structures provide expertise, they also create conflicts of interest when these agencies consider whether competitive services such as teeth whitening constitute dental practice that legally require a license. In addition, the substantive requirements for entry often have little relation to ensuring health, safety, or minimum competence.[71] Instead, the requirements artificially limit the supply of competitors by imposing excessive costs and educational requirements.

These barriers to entry have many harmful consequences. First, occupational licensing negatively affects consumer welfare. Most obviously, licensing results in artificially high wages. As a result, many licensed services cost more than they otherwise would.[72] While these prices might create higher quality, the economic literature has found little hard evidence that occupational licensing increases service quality (though, in fairness, it is a difficult metric to determine either way).[73]

69. *See* Raynor, *supra* note 50, at 1086 ("[O]ccupational licensing boards are frequently composed of members of the regulated occupation, thereby endowing established producers with the discretion to exclude their own potential competitors."); *see also 2014 Hearing*, *supra* note 64, at 1–2 (describing this situation as akin to the "proverbial fox . . . put in charge of the hen house"); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103–04 (2014); Larkin, *supra* note 11, at 213; Matthew Yglesias, *Do Straight Razors Justify Barber Licensing*, THINKPROGRESS (Aug. 18, 2010), http://thinkprogress.org/yglesias/2010/08/18/198262/do-straight-razors-justify-barber-licensing [https://perma.cc/VL79-VJSH] (illustrating the conflict of interest of "incumbent practitioners" in the realm of barber licensing).

70. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1108 (2015) ("The Act provides that six of the Board's eight members must be licensed dentists . . . . They are elected by other licensed dentists . . . ."); *see also* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 937 (2014) ("The North Carolina Board of Dental Examiners, composed almost entirely of practicing dentists who are elected by practicing dentists, regulates the practice of dentistry.").

71. *See 2014 Hearing*, *supra* note 64, at 11–13 (demonstrating certain regulations did not increase safety or competency for advanced practice registered nurses and funeral directors); Sanderson, *supra* note 17, at 460–61.

72. *See 2014 Hearing*, *supra* note 64, at 6–7 (noting a study by Morris Kleiner and Alan Krueger finding that occupational licenses increase earnings for licensed practitioners by 17 percent) ; U.S. DEP'T OF TREASURY, *supra* note 14, at 12–13; Larkin, *supra* note 11, at 235–37 ("Licensing requirements give licensees a 'premium' of four to thirty-five percent above the competitive price.").

73. *See* U.S. DEP'T OF TREASURY, *supra* note 14, at 13–14 ("[M]ost research does not find that licensing improves quality or public health and safety."); Larkin, *supra* note 11, at 238 ("Licensing programs . . . do not provide guaranteed improvements in service quality."). For a specific example of the difficulty in accounting for quality, see Edward J. Timmons & Anna Mills, *Bringing the Effects of Occupational Licensing Into Focus: Optician Licensing in the United States* 14–15 (Feb. 18, 2015), https://www.mercatus.org/system/files/Timmons-OpticianLicensing.pdf [https://perma.cc/VA44-2PQS], for a discussion on measuring quality of opticians.

In addition, overbroad occupational licensing prevents parties from practicing their highest valued occupation. Libertarians have denounced these restrictions on deontological grounds as violations of economic liberty.[74] Many of them conceptualize the right to work as a fundamental right, no different than the rights of privacy or marriage.[75] Recent progressive critiques have focused more closely on how these restrictions prevent social mobility and entrench inequality.[76] Many of the services targeted by occupational licensing enforcement—hair braiding, teeth whitening, food trucks—are provided by people that generally have less formal education and less access to capital. These potential new businesses thus provide an opportunity for lower-skilled workers to earn higher wages and move up the social ladder.[77] Further, by preventing new entrants from changing jobs, licensing arguably depresses the wages of their current occupations.[78]

These barriers also have a disproportionate impact on certain marginalized groups.[79] Most obviously, the more expensive that occupational licensing requirements are (for example, education and fees), the harder it is for lower-income people to satisfy them. As a result, occupational licensing can impose particularly difficult hurdles for historically disadvantaged groups such as minorities and lower-skilled immigrants.[80] Many licensing regimes also limit the entry of higher-skilled immigrants. In some states, licensing regimes fail to give credit to the often extensive education and training in foreign countries that many immigrants have already obtained.[81] As a result, immigrants must endure

74. *See* Harfoush, *supra* note 61, at 136–37, 141 ("This process hurts new and rising entrepreneurs, who simply want to start their businesses without unreasonable interference, and consumers, who want to buy quality goods at low prices.").

75. *See, e.g.* Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why "Rational Basis With Bite" Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721, 741–42 (2012) ("There are certainly some compelling reasons to think that the right to enter one's chosen profession is a fundamental right . . . ."); Raynor, *supra* note 50, at 1068 ("The two principles enumerated in *Lawrence* and *Moreno* are directly applicable to a particular subset of economic liberty claims . . . .").

76. *See* Sanderson, *supra* note 17, at 460 (explaining that licensure "restricts social mobility," disproportionately affecting people with lower socioeconomic status).

77. *See* Morris M. Kleiner, Opinion, *Why License a Florist?*, N.Y. TIMES, May 29, 2014, at A35 (arguing that occupational licensing erects significant barriers to people with limited skills or education, resulting in doing "nothing to close the inequality gap in the United States").

78. Gittleman et al., *supra* note 44, at 7 (finding that unregulated positions experience a decrease in wages due to the influx of people who switch careers as a result of not being able to obtain a license for their previous occupation).

79. *See supra* note 14 and accompanying text.

80. Sanderson, *supra* note 17, at 460–61. While the Supreme Court has held that licensing regimes requiring citizenship violated equal protection, *In re* Griffiths, 413 U.S. 717 (1972), the regulation of nonresident aliens has not been taken up by the Court. Sanderson, *supra* note 17, at 461 n.32.

81. U.S. DEP'T OF TREASURY, *supra* note 14, at 38–39 ("[N]early half of immigrants with a bachelor's degree are overqualified for their current jobs . . . .").

duplicative, expensive, and arguably unnecessary training and education to obtain a license.[82] Many states also categorically restrict ex-convicts from obtaining occupational licenses.[83] While such restrictions are justified for many types of crimes, it is legal in many states to deny a license for *any* type of crime and regardless of how long ago it occurred.[84] These burdens also fall disproportionately on black and Hispanic individuals.[85]

Occupational licensing barriers to entry are also inconsistent with emerging labor market structures. In particular, occupational licensing barriers threaten the emerging sharing economy exemplified by the rise of companies like Uber and Airbnb.[86] They also impede geographic mobility across states.[87] For instance, an experienced licensed lawyer in one state generally must start the licensing process from scratch if he or she wants to practice in a different state. Such restrictions are particularly problematic given the rise of telework that allows parties to provide services outside their own state or jurisdiction.[88] Licensing can also limit a party's ability to benefit from distance learning if the state or its licensing board adopts obstacles to accepting degrees and credentials from out-of-state institutions.[89] As the 2015 White House report notes, the lack of reciprocity across states poses specific challenges to veterans and their civilian spouses given how frequently they move from state to state.[90]

Occupational licensing regimes also arguably reduce innovation. Interestingly, recent communications law literature offers an additional normative foundation for this critique. Indeed, one novel contribution this Article makes is to apply these insights to the occupational licensing context. Recent work on innovation theory—particularly Barbara van Schewick's—illustrates the problem.[91] In the Internet law context, one policy challenge is how to create innovation when there is either high uncertainty about user needs or high levels of heterogeneous demand. In these contexts, van Schewick argues,

82. *See id.*
83. *See id.* at 36–37.
84. *Id.* at 36. Moreover, many states can also inquire into criminal behavior that did not involve a conviction such as prior arrests when determining eligibility for occupational licenses. *Id.*
85. *Id.* at 35.
86. *See* Porter, *supra* note 13, at B1.
87. *See* U.S. DEP'T OF TREASURY, *supra* note 14, at 39–40. Some reform efforts like the Interstate Medical Licensure Compact have been implemented to reduce barriers to single-state licensing regimes. *Id.* at 40. However, while providing a medium for multi-state licensure, these reforms may be subject to much stricter regulations. *Id.*
88. *Id.* at 28–30 (reporting that since 2001, 44 percent of the workforce now work from home on a regular basis and some "take calls . . . for clients across the country").
89. *See id.* at 32–34.
90. *Id.* at 13.
91. *See* BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION (2010).

economic theory suggests that innovation is most likely to occur by increasing the number of potential innovators.[92] In other words, we should try lots of things and see what works.[93]

The open Internet (a concept related to "network neutrality") achieves this goal by lowering entry costs for new innovators.[94] Because the Internet is open, new entrants do not need to ask permission from access providers such as Verizon or Comcast to offer service. Further, they do not need to know the technical aspects of how the networks operate. On the Internet, much like the electricity grid, innovators can simply "plug" their new application or content into the network with virtually no coordination with anyone else.[95] Because entry costs approach zero, the Internet has been one of the greatest engines of innovation in history.

These arguments apply equally well to occupational licensing. Much like Internet applications, many new markets that require licenses (such as food trucks, craft beer manufacturing, and braiding) are characterized by uncertain customer needs and heterogeneous demand. In this context, the best way to generate innovation is to increase the number of potential innovators by lowering the costs of entry. Licensing regulations, however, do precisely the opposite. By raising the costs of entry, these regimes necessarily restrict new innovation.

As criticisms have grown, occupational licenses are increasingly facing legal challenges. In Part III, I argue that these legal challenges are normatively justified, but that the existing doctrinal toolkit is inadequate for such challenges. I ultimately propose that administrative law provides a better set of doctrines to challenge occupational licensing laws. To understand why, it is first necessary to have a clearer understanding of the different categories of licensing laws than the literature currently provides.

II. A NEW DESCRIPTIVE FRAMEWORK FOR LICENSING LAWS

This Part provides a new descriptive framework for occupational licensing laws. This novel classification system will illustrate both the limits of the current

92. *Id.* at 301 (2010) ("[A] large and diverse group of potential innovators will discover a larger number of opportunities for innovation . . . .").

93. *See* Barbara van Schewick, Faculty Dir., Ctr. for Internet & Soc'y, Stanford Law Sch., Opening Statement at the Federal Communications Commission's Workshop on Approaches to Preserving the Open Internet 4–5 (Apr. 28, 2010) (explaining that "trying is the only way to find out" to determine the success of innovators).

94. *See* Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17910–11 (2010).

95. *Cf.* Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 74–75 (2004) (noting how users no longer need to coordinate with third parties to use electricity after the freedom of the electric grid model; they can simply "plug[] in").

legal strategies and the benefits of an administrative law approach. This framework organizes these laws into three categories depending upon their legal source of authority. The first category involves purely municipal licensing regulations. The second category includes restrictions that result from agency interpretations of broad statutes. In this category, the statute does not specifically address the practice in question. Instead, an administrative agency construes the language to encompass the economic activity. The third category comes from statutes that explicitly address the restricted economic activity.

The three categories can thus be summarized as (1) municipal restrictions, (2) restrictions via agency interpretation, and (3) explicit statutory restrictions. This Part describes each category and illustrates how broad—and irrational—these restrictions have become.[96]

A. Municipal Restrictions

The first category is municipal licensing restrictions whose positive source of legal authority is local ordinances. The legal disputes surrounding these ordinances tend to follow a general pattern. New entrepreneurs enter the market and either compete directly with local incumbents or provide services related to the incumbent's licensed activity. At the urging of incumbents, municipal governments resist these activities through new or existing ordinances. Municipal restrictions are therefore common obstacles to so-called sharing services such as Uber, Lyft, and Airbnb—which fight for approval on a city-by-city basis.[97]

While these municipal restrictions are necessarily diverse, certain industries are common targets of enforcement. Perhaps the most well-known is the municipal regulation of competitive taxi and limousine services. While high-profile disputes surrounding ride-sharing services such as Uber and Lyft capture headlines, municipal restrictions sweep far more broadly to target smaller entrepreneurs with less resources.

These restrictions stifle potential competitors with a diverse range of strategies. One common tactic is to impose caps on the number of permits (or medallions) the city grants. Without an approved permit, it is illegal to provide transportation service. The medallion cap number is not only arbitrary, but it also

96. Many of the cases I discuss are discussed more fully on the Institute for Justice's website as part of its legal challenges to licensing laws. *See generally Economic Liberty*, INST. FOR JUST., http://ij.org/pillar/economic-liberty/?post_type=case [https://perma.cc/5SXT-HLQ8] (providing a list of economic-centered cases that the Institute has challenged or is challenging). I have no affiliation or relationship with the organization or any of the cases.

97. *See* Rauch & Schleicher, *supra* note 15, at 903–04.

fails to adjust to population growth. In Milwaukee, for instance, the city established a cap in 1992 that prevented any new permits from being issued.[98] Existing permits could be transferred, but the cap could only go down, not up.[99] As a result, Milwaukee had only 320 licensed cabs, one for every 1850 residents, which is "one of the highest ratios in the country."[100] In Bowling Green, Ohio, the municipal government set the cap at sixteen. This restriction prevented the entry of a low-cost eco-friendly cab company that targets university students. The company, Green Cab, had successfully served students at Ohio University in Athens by providing rides at $3 per head in hybrid vehicles before attempting to enter the Bowling Green market.[101] Similarly, in Kansas City, the government enacted new ordinances designed to lower the existing medallion cap to five hundred through an "attrition" strategy.[102] While companies could renew existing permits, the city would not approve new permits until the total number fell below five hundred. Because companies could only apply for ten at a time, the number of permits needed to drop to 490 before the city would actually issue any new permits.[103]

Even assuming it is physically possible for new entrants to obtain a permit, the costs are often prohibitively expensive. In Milwaukee, taxi drivers claimed that the caps drove the prices of permits up to $150,000.[104] In other cities, municipal ordinances effectively raise entry costs through onerous licensing application processes that often grant extra rights to incumbent industries. In Las Vegas, the city required applicants to submit voluminous financial and business information with their applications. It also authorized existing companies to intervene and object that the new services would harm their business.[105] In New York, the licensing

98. *See* Transcript of Motion Hearing at 44–45, Ibrahim v. City of Milwaukee, No. 11-CV-15178 (Wis. Cir. Ct., Apr. 16, 2013).

99. Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 46 F. Supp. 3d 888, 890 (E.D. Wis. 2014) (explaining "downward-floating" cap, which restricted the number of taxicab permits issued each year).

100. *Milwaukee Taxis*, INST. FOR JUST., http://ij.org/case/milwaukee-taxis [https://perma.cc/Z8JF-PT3W].

101. *See* Complaint for Declaratory and Injunctive Relief at 3–11, Rinaldi Mgmt. Assistance v. City of Bowling Green (Ohio Ct. Com. Pl. June 2015), http://ij.org/wp-content/uploads/2015/06/Green-Cab-Complaint.pdf [https://perma.cc/5PK8-42VU]. This complaint was filed on June 3, 2015, but "[w]ithin days of the filing . . . Bowling Green officials were forced to acknowledge that the taxi cap was outdated and unjustifiable," subsequently resulting in the repeal of the cap and the case closing. *See Bowling Green Taxis*, INST. FOR JUST., http://ij.org/case/bowling-green-taxis/ [https://perma.cc/F4PP-CKGY].

102. Kansas City Taxi Cab Drivers Ass'n v. City of Kansas City, 742 F.3d 807, 808 (8th Cir. 2013).

103. *Id.*

104. *Milwaukee Taxis*, *supra* note 100.

105. *See* Clutter v. Transp. Servs. Auth. of Nev., No. A386841, at 5–12 (Nev. Dist. Ct. May 16, 2001); *Las Vegas Limousines*, INST. FOR JUST., http://ij.org/case/clutter-v-state-of-nevada [https://perma.cc/5ME4-TJ2K].

process for vans allowed incumbent bus services to object to new applications. If the incumbents objected (which they commonly did), applicants had the burden of showing that the existing mass transit system was inadequate.[106]

Another municipal strategy against competitive transportation services is to impose additional service requirements on new competitors while exempting incumbent services. In Portland, for instance, the city required limousine services to charge customers at least fifty dollars and to wait a minimum of one hour before being picked up. It also required the cost of limousine services to be 35 percent higher than the prevailing taxi rate.[107] In Nashville, sedan services had to charge a minimum of forty-five dollars. The city also required them to dispatch only from their place of business and to remove vehicles that were older than seven years.[108] Neither Portland nor Nashville imposed such requirements on incumbent taxis. In several cities, these restrictions also target ride-sharing services with disproportionate requirements. In Chicago, regulations had initially prevented companies like Uber and Lyft from picking up customers at the airport altogether.[109]

Food trucks are another common target of restrictive ordinances. Cities often apply "proximity restrictions" to limit a food truck's freedom of operation.[110] In dense urban areas, these proximity restrictions can effectively ban food trucks entirely from wide areas of the city. In San Antonio, food trucks cannot be within three hundred feet of the property line of restaurants, groceries, or convenience stores even if they are on private property. To offer service within this distance, food trucks must obtain prior written permission from the nearby establishments.[111] In New Orleans (prior to reform), the city required food trucks to be at least six hundred feet (roughly two city blocks) from any restaurant.[112] In Chicago, the city still requires food trucks to be at least two hundred feet from a

106. *New York Vans*, INST. FOR JUST., http://ij.org/case/ricketts-v-new-yorkcity/#backgrounder [https://perma.cc/TJ62-UR6Z].
107. Speed's Auto Servs. Grp. v. City of Portland, No. 3:12-CV-738-AC, 2013 WL 1826141, at *3 (D. Or. Apr. 30, 2013).
108. Bokhari v. Metro. Gov't of Nashville & Davidson Cty., No. 3:11-00088, 2012 WL 162372, at *2 (M.D. Tenn. Jan. 19, 2012).
109. *See* Editorial, *Open the Airports to Uber*, CHI. TRIB. (Oct. 4, 2015, 8:55 PM), http://www.chicagotribune.com/news/opinion/editorials/ct-uber-chicago-airport-edit-1005-20151002-story.html [https://perma.cc/X2LW-8HJR].
110. ERIN NORMAN ET AL., INST. FOR JUSTICE, STREETS OF DREAMS: HOW CITIES CAN CREATE ECONOMIC OPPORTUNITY BY KNOCKING DOWN PROTECTIONIST BARRIERS TO STREET VENDING 15–27 (2011).
111. *See San Antonio Food Trucks*, INST. FOR JUST., http://ij.org/case/san-antonio-vending [https://perma.cc/LNH3-66ND].
112. *See* Eggler, *Additional Food Trucks*, *supra* note 9.

restaurant.[113] Prior to liberalization, the city of El Paso had adopted a one thousand foot limit.[114]

Food trucks also face onerous service restrictions.[115] Prior to its reform, New Orleans had prohibited food trucks from remaining stationary for more than thirty minutes.[116] Similarly, the city of Chicago had initially prohibited the actual cooking of food on the truck. Instead, employees had to cook the food in a kitchen and then sell it on the truck.[117] Despite the reforms, Chicago's regulations remain onerous and include GPS tracking requirements, heavy fines, and extensive inspections.[118]

These restrictions go beyond food trucks and often apply to other types of mobile vendors as well. In Hialeah, Florida (a city near Miami), the municipal government required mobile vendors to be at least three hundred feet away from an establishment selling "similar" merchandise. Even after reform, it continues to require the vendors to move constantly and prevents them from placing merchandise on the ground.[119] In Atlanta, the city council recently granted a single company exclusive control over vending operations. Mobile vendors who had operated legally for years (such as outside of Turner Field baseball games) now had to seek permission from the new vending monopoly (its potential competitor) that charged substantially higher costs.[120] The city of Atlanta also granted this company power to restrict vendors that would compete with nearby brick-and-mortar establishments.[121]

Municipal restrictions also commonly impose limits on tours and tour guides. In general, aspiring tour guides must take an examination and pay a fee before being allowed to share information with tourists. In Savannah, for

113. Hilary Gowins, *Food-Truck Bust in the Loop Sets Disturbing Precedent for Chicago Chefs*, ILL. POL'Y (Oct. 7, 2015), https://www.illinoispolicy.org/food-truck-bust-in-the-loop-sets-disturbing-precedent-for-chicago-chefs [https://perma.cc/Y3C5-FYSC].

114. *See El Paso Vending*, INST. FOR JUST., http://ij.org/case/el-paso-vending [https://perma.cc/93KQ-8RFP].

115. *See* NORMAN ET AL., *supra* note 110, at 15–27 (noting that vendors struggle with public property bans, restricted zones, proximity bans, stop-and-wait restrictions, and duration restrictions).

116. *See* Maynard, *supra* note 7.

117. *See* Scott Kanowsky, *Are New Regulations Helping or Hurting City's Food Truck Industry?*, WBEZ (Jan. 31, 2013), http://www.wbez.org/news/culture/are-new-regulations-helping-or-hurting-city%E2%80%99s-food-truck-industry-105265 [https://perma.cc/83G9-BBJ8].

118. *See id.*

119. *See Hialeah Vending*, INST. FOR JUST., http://ij.org/case/hialeah-vending/#case-history [https://perma.cc/24U4-FMDE].

120. Jeremiah McWilliams, *Ruling Complicates City Vending Plans*, ATLANTA J. CONST., Jan. 3, 2013, at 1B.

121. *See Atlanta Vending*, INST. FOR JUST., http://ij.org/case/atlanta-vending/#case-history [https://perma.cc/A6VK-QBZ9].

instance, tour guides had to meet a series of requirements to become licensed to provide services.[122] The requirements include a one hundred question exam, a physical exam, a background check, and special taxes. People providing tours without a license were subject to fines and even jail time.[123] In the District of Columbia, the municipal government also imposed an examination and a fee before a party could obtain a license. This restriction was similarly enforceable through fines and even potential jail time.[124]

B. Restrictions via Agency Interpretations

The next category of licensing restrictions originates from *state* government rather than municipal government. In this category, the state legislature enacts broad and often vague statutory restrictions. An administrative agency, in turn, has authority to implement and interpret the restrictions. In this category, the statute does not expressly prohibit the economic activity in question. Instead, the agency interprets the statute broadly to encompass the activity at issue. In many cases, the agency consists of private practitioners from the incumbent industry itself (for example, practicing veterinarians often comprise state veterinary boards).[125]

Similar to the municipal category, restrictions in this category commonly target certain types of industries. One frequent target is the cosmetology industry. Many states require cosmetologists to obtain a license before they can offer services.[126] These states generally have statutes that define cosmetology broadly in terms of various hair and skin care services. The states then delegate authority to state agencies to enforce and interpret the licensing restrictions. In many cases, these agencies interpret the statute broadly to encompass services that only tangentially relate to cosmetology.

One persistent target of such enforcement actions is African hair braiding. This traditional practice involves an intricate process of weaving, twisting, and

122. Alan Blinder, *Lawsuit May Reshape Tourist Industry in History-Rich Savannah*, N.Y. TIMES, Dec. 21, 2014, at A28; Eric Curl, *Savannah to Drop Tour Guide Test, Restrict Tour Hours*, SAVANNAH MORNING NEWS (Sept. 29, 2015, 11:12 PM), http://savannahnow.com/news/2015-09-29/savannah-drop-tour-guide-test-restrict-tour-hours [https://perma.cc/L5J8-J8Z5] (noting that tour guides must submit to a background check, physical exam, and "pass a 100-question multiple-choice test with an 80-percent score or higher").

123. *See Savannah Tour Guides Free Speech*, INST. FOR JUST., http://ij.org/case/savannah-tour-guides-free-speech [https://perma.cc/9B63-7NWA].

124. Edwards v. District of Columbia, 755 F.3d 996, 998 (D.C. Cir. 2014).

125. *See supra* note 69 and accompanying text.

126. *See Cosmetology License Requirements by State*, BEAUTY SCHS. DIRECTORY, http://www.beautyschoolsdirectory.com/faq/state_req.php [https://perma.cc/X2TS-QX5T] (listing license requirements by state).

braiding that is considered more natural because it uses no chemicals.[127] These braiders also come from, and serve, immigrant communities. In many states, agencies have interpreted statutes broadly to require that African hair braiding businesses obtain a license. In Washington, the Department of Licensing ordered a salon to get a license because braiding constituted the "practice of cosmetology" even though the statute itself did not explicitly refer to braiding.[128] In stretching the language to cover these activities, the Washington agency reversed its earlier interpretation, which had concluded that the statute did not "specifically identif[y]" braiding.[129] In Missouri, the Board of Cosmetology and Barber Examiners interpreted the statutory definition of "cosmetology" to include African hair braiding as well.[130] The statute does not explicitly cover braiding, but includes "arranging" a person's hair.[131] In Arkansas, the relevant state agency interpreted a similarly worded statute as including African hair braiding as well.[132] In all these states, the parties could not continue providing services without complying with onerous licensing requirements that included examinations, fees, and thousands of hours of training and apprenticeship, often regarding curriculum that did not cover African hair braiding in the first place.[133]

Cosmetology licensing restrictions also extend to industries such as makeup artistry and eyebrow threading. In Nevada, practicing makeup artistry does not

127. Bah v. Att'y Gen. of Tenn., No. 13-2789-STA-dkv, 2014 WL 2589424, at *1 (W.D. Tenn. June 10, 2014) ("It refers to refers to braiding, locking, twisting, weaving, and cornrowing or otherwise physically manipulating hair without the use of chemicals that alter the physical characteristics of the hair."); PAUL AVELAR & NICK SIBILLA, INST. FOR JUSTICE, UNTANGLING REGULATIONS: NATURAL HAIR BRAIDERS FIGHT AGAINST IRRATIONAL LICENSING 5 (2014).

128. WASH. REV. CODE § 18.16.020(29) (Supp. 2015); *see also* WASH. DEP'T OF LICENSING, INTERPRETIVE STATEMENT–COS1, REGULATION OF NATURAL HAIR BRAIDING, (2005), http://ij.org/wp-content/uploads/2014/06/wa-braiding-interpretive-statement-1-24-2005.pdf [https://perma.cc/E5CW-T8XE].

129. WASH. DEP'T OF LICENSING, *supra* note 128; Complaint for Declaratory and Injunctive Relief at 6–8, Sylla v. Kohler, No. 2:14-CV-00885 (W.D. Wash. June 17, 2014).

130. Amended Complaint for Declaratory and Injunctive Relief at 10–11, Niang v. Carroll, No. 4:14-CV-01100-JMB (E.D. Mo. Apr. 15, 2015). In this case, the district court found that the licensing statute did not violate the rights of the plaintiffs because they failed to "negative every conceivable basis which might support [the cosmetology and barbaring regulations]." *Niang*, 2016 WL 5076170, at * 19 (alteration in original) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)), *appeal filed*, 8th Cir., Oct. 19, 2016.

131. MO. REV. STAT. § 329.010(4) (2000) (defining cosmetology as including "performing or offering to engage in any acts of the classified occupations of cosmetology for compensation" and specifying that this includes hairdressers, manicurists, and estheticians).

132. Complaint at 10–11, Earl v. Smith, No. 4:14-CV-358-KGB (E.D. Ark. June 17, 2014); *see also* ARK. CODE ANN. §17-26-102(a)(3), (b) (2012) (defining "cosmetologist" and the "art of cosmetology").

133. *See id.* at 1–2; Amended Complaint for Declaratory and Injunctive Relief, *supra* note 130, at 12–15; Complaint for Declaratory and Injunctive Relief, *supra* note 129, at 8–13.

require a license. The Board of Cosmetology, however, found that "*teaching* makeup artistry was" illegal unless it took place at a licensed cosmetology school.[134] Again, the statute did not explicitly define cosmetology in terms of makeup artistry. The restriction resulted from an agency interpretation of the word "cosmetic."[135] In Texas, the state agency similarly concluded that eyebrow threading constituted licensed cosmetology services.[136] This practice involves removing eyebrow hair without the use of chemicals. It is also less painful than more traditional methods. Similar to African hair braiding, these interpretations require parties to complete significant training requirements and pay substantial tuition fees before they can continue with their businesses.[137]

Teeth whitening is another business that state agencies routinely target through interpretations of dental licensing statutes. The Food and Drug Administration (FDA) regulates teeth whitening as a "cosmetic" service and does not require a prescription to obtain it.[138] Several state agencies, however, interpret teeth whitening to be dental service, which only a licensed dentist can provide. In Arkansas, for instance, the state dental board prohibited a licensed orthodontist from providing cheap teeth whitening services for low-income customers. As background, all orthodontists are dentists with additional specialized training. The state statute provides that orthodontists cannot provide services outside of their specialization. In other words, orthodontists cannot claim to be things they are not—such as oral surgeons. The state board, however, interpreted basic teeth whitening to be outside the orthodontist's specialization and prohibited it.[139]

In Georgia, the state dental board took the more common approach of interpreting the dental practice statute to include teeth whitening. The statute had defined dental practice to include the use of an "appliance."[140] The state dental agency, in turn, had construed "appliance" in its regulation to include

134. Waugh v. Nev. State Bd. of Cosmetology, 36 F. Supp. 3d 991, 997–99 (D. Nev. 2014) (emphasis added), *appeal filed*, 9th Cir., Sept. 2, 2014.

135. *Id.* at 1016–17 ("The cosmetology statute does not define the term 'cosmetic' . . . ."); *see also* NEV. REV. STAT. ANN. §§644.023(1)(g), 644.0204 (2014 & 2017 Supp.) (providing definitions of cosmetology services).

136. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 74 (Tex. 2015). In 2011, after these enforcement actions, the state legislature modified the statute to explicitly include eyebrow threading. Petitioners' Brief on the Merits at 6 n.3, *Patel*, 469 S.W.3d 69 (No. 12-0657).

137. *See Texas Eyebrow Threading*, INST. FOR JUST., http://ij.org/case/patel-v-tx-department-of-licensing-and-regulation [https://perma.cc/9ASA-YA43].

138. Respondent's Memorandum in Support of Its Motion for an Order Compelling Discovery at 33, N.C. State Bd. of Dental Exam'rs, No. 9343 (F.T.C. Jan. 11, 2011), 2011 WL 188934, at *33.

139. *See Arkansas Dentistry*, INST. FOR JUST., http://ij.org/case/ar-dentist-law [https://perma.cc/W5XC-DS6P].

140. GA. CODE ANN. § 43-11-17(a)(6) (2016).

"removable structure[s] . . . [to] change the shape and shade of teeth."[141] This interpretation thus prevented low-cost whitening services in places such as shopping malls unless they incurred the costs and time of becoming a licensed dentist.[142]

One final example involves animal massages. In Arizona, a group of people who loved animals started a company that provided massage services to animals.[143] They had grown up around horses and obtained training and private certification in animal massage therapy. The Arizona Veterinarian Board, however, soon sent them cease-and-desist letters.[144] The Board had interpreted animal massage to be "veterinary medicine" that only licensed veterinarians can provide.[145] To be a licensed veterinarian, however, the individuals would have had to attend veterinary school, which requires up to four years and can cost hundreds of thousands of dollars.[146]

C. Express Restrictions via State Statutes

The final category of licensing restrictions are statutes that clearly prohibit the economic activity in question. Although a state board often enforces the statutory requirements, there is no interpretative leap required to proscribe the economic activity.

This category of licensing generally targets many of the same industries targeted by licensing via interpretation. The difference is that the statute expressly encompasses the specific services being offered. For instance, in Iowa, the definition of "cosmetology" explicitly includes the term "braiding."[147] Therefore, Iowa's restriction against African hair braiding rests on a different legal foundation than those in other states where braiding is not explicitly mentioned in the statute.

These express statutory restrictions target similar types of industries as the more vague ones in the previous Part. Like them, many of these laws are difficult to justify on any grounds other than economic protection of incumbent licensed industries. One example is casket sales. In Louisiana and Tennessee, the states had tried to prohibit individual casket sales from anyone other than a licensed

141. Collins v. Battle, No. 1:14-CV-03824-LMM, 2015 WL 10550927, at *2 (N.D. Ga. July 28, 2015) (quoting GA. COMP. R. & REGS. § 150-14-.01 (2007)).
142. *See id.* at *1–5.
143. *See Arizona Animal Massage*, *supra* note 28.
144. *Id.*
145. *Id.*; *cf.* ARIZ. REV. STAT. ANN. § 32-2238(A)(4) (2016).
146. *Id.*
147. IOWA CODE ANN. § 157.1(5)(a) (West 2014).

funeral director.[148] The license requirements, in turn, required mortuary school training and apprenticeship. Parties whose only interest was in selling caskets had to obtain this broader license to sell these products. In Texas, the state recently passed a law that prevented craft brewers from selling the distribution rights to their beer. Instead, Texas law requires them to assign those rights to a separate set of distributors, who in turn can sell them for whatever they want.[149] Such restrictions are almost laughably transparent attempts to benefit incumbent beer distributors over brewers.

III. EVALUATING THE CURRENT LEGAL CHALLENGES TO OCCUPATIONAL LICENSING LAWS

This Part evaluates the current legal challenges to occupational licensing laws. These challenges generally rely on two doctrines: constitutional law and antitrust law. Below, I analyze the strengths and weaknesses of both approaches. I conclude that, on balance, both doctrines are inadequate for both doctrinal and normative reasons.

A. Are Legal Challenges Justified?

Before analyzing specific legal doctrines, the threshold question is whether *any* legal challenges are justified. Specifically, why should litigation be preferred to legislative or regulatory reform efforts that would arguably enjoy more democratic legitimacy?

The basic reason is that the political process is extremely unlikely to reform overbroad occupational licensing without legal pressure. Licensing regimes are textbook examples of the types of laws that public choice theory predicts are most resistant to political reform.[150] While regulatory critics often invoke public choice

148. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 215 (5th Cir. 2013) (finding that the Louisiana statute was not "rationally related to a legitimate governmental interest in consumer protection, and . . . promoting public health and safety"); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) ("[W]e invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.").

149. *See* Mark Curriden, *Texas Craft Brewers Sue the State Over a Law Restricting Their Distribution Rights*, A.B.A. J. (May 1, 2015, 5:45 AM), http://www.abajournal.com/magazine/article/texas_craft_brewers_sue_the_state_over_a_law_restricting_their_distribution [https://perma.cc/WUW5-BZBF] (illustrating the struggles of a craft brewer: "The law is like the government forcing authors to give the rights to their books to publishers for free.").

150. *See* Florman, *supra* note 75, at 760 (explaining public choice theory's function in politics: "A well-knit special interest group is likely to prevail over an amorphous 'public' whose members are dispersed" and the chances for the public's political success "is, for all practical purposes, non-existent"

too casually to oppose any regulation, the theory works well for occupational licensing. These laws provide concentrated tangible benefits to organized groups with resources, while the costs of these restrictions are diffused among the public as a whole.[151] Professional organizations also have the cohesion and the resources to lobby for favorable laws, to prevent reforms, and to provide information to policymakers.[152] Under these conditions, occupational licensing laws would be extremely difficult to change through the political process alone.

Recent scholarship provides some empirical support for these theoretical predictions. Robert Thornton and Edward Timmons contend that occupational licensing regimes, once enacted, almost never get revoked.[153] Indeed, they found only eight instances of de-licensing a profession in the last forty years. Of these eight, four were ultimately reinstated in a different form.[154] Admittedly, the growing salience of occupational licensing has generated some recent legislative efforts to reform or remove them. Thornton and Timmons, however, find that none of these legislative efforts have succeeded so far.[155]

In a separate study, Benjamin McMichael found that the restrictiveness of occupational licensing laws is correlated with greater political contributions by the affected interest groups.[156] Specifically, he compared occupational licensing restrictions of nurse-practitioners and physician assistants—who both provide a lower-cost alternative to doctors for many medical services. In states with

(alteration omitted) (internal quotation omitted)); Larkin, *supra* note 11, at 324–25 ("[T]he parties seeking to enter [professions requiring licenses] are precisely the type of individuals for whom seeking relief through the ballot box is generally a futile endeavor.").

151. U.S. DEP'T OF TREASURY, *supra* note 14, at 22 (discussing public benefits of licensing regimes); Kleiner, *supra* note 37, at 20; *see also* Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 209-13 (2014) (applying these principles to explain why legislative reforms to the corporate practice restriction would be difficult).

152. *See* Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, MONTHLY LAB. REV., May 2015, at 1, 13 (explaining Milton Friedman's observation that licensing benefits are high for professional organizations and come at a low, widely dispersed cost to the public, whereas de-licensing yields high costs to the organization with low, widely dispersed benefits to the public).

153. *Id.*

154. *Id.* at 2–8 (noting the history of occupational de-licensing and re-regulation for Alabama interior designers and barbers and Colorado morticians and private investigators). Naturopaths in Virginia, egg candlers of Colorado, and watchmakers in Wisconsin and Minnesota are the only groups to have enjoyed permanent de-licensing. *Id.*

155. *Id.* at 7–12 (noting the failed attempts of North Carolina, Florida, New Hampshire, Indiana, Michigan, Texas, Connecticut, Missouri, and Minnesota to de-license groups of occupations).

156. Benjamin J. McMichael, *The Demand for Healthcare Regulation: The Effect of Political Spending on Occupational Licensing Laws* 4–5, 12 (May 27, 2015) (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611532 [https://perma.cc/F7PB-8WDC] (incorporating data from the National Institute on Money in State Politics on political contributions by interest groups).

relatively more political donations by physician interest groups, the restrictions on these lower-cost services were greater. Hospital interest groups, by contrast, tend to support more autonomy for nurse-practitioners and physician assistants.[157] Accordingly, in states where hospital political donations were greater, there were fewer restrictions.[158] The implication is that occupational licensing turns more on interest group politics and rent seeking than rational policy concerns.[159]

Practically speaking, litigation is the only realistic means to reform overbroad occupational licensing laws. The question, however, is whether the current litigation is using the right legal doctrines. Recent legal challenges have relied on two major doctrines: constitutional law and antitrust law. The remainder of this Part analyzes the costs and benefits of each approach.

B. Constitutional Law

Constitutional challenges are the most common type of legal attack on overbroad licensing laws. Interestingly, the challengers claim that these licensing laws violate their *economic* liberty rights under the due process and equal protection clauses of both federal and state constitutions.[160] Using these doctrines, the challengers generally assert that the licensing laws either have an improper purpose (such as pure economic protectionism) or that the laws (or the legal distinctions among groups) have no rational relationship to legitimate state purposes.

The use of these constitutional economic liberty doctrines is a peculiar—and possibly radical—choice. While few acknowledge it openly, the logic of these constitutional challenges is indistinguishable from the *Lochner* line of cases in the early twentieth century.[161] Both courts and the legal academy, however,

157. *Id.* at 4. Allowing for more autonomy of healthcare practitioners provides several benefits:

> A number of national organizations . . . have noted that states can increase access to healthcare, lower costs and improve their healthcare systems by allowing NPs and PAs to practice to the full extent of their knowledge and training. [They] have also suggested that the licensing laws governing NPs and PAs are driven more by politics than by economic, scientific, or clinical evidence.

Id. (citation omitted).

158. *Id.*

159. *See also* Thornton & Timmons, *supra* note 152, at 12–13 (noting lobbying power of industries benefiting from occupational licensing barriers).

160. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 15–18, Eck v. Battle, No. 1:14-CV-00962-MHS (N.D. Ga. Apr. 1, 2014); *see also* Amended Complaint for Declaratory and Injunctive Relief, *supra* note 130, at 13–15.

161. Lochner v. New York, 198 U.S. 45 (1905). By "Lochner," I refer more broadly to the cases in the early 20th century when federal courts struck down economic legislation on questionable constitutional grounds. Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100

have consistently repudiated these doctrines since the New Deal.[162] So why use them? Why select such contentious and seemingly discredited doctrines? One reason is simply that there are no other better options. Modern law lacks viable doctrinal tools to invalidate irrational protectionist licensing.[163] A second is that occupational licensing litigation has become about more than the individual cases themselves. Instead, they are part of a larger attempt to revive dormant economic liberty doctrines. In this respect, occupational licensing battles are a new form of public interest litigation, not unlike same-sex marriage or desegregation litigation. The libertarian groups bringing these challenges are self-consciously attempting not merely to overturn irrational licensing, but to revive doctrines whose logic could extend to other regulatory regimes.

Interestingly, these efforts are enjoying some limited success. Despite decades of hostility from both courts and legal literature, these doctrines have been the basis of some recent victories in federal and state court.[164] Most importantly, the challenges have succeeded in at least three federal appellate courts.[165] These victories, in turn, have created a precedential foundation to challenge even more licensing restrictions.

CORNELL L. REV. 527, 541–44 (2015) (chronicling the "Evolution of Liberal Legal Thought About *Lochner*").

162. *See, e.g.*, Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 892 (9th Cir. 2008) ("*Lochner*-ian analysis [has been] long since discredited."); Colby & Smith, *supra* note 161, at 536–37 (noting Justice Holmes's critique of *Lochner* as a decision that "lawlessly substituted . . . personal policy preferences for that of a more Progressive legislature that sought to protect workers from overreaching employers and unhealthy working conditions"); Larkin, *supra* note 11, at 250 ("*Lochner* has become one of the Supreme Court's most highly vilified decisions."); James Y. Stern, Note, *Choice of Law, the Constitution, and* Lochner, 94 VA. L. REV. 1509, 1510–11 (2008) (describing *Lochner* as "among the most vilified Supreme Court decisions in American history").

163. *See* Sanderson, *supra* note 17, at 456–57 ("[Today's courts believe that they] lack the institutional competence to determine whether there is some public-regarding justification hidden behind an ostensibly protectionist regulatory measure.").

164. I define victories to include defeating dispositive motions. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (invalidating prohibition on casket sales); Merrifield v. Lockyer, 547 F.3d 978, 992 (9th Cir. 2008) (holding that pest control regulations targeting certain pest controllers but not others violated equal protection); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) (invalidating prohibition on casket sales); Brantley v. Kuntz, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015) (holding Texas barbering laws unconstitutional as applied to braiders); Clayton v. Steinagel, 885 F. Supp. 2d 1212, 1216 (D. Utah 2012) (holding Utah's cosmetology laws unconstitutional as applied to braiders); Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1119 (S.D. Cal. 1999) (holding California cosmetology laws unconstitutional as applied to braiders); Astramecki v. Minn. Dep't of Agric., No. A14-1367, 2015 WL 2341509, at *1 (Minn. Ct. App. May 18, 2015) (reversing motion to dismiss state constitutional challenge to Minnesota state law regulating cottage foods); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 91 (Tex. 2015) (finding application of cosmetology law unconstitutional under Texas constitution); Transcript of Motion Hearing, *supra* note 98, at 62 (holding Milwaukee medallion cap unconstitutional under Wisconsin constitution).

165. *See St. Joseph Abbey*, 712 F.3d at 227; *Merrifield*, 547 F.3d at 992; *Craigmiles*, 312 F.3d at 229.

The earliest of these cases was the Sixth Circuit's decision in *Craigmiles v. Giles* in 2002.[166] *Craigmiles* created the initial beachhead for the subsequent challenges in both federal and state courts. The state of Tennessee had prohibited casket sales by anyone other than a licensed "funeral director."[167] This license, in turn, required completing onerous apprenticeship and mortuary school requirements.[168] The court found that this prohibition violated both equal protection and substantive due process rights. Specifically, the court upheld the finding that the only actual purpose of the law was economic protectionism, which it held was not a legitimate interest.[169] It also rejected as pretextual the State's health and safety justifications for regulating casket sales, such as fears of chemical leaks into groundwater.[170]

Craigmiles paved the way to more expansive victories in the federal circuit courts. In 2008, the Ninth Circuit—citing *Craigmiles*—found that a licensing regime for pest controllers violated the Equal Protection Clause in *Merrifield v. Lockyer*.[171] California licensing laws distinguished between pesticide-based services and non-pesticide services. The statute further divided non-pesticide services according to the type of animals being controlled. The State exempted pest controllers who removed large vertebrates (for example, raccoons), wasps, and bees. Licensing requirements remained in place, however, for non-pesticide control of the most common types of animals, which included mice, rats, and pigeons.[172] The Ninth Circuit found this distinction to be unconstitutionally irrational.[173] *Merrifield* is arguably broader than *Craigmiles* in that the court recognized the State's purpose as legitimate, but found that the regulation had no rational connection to it. To do so, the court engaged in significant speculation about the potential exposures of certain pest controllers to chemicals.[174]

The third major appellate court victory was *St. Joseph Abbey v. Castille* in the Fifth Circuit.[175] This case involved a Louisiana licensing restriction that

166. *Craigmiles*, 312 F.3d 220.
167. *See id.* at 222.
168. *Id.*
169. *Id.* at 224, 229 ("No sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations for the 1972 amendment.").
170. *Id.* at 225–26 ("[T]he only difference between the [independently sold and licensed caskets] is that those sold by licensed funeral directors were systematically more expensive.").
171. 547 F.3d at 992 (citing *Craigmiles*, 312 F.3d at 229).
172. *Id.* at 981–82.
173. *Id.* at 989–92 ("Needless to say, this type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review.").
174. *See id.* at 990–91.
175. St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

prevented monks from selling a more basic and inexpensive type of casket than those sold in funeral homes. The law seemed particularly ridiculous given that it only applied to intrastate sales, which could only occur at licensed funeral establishments with a licensed director. Louisiana residents remained free to purchase caskets from outside the state, largely because of Federal Trade Commission enforcement actions.[176] Citing both *Craigmiles* and *Merrifield*, the Fifth Circuit found the regulation to violate both due process and equal protection rights.[177]

In addition to these key federal appellate cases, challengers have also enjoyed some success in the lower federal courts and state courts.[178] Indeed, the challengers in these cases—as well as in the unsuccessful ones—rely heavily on *Craigmiles*, *Merrifield*, and *St. Abbey*.[179] In this respect, each victory has provided an increasingly broad precedential foundation for future legal challenges.

Not all constitutional challenges, however, use *Lochner*-style doctrines. In at least one case, a court held that occupational licensing laws violate the First Amendment.[180] That case, however, involved the narrow category of tour guide restrictions. Most occupational licensing restrictions do not implicate speech so directly, and the First Amendment therefore provides limited value for challenges in most contexts. A separate potential doctrine is the Privileges and Immunities Clause.[181] Many plaintiffs include this doctrine as one of the claims in their complaints, but no court has recognized it yet.[182] Its continued appearance in complaints, however, bolsters the view that this litigation is attempting to

176. *Id.* at 217–20.

177. *Id.* at 222 n.38, 223, 227 (noting that in light of *Craigmiles* and *Merrifield*, "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate government purpose").

178. *See supra* text accompanying note 164.

179. *See, e.g.*, Appellants' Initial Brief at 46, Halsnik v. Hillsborough Cty. Pub. Transp. Comm'n, No. 2D15-1722 (Fla. Dist. Ct. App. Sept. 22, 2015), 2015 WL 6384498, at *46 (citing *Craigmiles*, *Merrifield*, and *St. Abbey* as support for anti-economic protectionism); *see also* Kansas City Taxi Cab Drivers Ass'n v. City of Kansas City, 742 F.3d 807, 810 (8th Cir. 2013) (noting that challengers cited *Craigmiles*); Appellant's Opening Brief at 11, Young vs. Ricketts, 825 F.3d 487 (8th Cir. 2015) (No. 15-1873), 2015 WL 3644576, at *11 (challenging scope of real estate licensing requirements).

180. Edwards v. District of Columbia, 755 F.3d 996, 1009 (D.C. Cir. 2014).

181. For a recent defense of using this legal strategy, see Caleb R. Trotter, Comment, *Exhuming the Privileges or Immunities Clause to Bury Rational-Basis Review*, 60 LOY. L. REV. 909 (2014). The Supreme Court significantly weakened the Privileges and Immunities Clause in 1872 in the Slaughter House cases, which limited the scope of the clause's protections to rights of national citizenship that had already existed prior to ratification. Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights,* 37 LOY. L.A. L. REV. 1065, 1069–70 (2004).

182. *See, e.g.*, Merrifield v. Lockyer, 547 F.3d 978, 982–84 (9th Cir. 2008) (rejecting claims based on Privileges and Immunities Clause due to the precedent of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

revive dormant libertarian-friendly doctrines. Given the limited relevance of these latter doctrines, the remainder of the Part focuses only on the strengths and weaknesses of the more traditional *Lochner*-esque doctrines of substantive due process and equal protection.

1. The Strengths of Using Constitutional Law

Constitutional doctrines provide several benefits as a means to challenge occupational licensing laws. The first, and most important, is that constitutional law provides the biggest stick. If courts recognize the doctrine's viability, it can invalidate licensing restrictions at any jurisdictional level. With these doctrines, there is little meaningful difference among licensing regimes via state statutes, municipal ordinances, or state regulations. Further, state legislatures cannot overrule constitutional rulings via statute. Constitutional law can thus overcome the political obstacles to reform that public choice theory predicts and that recent economic literature observes.[183] Given these potential benefits, it is understandable why libertarian organizations may want to swing for the fences to obtain the most powerful doctrine possible to protect economic liberty rights.

The second benefit is that constitutional law potentially provides the most political benefits to reformers and challengers. Given the public choice dynamics, the credible threat of legal action is essential to reforming occupational licensing laws. Without it, elected officials have little concrete incentive to reduce or reform irrational licensing laws given the concentrated benefits and diffuse costs. Indeed, in some jurisdictions, legal challenges blazed the trail for political reform that liberalized licensing regulations. For instance, in Washington, the state licensing department exempted African hair braiders from licensing requirements following litigation.[184] Similarly, the city of Milwaukee liberalized its medallion cap policies in response to legal challenges.[185] In this respect, the mere *threat* of litigation can be sufficient to spark reform.

These threats can also provide political cover to reform-minded politicians who would prefer to liberalize licensing laws, but face strong incumbent

183. *See supra* notes 150–159 and accompanying text.

184. Christine Clarridge, *Hair Braider Wins Cosmetology-Licensing Battle With State*, SEATTLE TIMES (Apr. 10, 2015, 6:50 PM), http://www.seattletimes.com/seattle-news/hair-braider-wins-cosmetology-licensing-battle-with-state; *see also* WASH. ADMIN. CODE § 308-20-025 (Supp. 2016).

185. *See* Jason Stein & Bruce Vielmetti, *Assembly Backs New City Taxi Licensing System*, MILWAUKEE-WISCONSIN J. SENTINEL (Feb. 22, 2012), http://www.jsonline.com/news/milwaukee/assembly-backs-new-city-taxi-licensing-system-8c4a2bb-140077583.html [https://perma.cc/2E53-WCAD]; *see also* Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613, 615 (7th Cir. 2016) (outlining history of Milwaukee's liberalization of the market).

opposition. The New Orleans food truck disputes arguably illustrate this dynamic. In 2014, the city liberalized and loosened food truck restrictions in the face of opposition from the local restaurant groups, which are important political actors in New Orleans.[186] In justifying the changes, the mayor noted that the existing restrictions would violate constitutional rights.[187] Admittedly, constitutional law itself is not necessary to provide political cover. In theory, any doctrine capable of invaliding licensing laws would suffice. Constitutional law, however, provides the strongest threat, and one that arguably has more rhetorical power with the public.

Another benefit is that constitutional challenges can help provide a more favorable venue by making it easier to pursue the case in federal court.[188] The idea is that federal judges might be less susceptible to political pressure from established incumbents than state judges—many of whom are elected and thus subject to similar public choice pressures.[189]

2. The Weaknesses of Using Constitutional Law

Despite their potential strengths, constitutional doctrines are ultimately inadequate from both a doctrinal and normative perspective. Ironically, these doctrinal tools are both too weak and too strong to rein in expansive licensing laws.

The main doctrinal problem is that constitutional law is simply too weak to provide viable remedies in most cases.[190] As Aaron Edlin and Rebecca Haw note, "[c]onstitutional suits alone cannot curtail the anticompetitive effects of

186. *See supra* note 5 and accompanying text.

187. *See* Price, *supra* note 6; Richard Rainey, *Mayor Landrieu Vetoes New Orleans Food Truck Law, Says It Would Not Stand Up in Court*, TIMES-PICAYUNE (May 1, 2013, 5:03 PM), http://www.nola.com/politics/index.ssf/2013/05/mayor_landrieu_new_orleans_foo.html [https://perma.cc/WK6W-WDY5].

188. *Cf.* Arbaugh v. Y&H Corp., 546 U.S. 500, 513 (2006) ("A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States.").

189. *See* Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law: 1790–1865*, 19 SUP. CT. ECON. REV. 143, 145 (2011) ("A public choice approach . . . has generally been less successful at explaining the federal judiciary. Public choice theory's comparative weakness at explaining the behavior of the federal courts largely stems from the success of the Founders in insulating federal judges from interest group pressures." (footnote omitted)).

190. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis With Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1057 (2014) (explaining that when a court applies rational basis review, there is little to no analysis beyond finding any possible justification for the statute); Trotter, *supra* note 181, at 928 ("[T]oday, economic liberty is essentially unprotected by the courts.").

professional licensing" because "they are almost impossible to win."[191] To uphold challenges, courts would have to ignore decades of well-established precedent that is highly deferential to the legislature's economic choices. Today, for instance, courts apply rational basis scrutiny to licensing restrictions.[192] Under this standard, the government need only establish that the licensing requirement bears some rational relation to any legitimate state interest.[193] With respect to the latter, the government will be able to identify a legitimate purpose in the overwhelming majority of cases.[194] Only the most incompetent government attorneys will fail to identify a valid interest. Even in *Craigmiles*, the Sixth Circuit arguably ignored alternative, and plausible, state interests, such as protecting groundwater, in holding that economic protectionism was not a legitimate government interest.[195]

Assuming the purposes are legitimate, courts will also rarely find that licensing laws lack any rational relation to that purpose. Courts must not only defer to the elected branches' fact-finding and economic conclusions, but they are also free to create their own reasons if the government fails to provide them. Under long-established precedent, any conceivable relationship is sufficient.[196] These same obstacles exist even under the "rational basis with bite" standard that many plaintiffs and scholars prefer.[197] In sum, constitutional law provides a weak doctrinal toolkit to challenge occupational licensing laws. Courts can only invalidate them by ignoring decades of firmly established, and strongly deferential, precedent.

191. Edlin & Haw, *supra* note 69, at 1134. The authors also note that constitutional litigation is insufficient because "successful challenges vindicate an individual's right to work, not a consumer's right to low prices driven down by robust competition." *Id.*

192. *See, e.g.*, Merrifield v. Lockyer, 547 F.3d 978, 984 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 222–23 (6th Cir. 2002).

193. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("States are accorded with wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with *substantially less* than mathematical exactitude." (emphasis added)); Trotter, *supra* note 181, at 928–29.

194. *See* Sanderson, *supra* note 17, at 465–67.

195. *See* Brianne J. Gorod, Note, *Does* Lochner *Live?: The Disturbing Implications of* Craigmiles v. Giles, 21 YALE L. & POL'Y REV. 537, 542–43 (2003).

196. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 309 (1993) ("The question before us is whether any conceivable rational basis for justifying this [regulation] . . . .").

197. *See, e.g.*, Florman, *supra* note 75, at 754–55; Raynor, *supra* note 50, at 1065–69 (arguing that "[l]icensing regulations are . . . strong candidates for review under the second-order rational basis test"). The second-order rational basis test, or rational basis with bite, is a "more demanding inquiry into the means and ends of a challenged statute." Raynor, *supra* note 50, at 1072 & n.43. Rational basis with bite refers to a standard of review that is more rigorous and less deferential than ordinary rational basis review. Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1363–64 (2013).

If, however, courts nonetheless chose to ignore this precedent, the explosive doctrinal expansion would be normatively problematic. It would also become a weapon too powerful for courts to wield responsibly. The central problem is that today's version of "local *Lochner*" cannot escape the problems that plagued the traditional *Lochner* regime. The literature surrounding *Lochner* is too voluminous to recount here. The core critiques, however, focus on the courts' lack of deference to the legislature's economic choices and conclusions.[198] In short, *Lochner* transforms courts into super-legislatures free from democratic control. And while recent literature has complicated the picture of how contemporaries actually understood *Lochner*, the critique of insufficient deference stands on its own.[199]

Of course, the very notion of a higher constitutional law implies that courts can and should sometimes invalidate legislative acts. This power, however, is more problematic in the economic arena for several reasons. First, courts lack the institutional competence to make economic judgments that override the compromises and policy choices that elected branches make.[200] Indeed, both the *Craigmiles* and *Merrifield* courts relied on entirely speculative conclusions about health and safety. In *Merrifield* in particular, the court's hypothetical assumptions about when pest controllers may or may not encounter pesticides were almost comically speculative.[201] While the courts' rejection of legislative judgment is troubling on its own, constitutionalizing these decisions insulates them from democratic control and accountability. If legislatures ultimately disagree with the judiciary's conclusions, they cannot override them through new legislation or regulations.

This latter point is crucial because a revived *Lochner* doctrine could easily expand beyond the occupational licensing context. The logic of these doctrines extends to other regulatory realms that impact one's economic freedom, such as labor, health, and environmental restrictions. Occupational licensing could thus validate the doctrine and make it respectable to use in other contexts. And once unleashed, the doctrines could not be checked by legislative actions.

198. *See* Colby & Smith, *supra* note161, at 541–42; Howard Schweber, Lochner v. New York *and the Challenge of Legal Historiography*, 39 LAW & SOC. INQUIRY 242, 253–54 (2014) (noting that some may be dissatisfied with *Lochner*'s "closer and more skeptical scrutiny to [the] economic regulation [in this case] than they did to others" without much, if any, explanation).

199. For an analysis of various revisionist accounts, see Schweber, *supra* note 198, at 249–50, 253–70.

200. *See* Gary Peller, *A Subversive Strand of the Warren Court*, 59 WASH. & LEE L. REV. 1141, 1145 (2002); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 991 (2006) (arguing that courts lack the competence to "substitut[e] its policy preferences for those of the legislature"); Sanderson, *supra* note 17, at 456–57.

201. *See* Merrifield v. Lockyer, 547 F.3d 978, 990–91 (9th Cir. 2008).

Recognizing these problems, recent literature has attempted to provide alternative doctrinal and normative foundations for constitutional challenges to licensing laws. One such attempt is conceptualizing the right to work as a type of personal or even fundamental right that triggers higher scrutiny.[202] For instance, some prefer applying a more rigorous rational basis with bite (or second-order rational basis) to occupational licensing laws.[203] In doing so, some have attempted to treat occupational licensing as a type of "animus" against excluded parties who seek to work in a certain profession.[204] This step would thus ground occupational licensing cases within the same context as recent same-sex discrimination cases.[205]

Despite their creativity, these efforts are unconvincing. Applying rational basis with bite is inconsistent with both the doctrinal and normative assumptions of modern equal protection law. At its most fundamental, the justification for rational basis with bite is to protect disfavored and disenfranchised minorities. The famous *Carolene Products* footnote provides much of the normative justification for these judicial interventions.[206] And indeed, the recent second-order rational basis cases tend to invalidate laws that harm disfavored groups and that impede personal relationships.[207]

Occupational licensing laws, however, are very different. For one, these laws—as public choice scholars recognize—are the very opposite of what *Carolene Products* fears.[208] These laws *favor* a numerical minority at the expense of the broader public. Despite public choice insights, courts have historically assumed that such laws can be "rectified by the democratic processes."[209] Further, it strains reason to include aspiring entrepreneurs in the same category as racial minorities, same-sex couples, and other discrete groups that have endured generations of exclusion and discrimination. Courts have long recognized a qualitative distinction between laws affecting economic rights and laws

202. *See, e.g.*, Florman, *supra* note 75, at 736–38 (arguing that the right to earn a living could fit under the framework of fundamental rights set up by the analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997)), 741; Raynor, *supra* note 50, at 1068.

203. *See supra* text accompanying note 197.

204. *See* Raynor, *supra* note 50, at 1093–94 (positing that the non-traditional rational basis with bite standard, as exemplified by *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), could apply similarly to licensing regimes as they "are frequently predicated on animus towards the excluded class").

205. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

206. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, 152 n.4 (1938).

207. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

208. *See* Menashi & Ginsburg, *supra* note 190, at 1086–89, 1087 n.139 (noting that *Carolene*'s call to protect the "discrete and insular minorities," in licensing regimes would not be in accordance with the underlying principles that gave rise to this language); *see Carolene*, 304 U.S. at 152 n.4.

209. *Lawrence*, 539 U.S. at 579–80 (O'Connor, J., concurring) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

affecting one's intimate personal relationships.[210] That distinction may lack a strong metaphysical basis, but it is one recognized for decades and one that can be abandoned only with a sharp break from decades of precedent.

The use of fundamental rights is an even more problematic analogy. Doctrinally, the test for determining fundamental rights depends upon the ability to carefully describe the right and to show that the right is firmly rooted in history.[211] But, as even Marc Florman (a supporter of expanding economic liberty doctrines) recognizes, economic protectionism is firmly rooted in our nation's history.[212] While it is conceptually possible to expand constitutional law in this way, doing so would again be an extreme break from history and doctrine.

In short, the constitutional law toolkit just is not very helpful. The modern doctrine is too weak. An expanded doctrine would be too strong, and it would revive all the problems that plagued the old *Lochner* regimes.

C. Antitrust Law

Antitrust law provides an alternative that has several advantages over constitutional law. Antitrust doctrines are more naturally suited for the types of economic questions that licensing cases raise. Recent court decisions and regulatory enforcement have also given new momentum to antitrust challenges of occupational licensing laws. Despite these promising developments, however, antitrust law remains inadequate on its own. This Part examines these strengths and weaknesses in more detail.

1. The Strengths of Using Antitrust Law

At the most general level, protecting competition is at the heart of antitrust law.[213] It does so by preventing various types of market power abuses that would stifle competition.[214] Interestingly, antitrust law generally prohibits many of

210. Florman, *supra* note 75, at 762–64.
211. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).
212. *See* Florman, *supra* note 75, at 742–43 (noting that some argue that "state-sponsored monopolies and economic protectionism are as much part of the American tradition as the Ford pickup"). One potential response, however, is that courts' analysis would depend on the level of generality it uses. For instance, while economic protectionism as a general matter is firmly rooted in history, the regulation of specific activities such as hair-braiding might not be. I thank the editors of the *UCLA Law Review* for raising this interesting point.
213. *E.g.*, United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982) ("[T]he issue of competition and the effects on competition . . . are at the heart of the antitrust laws . . . ."); Steven Semeraro, *Should Antitrust Condemn Tying Arrangements That Increase Price Without Restraining Competition?*, 123 HARV. L. REV. FORUM 30, 36–37 (2010).
214. *Cf.* A. Michael Ferrill et al., *Antitrust and Consumer Protection*, 64 SMU L. REV. 19, 19–20 (2011).

the actions that occupational licensing boards routinely adopt, such as entry restrictions, price-fixing, and attempts to maintain monopolies.[215] Indeed, Aaron Edlin and Rebecca Haw have even compared occupational licensing to a type of cartel designed to limit competitive entry.[216] Licensing requirements, they explain, are actually more effective than traditional cartels because licensing eliminates the ability to defect.[217]

Accordingly, one advantage of antitrust law is that the doctrine is better suited than constitutional law to challenge occupational licensing. On a more specific level, antitrust doctrines themselves are more finely calibrated to address the specific types of questions that overbroad licensing raises. The rule of reason, for instance, provides courts with a tool to balance the procompetitive and anticompetitive effects of licensing restrictions.[218] Recognizing these advantages, Edlin and Haw proposed that courts apply a modified rule of reason doctrine to occupational licensing challenges.[219] They reject constitutional approaches because "they are almost impossible to win."[220] Indeed, constitutional doctrines are not only more deferential, but they were never intended to apply to these types of questions. Using them often feels like squeezing a square peg in a round hole.

In addition, recent legal developments have given new momentum to antitrust challenges. The Federal Trade Commission (FTC) has recently become more active in using its antitrust enforcement authority to challenge irrational licensing and draw public attention to the issue.[221] The Supreme Court also strengthened the ability of both the FTC and private parties to bring

215. Ilya Shapiro, *Protecting Economic Liberty by Other Means*, 10 N.Y.U. J.L. & LIBERTY 118, 118 (2016).

216. *See* Edlin & Haw, *supra* note 69, at 1102.

217. *See id.* at 1133.

218. *See* Thomas C. Picher, Note, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT L. 5, 10–11 (1997) ("The rule of reason analysis balances the anti-competitive and pro-competitive effects of a given restraint . . . .").

219. Edlin & Haw, *supra* note 69, at 1145–50. Specifically Edlin and Haw's vision involves:

> [A] modified rule of reason that would allow licensing boards to cite public safety and quality enhancement justifications even when those alleged benefits flow directly from eliminating or limiting competition. When courts balance the competitive effects of a licensing restriction, they should place service quality and public safety benefits on the procompetitive side of the scale.

Id. at 1146.

220. *Id.* at 1134.

221. *See License to Compete: Occupational Licensing and the State Action Doctrine Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 4–7, 4 n.22 (2016) (prepared statement of the Federal Trade Commission (FTC)) (providing several examples of the FTC's efforts in challenging suspect licensing regimes over the last forty years); *2014 Hearing*, *supra* note 64, at 9–16.

occupational licensing challenges in *N.C. Board of Dental Examiners v. FTC*, a case that could open the door to far more aggressive challenges.[222]

N.C. Dental involved a licensing restriction on inexpensive teeth-whitening services. It was a typical example of regulation via agency interpretation. North Carolina's statute requires a license to perform "[t]he practice of dentistry."[223] The state dental board construed this language to include teeth whitening even though the practice is neither dangerous nor explicitly mentioned in the governing statute. It then sent several cease-and-desist letters to parties performing these services.[224] The board itself consisted almost entirely of practicing dentists who were, in turn, elected by fellow practitioners rather than being appointed by an executive official.[225] The FTC alleged that this exclusion was an uncompetitive practice and brought an enforcement action under its Section 5 antitrust authority. The North Carolina board challenged the agency, claiming that it enjoyed state-action *Parker* immunity from antitrust enforcement.[226] The premise of *Parker* immunity is that antitrust oversight is inappropriate because state agencies are politically accountable to elected officials and voters.[227]

The Supreme Court rejected the State's arguments. In doing so, it limited the ability of quasi-public licensing boards to claim state action immunity. The Court held that these types of boards could claim *Parker* immunity only if there is "active supervision" by the state.[228] Here, the state did not supervise the board, and *Parker* immunity was therefore unavailable.[229]

For purposes here, the key move in *N.C. Dental* was the narrowing of *Parker* immunity. This doctrine had been a key obstacle to applying antitrust law to occupational licensing challenges.[230] Under this doctrine, boards

222. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).
223. N.C. GEN. STAT. § 90-22(a) (2015).
224. *N.C Dental*, 135 S. Ct. at 1108.
225. N.C. GEN. STAT. § 90-22(b) (2015); Volokh, *supra* note 70, at 937.
226. *N.C. Dental*, 135 S. Ct. at 1108–09; Parker v. Brown, 317 U.S. 341 (1943).
227. *See N.C. Dental*, 135 S. Ct. at 1111; Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 696 (1991).
228. *N.C. Dental*, 135 S. Ct. at 1112. In addition to active supervision, the restraint must also be "clearly articulated and affirmatively expressed as state policy." *Id.* at 1110 (quoting FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010 (2013)).
229. *Id.* at 1116–17.
230. *See* David A. Hyman & Shirley Svorny, *If Professions Are Just "Cartels by Another Name," What Should We Do About It?*, 163 U. PA. L. REV. ONLINE 101, 105 (2014) (noting that state action immunity has been a "substantial impediment"); Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism:* North Carolina Board of Dental Examiners v. FTC, CATO SUP. CT. REV., 2014–2015, at 195, 196 (finding that *Parker* "has had unfortunate consequences for the

could successfully claim that they were arms of the state entitled to *Parker* immunity. This immunity had applied even though the board was staffed by private practitioners with clear conflicts of interest. The immunity had also been easy to establish. The boards only needed to show that (1) the challenged policy was clearly articulated by the state and (2) the board was actively supervised by the state. These requirements, however, were largely toothless under courts' traditional application of the doctrine.[231] As a result, the licensing boards had the best of both worlds. On the one hand, they enjoyed *Parker* immunity from antitrust actions. On the other, they lacked the democratic accountability that is necessary to justify *Parker* immunity in the first place. This problem was particularly acute in North Carolina where fellow practitioners elected the board, and the board was effectively unsupervised by the elected branches.[232]

The Court, however, made *Parker* immunity more difficult to obtain by requiring a greater showing of "active supervision" by the state. The Court's logic was straightforward. If *Parker* immunity assumes political accountability, the boards cannot invoke it unless someone with political accountability is actually supervising them.[233] By narrowing state action immunity, this holding not only opens the door for greater private enforcement, it also helps the FTC in its enforcement efforts.

2. The Weaknesses of Using Antitrust Law

Despite these promising developments, however, antitrust law remains an inadequate tool in several respects for challenging licensing laws. First, antitrust enforcement only works in practice against one type of licensing regime—restrictions via agency interpretation. While municipalities do not enjoy complete freedom from antitrust enforcement, it is far more difficult under current doctrine to defeat their immunity.[234] The Supreme Court even affirmed in *N.C. Dental* that municipalities enjoy greater immunity than state licensing boards under these doctrines.[235]

marketplace thanks to regulatory capture—the tendency of regulatory bodies to be dominated by the private entities they purport to regulate"); Sanderson, *supra* note 17, at 468–73.

231. *See* Edlin & Haw, *supra* note 69, at 1118–21; Sandefur, *supra* note 230, at 205–08.

232. *See supra* text accompanying note 225; *see also N.C. Dental*, 135 S. Ct. at 1108.

233. *N.C. Dental*, 135 S. Ct. at 1112–13, 1116; Edlin & Haw, *supra* note 69, at 1136–39.

234. *See* Steven J. Cernak, *Slower Crony Capitalism: The Immediate Aftermath of* NC Board, ANTITRUSTCONNECT BLOG (Aug. 19, 2015), http://antitrustconnect.com/2015/08/19/slower-crony-capitalism-the-immediate-aftermath-of-nc-board [https://perma.cc/N5UZ-V3VH].

235. *See N.C. Dental*, 135 S. Ct. at 1112–13 ("[M]unicipalities are electorally accountable and like the kind of private incentives characteristic of active participants in the market.").

Even within this category, it is unclear how effective antitrust enforcement will be in most cases. While *N.C. Dental* strengthened the doctrine, it remains far too limited to provide meaningful challenges in most cases. One problem is simply the vagueness of *N.C. Dental* on many key questions. The case's effectiveness will depend on how future courts interpret what "active supervision" means. The Court provided little guidance to determine how much supervision is enough—and whether certain structures are categorically acceptable or problematic. It is possible, for instance, that *N.C. Dental* is a narrow holding, largely limited to its specific and somewhat unique facts.[236] The North Carolina dental board was elected by private parties rather than appointed by a government official.[237] As Edlin and Haw note, however, many boards are appointed by political officials.[238] That alone may be sufficient supervision in most instances.

It may also be easy for states to comply with *N.C. Dental* or to evade the spirit of its holding through formalistic steps. For all its value, *N.C. Dental* focused more on procedure and the issues of *whom*.[239] It did not focus on the more important question of *what*—that is, on the substance of the regulations themselves. Thus, states could likely comply by adding a new procedural layer on top of the current regime, such as an appeals or appointment process. Indeed, some states have already taken these very steps in response to *N.C. Dental*. In Connecticut and Oklahoma, the governments took steps to expand (at least on paper) the ability of public officials to review decisions by practitioner-composed boards.[240]

A broader problem with antitrust enforcement is that it is difficult to apply and expensive to enforce. Antitrust litigation itself is notoriously expensive,

236. *See* Edlin & Haw, *supra* note 69, at 1126–27 (addressing similar uncertainty in the earlier Fourth Circuit case); *The Supreme Court, 2014 Term—Leading Cases*, 129 HARV. L. REV. 181, 371 (2015) ("Future courts may be tempted to interpret the majority's test narrowly and apply the active supervision requirement only to boards with a majority of active participants in the precise market being regulated.").

237. *See supra* note 225.

238. *See* Edlin & Haw, *supra* note 69, at 1127 n.206, 1157 app., 1161 app. (noting that of the eighty-seven boards located in Florida and Tennessee, "[a]lmost all of the licensing boards . . . are appointed by the govenor").

239. *See* Jeff John Roberts, *Supreme Court Ruling Gives Startups a New Weapon Against Regulators*, FORTUNE (Aug. 11, 2015, 6:01 AM), http://fortune.com/2015/08/11/supreme-court-startups [https://perma.cc/QE3C-H4HD] ("The ruling, though, doesn't take aim at regulations themselves. Instead, the Supreme Court focused on who can do the regulating.").

240. *See* Cernak, *supra* note 234 (noting that Oklahoma requires licensing boards to submit their actions for approval by the state's attorney general and that Connecticut allows for any complaint regarding the boards under the state's Department of Public Health will automatically be reviewed by the Commissioner of Public Health).

which imposes barriers to parties with fewer resources.[241] Even assuming a party had infinite resources, antitrust cases would still be difficult to win. Assuming the initial hurdle of state action immunity can be cleared, a challenger must still establish violations of the substantive antitrust doctrines. While superior to constitutional law, rule of reason review has significant weaknesses in this context. The primary problem is that courts generally limit it to a review of competitiveness. Social utility considerations—such as health and safety—are often irrelevant to, and excluded from, rule of reason review.[242] Many licensing rules, however, only make sense in terms of health and safety. These deficiencies are likely why Edlin and Haw proposed a novel "modified" rule of reason in this context.[243] The current rule of reason doctrine would simply be too limited in scope. More broadly, antitrust violations often require complicated economic analyses and market failure determinations. It is unclear whether the specific tradeoffs in licensing regimes are even amenable to this type of analysis. Simply put, how do you measure health and safety benefits against the economic impacts of suppressing competition?

To be clear, I am not opposing antitrust challenges. *N.C. Dental* is a welcome development, and one that private parties and the FTC should use. My more narrow point is that antitrust remains an inadequate tool. For everyday challenges from individual parties, a more user-friendly doctrine would work better. In the next Part, I argue that administrative law provides the best doctrinal toolkit for these challenges.

IV. USING ADMINISTRATIVE LAW TO CHALLENGE OCCUPATIONAL LICENSING

This Part presents the Article's central claim—that administrative law doctrines provide the best tools for challenging overbroad licensing regimes. Below, I apply this doctrinal toolkit to each of the three categories of licensing laws. I then outline the theoretical and practical advantages of applying these doctrines to each category. In sum, my proposal strikes a better balance by increasing judicial scrutiny while simultaneously respecting legislative supremacy.

241. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007); Sharon E. Foster, *Systemic Financial-Service Institutions and Monopoly Power*, 60 CATH. U. L. REV. 357, 394–95 (2011).

242. *See* Edlin & Haw, *supra* note 69, at 1145–48 (noting that social welfare justifications like health and safety are normally not considered as procompetitive effects in balancing under the rule of reason). See *supra* notes 218–219 for a fuller discussion of the rule of reason in the context of licensing.

243. *See id.* at 1148; *see also* text accompanying *supra* note 219.

A. Municipal Restrictions

The first category is municipal licensing. I argue that courts should apply a form of arbitrary and capricious (or hard look) review under *state* law to these licensing regimes. The doctrines are not only a better fit for the specific public choice concerns associated with licensing; they will be more practically effective and democratically legitimate than other doctrines. This Part provides an overview of hard look doctrines and explains how they can be imported to licensing challenges under state law. It then outlines the normative and practical benefits of this approach.

At the federal level, the Administrative Procedures Act (APA) prohibits agency actions that are "arbitrary" and "capricious."[244] Its original New Deal era drafters intended this standard to be very deferential.[245] The doctrine evolved, however, in response to growing concerns about agency capture in both courts and the legal academy.[246] Through the 1960s and 1970s, the D.C. Circuit transformed the doctrine into a less deferential one to ensure that agency actions were the product of reasoned decisionmaking.[247] Courts started requiring agencies to take a "hard look" at the issues before them. The Supreme Court ratified this doctrinal evolution in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*[248] and hard look review is currently the most common reason why courts vacate federal agencies' actions.[249]

Today, hard look review generally applies to an agency's discretionary policy choices—agency actions that the law authorizes, but does not necessarily require.[250] For instance, assume that the Environmental Protection Agency (EPA)

244. 5 U.S.C. § 706(2)(A) (2012).

245. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1327 & n.451 (1999).

246. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 386–87 (7th ed. 2011); Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 727 (2014) (noting these concerns produced a "movement in the lower courts to develop a more rigorous approach to arbitrary and capricious review in hopes of protecting the public against imbalanced political influences on agency conduct").

247. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15–16 (2009); *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007); *cf.* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761–62 (2008).

248. Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42–44 (1983).

249. *See* Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn From Administrative Law*, 95 GEO. L.J. 269, 305 & n.190 (2007); Miles & Sunstein, *supra* note 247, at 762–63.

250. *See* Benjamin & Rai, *supra* note 249, at 304 ("If an agency fails to offer an adequate explanation for its rejection of . . . countervailing considerations, or promulgates a regulation that fails to take into account relevant factors, a court will invalidate the action."); Gary Lawson, *Outcome, Procedure and*

enacts a regulation that imposes caps on a category of carbon emissions. Courts can review several different dimensions of this decision. First, they may review whether the EPA followed the correct *procedures* before acting. Courts may also assess whether the EPA had *substantive* statutory authority to act in the first place. The EPA's decision, however, also includes a discretionary policy choice to set the caps at X rather than Y or Z, even though the agency had statutory authority to adopt any of these three choices. Courts review this discretionary decision under hard look review.

Judicial review of policy decisions, however, raises several challenges. Hard look doctrines have therefore evolved as a compromise between at least two unappealing options.[251] On the one hand, courts could review the actual substance of the policy decision—they could determine whether Cap X is preferable to Cap Y in the example above. This aggressive review, however, is problematic. Courts lack institutional competence to second-guess expert agencies. More broadly, this approach would effectively transform courts into agencies and violate separation of powers principles and the APA.[252]

At the other extreme, courts could defer to any policy decisions that fall within an agency's statutory authority. This broad deference is likely what the APA's drafters originally intended. Under this approach, courts would only review whether an action was within the agency's statutory delegation. Such broad deference, however, would allocate enormous power to agencies. The lack of meaningful judicial oversight would also provide greater opportunities for agencies to enact the private preferences of organized interest groups.[253]

Hard look review therefore strikes a balance between these two options by examining only the *process* of decisionmaking to ensure it was rational. It is therefore a separate category of judicial review that is neither purely procedural nor substantive.[254] It aims to find a middle ground between extreme deference

Process: Agency Duties of Explanation for Legal Conclusions, 48 RUTGERS L. REV. 313, 341 (1996); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1733 & n.41 (2011).

251. The following discussion of the hard look doctrine as a compromise between unappealing options is heavily indebted to Gary Lawson's work. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 726–37 (7th ed. 2016); Lawson, *supra* note 250, at 321–25 (illustrating four different options for a court to review agency decisions).

252. *See* LAWSON, *supra* note 251, at 728–29; Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 882 (2007).

253. LAWSON, *supra* note 251, at 727–28.

254. *See* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 820 (2d ed. 2013); LAWSON, *supra* note 251, at 724–25; Lawson, *supra* note 250, at 318; Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 826 & n.121 (1996) (noting that the hard look doctrine is a "process review," which is "distinct from the review of both outcomes (for

and illegitimate judicial activism. Courts do not (in theory) question the substance of an agency's decision, nor can they demand different policy choices.[255] Instead, they examine the process by which the agency makes its decision. So long as the action results from reasoned decisionmaking, courts uphold it even though they might have preferred a different policy decision.[256] If, for instance, the EPA had thrown darts to determine specific emission caps, that decisionmaking process would be irrational even if the statute authorized that specific cap and even if the EPA complied with all necessary procedures.

This balance between extreme deference and aggressive judicial oversight is precisely what occupational licensing challenges most need—and what other doctrines lack. Admittedly, many municipal licensing laws are both rational and in the public interest. Many, however, have little rational connection to their stated purpose, but are instead transparently protectionist. Courts have struggled with these laws because they lacked adequate doctrines to address them. Instead of the feast-or-famine options that constitutional doctrines provide, hard look offers courts a more finely adjusted set of doctrinal tools to analyze whether rational foundations actually exist. Indeed, unlike other doctrines, modern hard look review evolved to address these specific types of problems.

There is, however, an initial obstacle to overcome before courts can import federal hard look doctrines into state law challenges of licensing laws. That obstacle is finding a positive source of law to serve as the foundation. I propose that the foundational legal authority comes from the states' original delegation of power to municipal governments. Municipalities are not sui generis entities, but are instead creations of the state. They therefore derive power from state government delegations.[257] In this sense, they are more similar to administrative agencies than legislative bodies, even though they admittedly have characteristics of both.

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substantive reasonableness) and procedures used"); William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 419 (2015).

255. *See* Davis v. Mineta, 302 F.3d 1104, 1114 (10th Cir. 2002); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 156 (1991).

256. Sangre de Cristo Commc'ns, Inc. v. FCC, 139 F.3d 953, 957 (D.C. Cir. 1998) ("We review [agency] decisions 'under the arbitrary and capricious review standard' and 'do not substitute [our] judgment for that of the agency' but rather look to see 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'") (alterations in original) (quoting Freeman Eng'g Assocs. v. FCC, 103 F.3d 169, 178 (D.C. Cir. 1997).

257. GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 139 (4th ed. 2006) ("[T]he dominant view that cities . . . are mere delegates of the state . . . . [that the cities] do not possess reserved powers . . . ."); EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.3, at 383 (3d ed., rev. vol. 2006) ("[M]unicipalities have no inherent powers and possess only such powers as are expressly conferred by statute . . . .").

States generally delegate this power through statutes or constitutional provisions.[258] Many state courts have explained that this delegation, while extremely broad, is not unlimited. Specifically, it is subject to an implied restriction against arbitrary and capricious actions.[259] For instance, the Idaho Supreme Court has explained that the general police power granted to municipalities is "limited by the restriction that ordinances enacted under the authority conferred by this constitutional provision must not be unreasonable or arbitrary."[260] Similarly, the Virginia Supreme Court has noted the "implied restriction that the city's enactments will be reasonable [and] consistent with the general law and policy of the state . . . ."[261] In short, the grant of power contains limits on that power as well.

I propose that courts ground hard look review of occupational licensing within this inherent restriction. Admittedly, courts have not applied this inherent prohibition to the occupational licensing context. And to be fair, courts are very deferential when reviewing municipal ordinances. Indeed, courts usually identify the implicit restriction in cases that uphold municipal ordinances and explain that they enjoy strong presumptions of validity.[262] The implied prohibition, however, nonetheless exists, and thus provides a positive legal foundation for courts that seek either state law alternatives to constitutional challenges or doctrines with more bite. This evolution would also have ample precedent. The federal APA began as a deferential standard that evolved teeth in response to the very types of agency capture concerns present with occupational licensing.[263]

258. *See* JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH 68–69 (2000); MCQUILLIN, *supra* note 257, at § 10.3, at 383–84.

259. *See* MCQUILLIN, *supra* note 257, at § 18.3, at 751. For example, courts in Alabama, Arkansas, Idaho, Illinois, Kentucky, Louisiania, Minnestoa, Missouri, New Jersey, Vermont, and Wisconsin have subscribed to this reasoning. *See, e.g.*, St. Clair Cty. Home Builders Ass'n v. City of Pell City, 61 So. 3d 992, 1007–09 (Ala. 2010); Four Cty. (NW) Reg'l Solid Waste Mgmt. Dist. Bd. v. Sunray Servs., Inc., 971 S.W.2d 255, 260 (Ark. 1998); City of Lowell v. M & N Mobile Home Park, Inc., 916 S.W.2d 95, 97 (Ark. 1996); Ciszek v. Kootenai Cty. Bd. of Comm'rs, 254 P.3d 24, 32 (Idaho 2011) ; Opyt's Amoco, Inc. v. Vill. of S. Holland, 595 N.E.2d 1060, 1062 (Ill. 1992); Rottinghaus v. Bd. of Comm'rs, 603 S.W.2d 487, 489 (Ky. Ct. App. 1979); City of Crowley Firemen v. City of Crowley, 264 So. 2d 368, 371 (La. Ct. App. 1972), *aff'd*, 280 So.2d 897 (La. 1973); Constr. & Gen. Laborers Union Local 563v. City of St. Paul, 134 N.W.2d 26, 31–32 (Minn. 1965); Schlett v. Antonia Fire Prot. Dist., 685 S.W.2d 589, 591 (Mo. Ct. App. 1985); N.J. Shore Builders Ass'n v. Twp. of Jackson, 970 A.2d 992, 1002 (N.J. 2009); Twietmeyer v. City of Hampton, 497 S.E.2d 858, 860 (Va. 1998); City of Milwaukee v. Hampton, 553 N.W.2d 855, 860 (Wis. Ct. App. 1996).

260. Plummer v. City of Fruitland, 87 P.3d 297, 300 (Idaho 2004) (quoting Sanchez v. City of Caldwell, 20 P.3d 1, 4 (Idaho 2001)).

261. Nat'l Linen Serv. Corp. v. City of Norfolk, 83 S.E.2d 401, 403 (Va. 1954).

262. *See, e.g.*, *M & N Mobile*, Inc., 916 S.W.2d at 98.

263. *See* text accompanying *supra* note 246.

Courts would not need to import the entire line of hard look precedent. Because the positive source of law is not the APA, courts would be free to use a more narrow hard look review that focuses on the rationality of the link between the ordinance and its justifications. At the federal level, by contrast, courts applying the APA use several different criteria to determine if an agency exercised reasoned decisionmaking.[264] In fact, the American Bar Association has identified nearly a dozen potential grounds courts cite when invalidating agency actions using hard look doctrines.[265] Some criteria seem more procedural in that they focus on whether the agency created an adequate record, explored potential alternatives, and explained their choices adequately. Other criteria focus on whether an agency can demonstrate a rational foundation for its decision, whatever that decision may be.[266]

The complexity of modern hard look review, however, is less of a problem for licensing challenges at the municipal level. The only dimension of hard look review I propose importing from federal law is the relationship between the law and the ostensible justification for it.[267] I do not propose that courts start imposing various procedural requirements that would force city governments to develop records or initiate notice-and-comment rulemakings, though such measures would be helpful for developing better licensing regimes and deterring excessive protectionism. In short, I only propose that courts find a rational connection between the rule and the reasons offered for that rule. Governments would remain free to offer any justifications they want, but those justifications must be the product of a reasoned decisionmaking process.

For instance, assume that courts are reviewing a restriction that food trucks cannot operate within four hundred feet of a restaurant, or that ride-sharing services must charge a mandatory minimum to go to the airport. The government may choose to defend these measures by citing public health and quality of service. Challengers, however, could produce evidence that these justifications have no rational connection to the ordinance. While municipalities would enjoy presumptions of legality,[268] many laws would be impossible for the municipality to defend. For instance, establishing a minimum distance from an

264. BREYER ET AL., *supra* note 246, at 424–25; Virelli, *supra* note 246, at 737–39 (noting the use of "first-order" and "second-order" review within the hard look doctrine and their respective differences).

265. A.B.A., *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 42–43 (2002).

266. *See* Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 143–44 (2014); Virelli, *supra* note 246, at 758–60.

267. *See* text accompanying *supra* note 263.

268. *See supra* note 262 and accompanying text; *see also* MCQUILLIN, *supra* note 257, at § 18.3, at 755.

existing restaurant has no relevance to health or quality. Similarly, a minimum fare—particularly one that is different than incumbent taxis—has nothing to do with quality of service. These are simply protectionist measures.

Assuming that courts have the necessary legal authority, adopting hard look review would have numerous practical and normative benefits. Practically, the most important benefit is that hard look challenges would be more likely to succeed. The doctrine itself is less deferential than modern constitutional doctrines. Further, it would provide courts with a less controversial means to invalidate irrational licensing under state law. As noted earlier, constitutional challenges require courts either to be extremely deferential or to break radically with decades of post-New Deal precedent. Many judges, understandably, are wary of perceptions of reviving *Lochner* and drawing attention to themselves. Tellingly, every single federal appellate case invalidating licensing laws expressly disavowed *Lochner*.[269] Hard look, by contrast, gives courts a toolkit that not only provides greater scrutiny, but allows their decisions to remain subject to democratic control if the elected branches disagree. With these safety nets in place, courts would feel more comfortable applying more exacting scrutiny to these challenged ordinances—particularly for the most egregiously protectionist ones.

Hard look review can also be used in a flexible way to distinguish legitimate restrictions from more irrational ones. For instance, it would be easy for city governments to justify certain regulations about food safety or proper waste disposal methods. Even proximity requirements from stop signs and corners may be valid. Hard look review, however, would enable courts to focus in on specific measures, such as proximity requirements, that become so excessive that they morph from safety protections into protectionist measures.

Hard look cases are also comparatively easy to bring. Antitrust law, by contrast, is expensive and can require sophisticated economic analyses of market failures, consumer welfare, and other complicated questions.[270] The expense and complexity of these doctrines deter parties with fewer resources from bringing these challenges. They also present challenges for courts. Hard look doctrine, by contrast, is familiar to any judge or lawyer with basic exposure to administrative law. Challenging a six hundred-foot proximity law for food trucks would not

269. *See* Menashi & Ginsburg, *supra* note 190, at 1103; *see also* St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) ("Nor is the ghost of *Lochner* lurking about."); Merrifield v. Lockyer, 547 F.3d 978, 992 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) ("Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies.").

270. *See* text accompanying *supra* note 241.

require a sophisticated market analysis to establish its irrationality. Courts could also easily perform a granular analysis to determine which challenged regulations are irrational.

The existence of a more viable legal doctrine also creates a more credible threat that would generate political reform and deter future irrational licensing laws. If hard look is more likely in practice to invalidate irrational licensing, then it provides more leverage to demand political reform. Elected officials sympathetic to reform can cite this stronger doctrine to provide political cover for changes that will anger incumbent interest groups. Raising the costs of irrational licensing also gives municipalities incentives to avoid enacting them in the first place.

In addition to these practical benefits, there are several normative benefits as well. First, hard look review would be far more democratically legitimate and respectful of the elected branches than constitutional law. As noted above, hard look reviews the decisionmaking process, rather than the substance, of the municipality's decision.[271] It does not require the municipality to adopt any particular purpose or policy. Instead, it simply accepts the purposes the state adopts and examines whether this justification rationally relates to the licensing law.

Hard look review is also more normatively acceptable because it is based on a theory of delegated authority. At first glance, my proposal to apply hard look doctrines seems similar to applying revived *Lochner* doctrines. While both admittedly reallocate additional power to courts, there are fundamental distinctions between the two approaches. Constitutional challenges require courts to override the decisions and judgments of the elected branches. With hard look, courts are technically ensuring that municipalities act consistent with their delegated authority under state law.[272] In this respect, hard look review reinforces legislative supremacy in ways that *Lochner* cannot. Further, in many jurisdictions, there are statutory construction principles (related to a concept called Dillon's Rule) that require municipal authority to be narrowly construed to ensure the authority remains within its delegated power.[273]

271. *See* text accompanying *supra* note 255.

272. *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 120, 131 (2001); *cf.* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post*-Chevron *Era*, 32 B.C. L. REV. 757, 829 (1991); State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44 n.9 (1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

273. *See* FRUG, *supra* note 257, at 138–39 (discussing Dillon's Rule and explaining it is "a rule that specifies the extent to which local government power is restricted to actions authorized by enabling legislation enacted by the state legislature").

More importantly, hard look review remains subject to legislative supremacy and democratic accountability. Under my proposal, the state legislature—not courts—can always get the last word.[274] Because courts are interpreting implicit delegations of power, state governments remain free to override these decisions through explicit legislation.[275] If the state government wants to reverse a court's decision about six hundred-foot proximity rules for food trucks, it can do so. If, by contrast, courts use *Lochner*-esque constitutional doctrines, then state governments could not override these legislative decisions.

State legislatures can therefore have the last word under any type of delegated authority to municipalities.[276] In states that delegate authority through *statutes*, the legislative authority is straightforward. If statutes prohibit something, they can just as easily authorize it. The result is the same in states whose *constitutions* delegate authority to municipalities, though the issue is slightly more complicated. The basic idea is that explicit legislative action trumps implicit limitations on municipalities. Even in jurisdictions that create constitutional "home rule" powers, state statutes still trump this local authority.[277] State legislative action also remains subject to much stronger presumptions of legality than municipalities. For instance, because of varying levels of deference, a six hundred-foot proximity rule could be irrational for purposes of municipal law, but conceivably rational for a state legislature, given the need to avoid *Lochner*-type problems. In sum, hard look provides superior practical, doctrinal, and normative benefits as a means to challenge irrational licensing laws.

One potential objection is that this proposal could not be limited to occupational licensing. Once developed, it could—like *Lochner* before it—become a wide-ranging weapon to harass city governments and shift too much authority to courts. The first response is that the concept of occupational licensing is a coherent one that can exist as its own formal category. While there will always be scenarios that blur boundaries, occupational licensing covers professions that require express government permission to perform. This category does not generally extend to more uniformly applicable health, labor, and environmental laws that are not limited to industries that require government pre-approval. Further, limiting this type of hard look review to occupational licensing could be justified through a constitutional avoidance principle. Specifically, courts could

274. *See infra* Part IV.C.
275. *See* MCQUILLIN, *supra* note 257, at §§ 4.3, 4.6.
276. *See* text accompanying *supra* note 257.
277. MCQUILLIN, *supra* note 257, at § 10.15, at 453, 461 (noting that home rule powers are still subject to a state's restrictions: "[I]t is uniformly agreed that such [home rule] powers and charters must be consistent with the constitution and general laws of the state").

justify using it to avoid the question of whether permission-to-work restrictions impinge on constitutional liberties.

B. Restrictions via Agency Interpretations

The second category of licenses is restrictions via an agency's statutory interpretation. As explained in Part II, these statutes do not explicitly address the regulated activity in question. Instead, state agencies adopt expansive interpretations and then apply them to these activities. To return to the example of teeth whitening, many states require licenses in order to perform "dental practice."[278] Requiring dentists to have extensive education and training is uncontroversial. The precise issue is where the boundary of dental practice ends. Just because dentists perform teeth whitening does not necessarily make it a dental practice. As noted earlier, the FDA classifies teeth whitening as a cosmetic service rather than a medical one.[279]

Accordingly, the scope of the licensed activity often turns on questions of statutory interpretation and deference to agencies, which are fundamentally *administrative law* questions.[280] Determining the appropriate amount of deference to an agency's statutory interpretation is arguably the most central dispute in all of administrative law.[281] Courts have therefore developed and refined doctrines over decades that address these precise questions. And though scholars and courts quarrel endlessly about the infamous *Chevron*,[282] *Mead*,[283] and *Skidmore*[284] doctrines, these doctrines—unlike constitutional law doctrines—evolved to address these types of questions.

I therefore propose that courts use these statutory interpretation principles to restrict overbroad licenses. In essence, I propose that courts adopt a type of clear statement rule when interpreting statutes that give rise to licenses via interpretation. The key question in these cases is whether the statute explicitly contemplates the economic activity in question. If not, the courts should reject the agency's interpretation of the statute. In the example above, courts should

278. *See supra* notes 138–142 and accompanying text.
279. *See* text accompanying *supra* note 138.
280. LAWSON, *supra* note 251, at 10.
281. *See* Michael F. Perry, *Avoiding* Mead*: The Problem With Unanimity in* Long Island Care at Home, Ltd. v. Coke, *127 S. Ct. 2339 (2007)*, 31 HARV. J.L. & PUB. POL'Y 1183, 1183 (2008) ("One of the central questions in administrative law is the appropriate level of deference courts should give to agency interpretations of statutorily conferred authority.").
282. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
283. United States v. Mead Corp., 533 U.S. 218 (2001).
284. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

find that "dental practice" does not encompass teeth whitening unless the statute explicitly contemplates that activity.

Doctrinally, courts adopting this approach would be embracing the principles of *Mead* and *Skidmore* to justify greater scrutiny of agency interpretations. In doing so, courts would be rejecting the doctrine of *Chevron* deference, which generally requires courts to defer to reasonable agency interpretations of ambiguous statutes.[285] In *Mead*, the court held that agencies should only get legal *Chevron* deference if the legislature delegated that authority to the agency and the agency acted pursuant to that delegation.[286] This threshold question of whether an agency deserves deference in the first instance is also known as "Step Zero."[287] In licensing-via-interpretation cases, the basic critique is that agencies are stretching statutes for protectionist reasons. In administrative law terms, they are regulating matters that the legislature has not actually delegated to them.

Courts would, however, remain free to apply *Skidmore* deference in these situations.[288] In fact, *Skidmore* would allow courts to engage in a more granular and flexible analysis to determine if deference is appropriate under the circumstances. Courts could, for instance, examine questions such as how the board is appointed, whether conflicts of interest exist, and the expertise of the board before deciding on deference. The ultimate result, however, is that courts would apply greater scrutiny to these types of statutory interpretations.

Several normative justifications exist for this enhanced scrutiny. The first is that licensing agencies are riddled with conflicts of interest in that many consist of private practitioners with a direct economic stake in their quasi-public decisions.[289] As the Court recognized in *N.C. Dental*, the majority of the licensing board was actually elected by private practitioners, as opposed to being appointed by politically accountable officials such as governors or legislative

285. *See* Evan J. Criddle, Chevron's *Consensus*, 88 B.U. L. REV. 1271, 1276 (2008) (explaining Justice Steven's reasoning in *Chevron* as advocating for deference to agencies when statutes are ambiguous because agencies have valuable experience and expertise).

286. *Mead*, 533 U.S. at 226–27.

287. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191–92 (2006) (explaining "Step Zero" and its precedential effect on agency regulations).

288. *See* Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 304 (3d Cir. 2012) (defining *Skidmore* deference as "requir[ing] a court to assign a 'weight' to an administrative judgment based on 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (quoting *Skidmore*, 323 U.S. at 140)). Noting that this deference is on a "sliding scale" the Third Circuit Court of Appeals goes onto to say: "The most important considerations are whether the agency's interpretation is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act." (original alteration omitted) (internal quotation omitted). *Id.*

289. *See supra* note 69 and accompanying text.

boards.[290] Using *Skidmore*-like doctrines, courts could reject deference when these types of conflicts of interest exist. This approach would therefore create incentives to reduce conflicts of interest in both the boards and their appointment processes.

A clear statement rule would also force greater political accountability. One problem with occupational licensing decisions is that entities with low salience make public decisions that impact people's chosen profession. Requiring the legislature to delegate *explicit* authority for occupational regulation better ensures that elected officials can be held accountable for these important decisions.

My proposed clear statement rule would also have low administrative costs. The basic inquiry in such cases is how to interpret a statute and whether or how much deference an agency deserves. These questions are difficult, but they are the types of questions that fall squarely within a court's core institutional competence. They consider these questions every day. These analyses do not require engaging in the types of complicated market analyses that antitrust questions require. Finally, courts can invoke constitutional avoidance to justify its scrutiny of these statutory interpretations.[291] If courts were too deferential, it is at least somewhat more likely that the interpretations would trigger constitutional concerns.[292]

One key objection to my proposal is that it ignores *Chevron* deference. While *Chevron* technically applies only at the federal level, many of its animating principles seem to apply equally well at the state level. The core justifications for *Chevron* deference are that agencies have greater expertise, that the legislature has delegated authority to agencies (not courts) to make these decisions, and that agencies are more politically accountable than courts.[293] Accordingly, several states apply *Chevron* deference or something very similar when reviewing a state agency's statutory interpretation.[294]

290. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1107–08 (2015).

291. *See* United States v. Hernandez, 322 F.3d 592, 602 (9th Cir. 2003) ("[T]he fundamental canon of constitutional avoidance [is that] [c]ourts can and should continue to adopt statutory interpretations, when feasible, that will avoid serious constitutional issues.").

292. More broadly, all the normative critiques of occupational licensing from Part I could be imported here to justify narrowly construing these statutes.

293. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 149–50 (2005); D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 373 (2009) (noting that the Supreme Court justified deference to state agencies as they are generally more politically accountable and possess more technical expertise).

294. Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing* Chevron *Into State Administrative Law*, 20 WIDENER L.J. 801, 818 (2011).

I argue, however, it is appropriate for state courts to ignore *Chevron* in this context. First, states are generally more skeptical of *Chevron* than federal courts.[295] Some states—such as Delaware and Michigan—have explicitly rejected *Chevron*-style deference at the state level.[296] Others have adopted doctrines that are less deferential than *Chevron*.[297] Even states that claim to adopt *Chevron* often fail to apply "major aspects" of the doctrine.[298] In short, there are always exceptions to *Chevron*, even in states that have adopted it.

The more important point is that the theoretical foundations for *Chevron* deference do not apply at the state level. Specifically, state government structures differ in ways that undermine the applicability of *Chevron* deference.[299] In many states, courts are elected, and thus more politically accountable than agencies.[300] And while the judiciary remains very different in kind from the legislature (for example, the requirement of impartiality), elected courts at minimum have less reason to defer to agencies than federal courts.

Courts also have greater lawmaking authority in states than in the federal government. One fundamental justification for *Chevron* at the federal level is that the legislature has delegated policymaking to the executive. State courts, however, have a long history of general jurisdiction and thus have more extensive policymaking powers.[301]

In addition, the executive is not always unified in states. In most states, attorneys general are elected and thus represent a different political party than the governor.[302] In cases when both of these executive branch officials disagree, it is not clear that courts should—or can—defer to either of them. Finally, state agencies do not necessarily have the same level of expertise that justifies deference at the federal level.[303]

While statutory interpretation is the primary means to challenge licensing via interpretation, courts may also be able to apply hard look review to certain

295. *See* Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557–60 (2014).

296. *See* Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378, 383 (Del. 1999); *In re* Complaint of Rovas Against SBC Mich., 754 N.W.2d 259, 272 (Mich. 2008) ("[W]e decline to import the federal regime into Michigan's jurisprudence.").

297. *See* Hudson, *supra* note 293, at 374.

298. Bell, *supra* note 294, at 819; *see also* Saiger, *supra* note 295, at 559–60 ("Most of the states, however, fall between the extremes of endorsing *Chevron* and repudiating it.").

299. *See* Bell, *supra* note 294, at 822–23 (noting that state selection of judges, delegations of authority to agencies, and deference to agencies likely differ from the federal approach); Hudson, *supra* note 293, at 375–76; Saiger, *supra* note 295, at 560–70.

300. *See* Bell, *supra* note 294, at 823–24.

301. *See* Saiger, *supra* note 295, at 562.

302. *See id.* at 566 & n.86 (noting that as of 2008, forty-three states elect the state attorney general).

303. Hudson, *supra* note 293, at 378–80.

aspects of the agency's enforcement actions. Specifically, hard look could apply to any policy decisions that accompany the statutory interpretation. Consider, for instance, an agency that sends an enforcement letter or adopts regulations regarding unlicensed teeth whitening. One issue is whether the agency's statutory interpretation is proper. Assuming it is, the agency may also make discretionary choices regarding specific aspects of its enforcement. It may, for instance, choose a particular type of practice to prohibit—for example, whitening services in public places rather than over-the-counter services. It may also impose a particular penalty instead of another or make findings that whitening services pose health risks.

These agency actions can all be conceptualized as discretionary policy decisions and, in some instances, findings of fact. Accordingly, courts can apply the types of hard look doctrines described in the previous Part. In fact, courts can be *more* aggressive with hard look review in this context because they are reviewing agencies rather than municipalities that have quasi-legislative characteristics. Accordingly, they could apply the full panoply of requirements associated with the hard look doctrine, such as the requirements to create a record, to provide justifications of decisions, and for anything else that federal agencies must satisfy.[304]

Courts could use this same positive source of law to require "substantial evidence" for fact-findings that they rely upon to enforce licensing requirements.[305] With municipalities, it is unrealistic to apply the full set of hard look doctrines to entities that do not generally create records, seek comments, and justify their decisions ex ante. Imposing these additional requirements is far less problematic for the review of traditional administrative agencies.

In short, courts have multiple doctrines to apply greater scrutiny to licensing via agency interpretation. They can use *Mead* and *Skidmore*-type doctrines to require clear statutory statements. They can also apply hard look and substantial evidence requirements to such decisions. Unlike constitutional and antitrust doctrines, these administrative law doctrines evolved for these precise questions and challenges, and they are well suited for stronger challenges to occupational licensing regimes.

C. Express Restrictions via State Statutes

The third category consists of statutory restrictions that expressly apply to the economic activity at issue. A statute that defines "cosmetology" to specifically include "braiding" falls into this third category. Under my proposal,

304. *See supra* A.B.A., note 265, at 42–43.

305. *See* Ardmore Consulting Grp. v. Contreras-Sweet, 118 F. Supp. 3d 388, 394 (D.D.C. 2015) ("Agency fact-finding must be supported by substantial evidence to pass muster under the APA . . . .").

administrative law doctrines cannot be used to overturn this category of licensing restrictions. In essence, my proposal gives the last word to the state legislatures rather than to the judiciary. This limitation is the primary distinction between my proposal and legal challenges that rely on *Lochner*-esque economic liberty doctrines, which necessarily apply to any level of state action. In this Part, I explain why these limitations are both necessary and even helpful to licensing challenges.

As a threshold matter, this category of licensing may be smaller than it seems. My proposal is that state legislatures must *clearly* indicate that a given economic activity falls within the licensing laws. Such a standard is demanding, and courts should apply intense scrutiny to such statutes if they relate to occupational licensing restrictions. Accordingly, courts may find that many cases that seem to be express statutory restrictions should actually be analyzed as licensing via interpretation (my proposed second category).

For instance, both *Craigmiles* and *St. Joseph Abbey* could have been decided on alternative state law grounds. In *St. Joseph Abbey*, the court initially attempted to avoid the constitutional issue altogether. It inquired whether the Louisiana agency had statutory authority to regulate caskets when those sales were not "incidental" to the selling of funeral services.[306] It certified this question to the Louisiana Supreme Court, which refused to review it.[307] Similarly, in *Craigmiles*, the statute (the Funeral Directors and Embalmers Act) regulated "the selling of funeral merchandise."[308] Under a clear statement doctrine, a court could potentially conclude that this statute only encompassed casket sales that were incidental to selling funeral services. Accordingly, it might not apply to parties who sell only caskets but do not offer any type of funeral services. In short, many express prohibitions are not as express as they may first appear.

Assuming, though, that the statute is clear, there are still several reasons to adopt this limitation. Normatively, this limitation ensures legislative supremacy. Ironically, this limitation is the key to strengthening the challenges of licensing laws in other categories. The legislature's ability to override courts is what enables higher levels of scrutiny toward municipal licensing and licensing via interpretation. As noted above, many courts are wary of reviving *Lochner* and overturning the economic policy choices of the elected branches.[309] They are,

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

307. *Id.*

308. Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002) (emphasis omitted) (quoting TENN. CODE. ANN. § 62-5-101(6)(A)(ii) (2009)). The statute was amended in 2010, and now exempts the sale of funeral merchandise from the definition of funeral directing. TENN. CODE. ANN. § 62-5-101(6)(B)(vi) (2016).

309. *See supra* note 269 and accompanying text.

however, simultaneously frustrated by transparently protectionist licensing regimes that have little rational purpose. My proposal solves both problems. It allows them to increase the scrutiny of licensing regimes in the first two categories, while preserving legislatures' ability to override them.

There are also good reasons to think that the legislature would not step back in and simply restore irrational licensing regimes that courts invalidate. Most importantly, successful legal challenges would raise the political salience of these problematic laws. One way to overcome public choice obstacles is to publicize the issue and generate political risk for those who vote to reinstate them.[310] Over time, these successful challenges could also shift norms among policymakers.

In addition, my proposal's limitations would not relieve the legal pressure on state legislatures. Realistically, these legal challenges will likely continue to include constitutional claims. While I have outlined my concerns with constitutional challenges, there is nothing mutually exclusive about raising both constitutional challenges and challenges rooted in administrative law doctrines. In fact, one purpose of this Article is to provide courts with an alternative doctrinal basis to avoid these constitutional questions. But in actual litigation, parties will raise whatever claims can maximize their chances of success.

The combination of stronger administrative law challenges with the continuing threat of constitutional challenges will also create political space for reform. Indeed, my hope is that many policymakers can use the legal pressure as an unacknowledged ally in reforming irrational regimes in the face of incumbent resistance. This reform does not require the state to abandon licensing altogether, but merely to reform and rationalize it. For instance, in Minnesota, the legislature responded to a successful legal challenge against home baking restrictions by amending the statute by significantly loosening those restrictions, though not entirely ending them.[311] Another approach would be the creation of new intermediate forms of licensing. In Arkansas, the legislature responded to legal challenges from hair braiders by creating a new—and substantially less onerous—certification regime for hair braiders instead of requiring them to obtain a cosmetology degree.[312] Intermediate forms of licensing are already present in

310. *See* Robin Stryker, *Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies*, 3 ANN. REV. L. & SOC. SCI. 69, 86, 92 (2007) ("[S]ustained social movement pressure from below increases the likelihood that legislative law . . . is given a broad, effects-oriented interpretation that, in turn, maximizes state capacity to provide benefits.").

311. *See Minnesota Cottage Foods*, INST. FOR JUST., http://ij.org/case/mncottagefoods [https://perma.cc/V4MX-YMYW]; *see also* MINN. STAT. ANN. § 28A.152 (West 2016).

312. *See* Matt Powers, *"Natural Hair Braiding Protection Act" Now Law in Arkansas*, INST. FOR JUST. (Mar. 19, 2015), http://ij.org/press-release/natural-hair-braiding-protection-act-now-law-in-arkansas

some medical professions (for example, nurse-practitioners) and could also be applied to the legal profession and beyond.

Finally, assuming the legislature nonetheless decides to enact or preserve irrational licensing, my proposal requires those decisions to be made by the most salient and politically accountable entity in the state—the state legislature. States could no longer rely on obscure agencies using questionable statutory interpretations to implement protectionist licensing programs. Instead, they would have to stand before the public, vote for irrational laws, and assume the political risk. As more legal challenges against licensing regulations are successful, the public choice calculus will likely change for risk-averse politicians. In short, legal challenges will give rise to political reform, which remains the ultimate goal.

CONCLUSION

This Article has provided an answer to the central challenge courts face when confronting legal challenges to occupational licensing regimes. Specifically, how can courts increase their scrutiny of these laws without reviving the ghosts of *Lochner* or enduring expensive and complicated antitrust litigation? My proposal to use administrative law doctrines addresses both problems. Because it better respects legislative supremacy, courts will feel more comfortable applying greater scrutiny to these laws. Indeed, I expect that courts will welcome nonconstitutional state law alternatives to the existing legal challenges.

My proposal, however, is merely a starting point. States are different, and the framework will inevitably work better in some states than others. My proposed framework and classification system, however, will provide a new way to analyze legal challenges to irrational licensing regimes. The next step of this project is to focus on the more specific mechanics of how this type of litigation should proceed in individual states.

In addition, my proposal to use administrative law doctrines would not create an open hunting season on the regulatory state. In fact, its purpose is precisely the opposite—to preserve useful regulations by excising the harmful ones in a safer way. Those who believe in the social value of regulations should be most committed to ensuring their rationality and impartiality. My proposal would provide this essential check, while ensuring that the judiciary is not empowered to challenge regulations of any kind. In sum, administrative law

[https://perma.cc/89DD-9HBB]; *see also* Natural Hair Braiding Protection Act, ARK. CODE. ANN. §§17-26-501 to -505 (2015).

doctrines provide a better alternative to the current libertarian-dominated approaches that could, if widely adopted, do greater harm to social regulations.