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A Positive Step Toward Occupational Licensing Reform: The ALLOW Act

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Abstract

By eliminating or reducing the suffocating restrictions that licensing often imposes, the ALLOW Act would promote competition, encourage innovation, protect consumers, and promote compliance with federal antitrust law. Title I would enable the spouse of a servicemember to travel from one state to another and use on any military base whatever license he or she received elsewhere. Title II would revise the District of Columbia licensing laws to eliminate unnecessary licensing requirements. And Title III would allow federal park tour guides to operate free from any state licensing law. Each title would take a small but valuable step toward granting parties greater freedom to pursue a chosen line of work.

In the 114th Congress, Senators Mike Lee (R–UT) and Ben Sasse (R–NE) and Representatives Mark Meadows (R–NC) and Dave Brat (R–VA) introduced separate but identical bills that would have addressed the burgeoning problem of occupational licensing. Each one was labelled the Alternatives to Licensing that Lower Obstacles to Work Act but was also known by its far shorter acronym, the ALLOW Act.[1] The bills contained three titles, two addressed to the federal government and one to the District of Columbia. The bills would have had three principal effects. They would have allowed spouses of servicemembers to bring their occupational licenses with them when they move with their family from one state to another, would have prohibited the use of occupational licensing in the District of Columbia in the vast number of cases, and would have allowed tour guides at national parks and battlefields to be paid for their services.

This paper, in its entirety, can be found at **http://report.heritage.org/lm212**

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Key Points

- The ALLOW Act seeks to improve economic opportunity for servicemembers and their spouses, limit the exclusionary effect of occupational licensing in the District of Columbia, and eliminate occupational licensing requirements for paid tour guides in various federal parks.
- State licensing laws make it difficult for a military family to make ends meet, deterring individuals from pursuing a career in the armed forces and hampering the effectiveness of our armed forces through the loss of experienced personnel.
- Sections 204, 207, and 208 are the heart of Title II because they afford private parties a right to pursue a lawful occupation and a remedy to escape needless licensing requirements.
- Title II would effectively serve as a Declaration of Independence for Economic Liberty in the District of Columbia.
- By eliminating the need for superfluous government intervention, Title III would allow a large number of people to be paid for giving a tour.

The bills are a step in the right direction. They would remedy a small number of problems created by the numerous occupational licensing schemes seen throughout the country. They also would offer states interested in revisiting their licensing schemes a model for better legislation. Properly tweaked, they would help to eliminate some of the obstacles and redress some of the injuries that licensing requirements impose on the public today.

History of and Rationale for Occupational Licensing

Licensing regimes have an ancient lineage.[2] Medieval guilds limited entry into various occupations, while the 13th and 14th centuries saw elementary forms of medical licensing in Germany, Naples, Sicily, and Spain.[3] In 19th century America, states and localities licensed barbers, embalmers, ferry operators, horseshoers, boarding house operators, insurance agents, midwives, pawnbrokers, physicians, real estate brokers, steamboat operators, taverns, undertakers, veterinarians, and anyone who did business with the Indian tribes.[4] Licensing was particularly common for physicians and parties who worked in allied fields, such as dentistry and pharmacy. By the last quarter of the 19th century, more than half of the states required licenses to practice those professions.[5] Today, however, occupational licensing has exploded in size. Having an occupational license is a requirement to enter between one-quarter and one-third of all lines of work.[6]

The rationale used to defend occupational licensing is an early example of the Public Interest Theory of regulation.[7] Regulation is necessary to filter out unqualified practitioners because the public will not be able to distinguish experts from quacks. The optimal way to address the differences in the qualifications of service providers, the argument goes, is for the government to prohibit its supply by anyone who has not proved that he possesses the minimum qualifications necessary to offer it safely. Governments use an education, testing, and licensing process to filter out unqualified practitioners. That process sets a floor below which no one may offer a service that puts the public at risk. The public therefore can select from approved providers without needing to investigate or take a chance on their bona fides and relative qualifications.[8]

The Public Interest Theory of regulation suffers from several crippling flaws.[9] The biggest one is that it misses the fact that existing businesses regularly urge the government to adopt licensing requirements in order to fence out new entrants. Free entry into a profession increases the supply of service providers, which is likely to lower prices and raise service quality as firms compete for customers' business. Licensing requirements prevent consumers from reaping those competitive benefits. Government-imposed barriers to entry also place on the taxpayers, rather than on incumbent firms, the enforcement costs of their exclusionary policies, which benefits incumbent firms yet again. In addition, statutes are no less difficult to repeal than to pass[10]—in fact, the former may be more difficult than the latter[11]—which means that legally imposed restrictions can endure for a considerable period of time, causing the public economic harm along the way. Yet Public Interest Theory does not explain this counterintuitive phenomenon even though it has deep historical footprints.[12]

Public Choice Theory supplies a far better approach to understanding the prevalence of occupational licensing.[13] It has become an accepted analysis for understanding political behavior.[14] That theory applies the insights of microeconomics and game theory to political behavior. It explains far better than Public Interest Theory why we see the widespread application of licensing requirements to jobs—such as barbers, bartenders, cosmetologists, florists, hair braiders, makeup artists, and so forth[15]—that can be performed by anyone without posing any risk to public health and safety. The self-interest of incumbents, not the public interest of consumers, is what drives most licensing schemes. As noted elsewhere:

> Public Choice Theory teaches that elected officials do not fundamentally change their character and abandon the rational, self-interested nature they display as individual participants in a free market when assuming public office. The person that is "an egoistic, rational, utility maximizer" in the market also has that nature in the halls of government. Homo economicus and homo politicus are one and the same. The difference is in the goods that private desire and government officials dispense—statutes, regulations, funding, licenses, and so forth, rather than consumer goods or widgets. Their motivation, however, is parallel in each setting. Producers, consumers, and voters seek to maximize their

> own welfare; politicians, to attain or remain in office; and bureaucrats, to expand their authority. The result is trade in a political market. Interest groups will trade political rents in the form of votes, campaign contributions, paid speaking engagements, book purchases, and get-out-the-vote efforts in return for the economic rents that cartel-creating or reinforcing regulations, such as occupational licensing, can provide. Government officials are aware of interest groups' motivations and use those groups to their own political advantage. Lobbyists and associations serve as the brokers.[16]

Want more proof that state licensing requirements are irrational? Rather than simply consider the individual licensing requirements for each profession or line of work, consider how states regulate the range of occupations through their licensing schemes. The network of requirements to receive a license in different professions is often utterly nonsensical.

> Compare the licensing requirements in two different fields: Emergency Medical Services and Cosmetology. Emergency Medical Technicians (EMTs) are persons who "assess injuries, administer emergency medical care, extricate trapped individuals and transport injured or sick persons to medical facilities." By contrast, cosmetologists "provide beauty services, such as shampooing, cutting, coloring and styling hair and massaging and treating the scalp and may also apply makeup, dress wigs, perform hair removal and provide nail and skin care services." The skills demanded by the two occupations, and the importance of those professions to the health and safety of the community, are obviously quite different. Because they are the first medically trained parties to reach a patient, EMTs are not only an integral part of the medical system but also are the tip of the spear. Cosmetologists are not even part of the shaft. Accordingly, the average person might assume that the education and training requirements to become an EMT would be far more rigorous than the ones necessary to become a cosmetologist. If so, that person would be wrong.
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> According to the Institute for Justice, all states and the District of Columbia require EMTs to be licensed. The number of days of required education and training varies from zero (District of Columbia) to 140 (Alaska), with most states requiring between twenty-six and thirty-nine days, for an average of thirty-three days. All fifty-one jurisdictions also require cosmetologists to be licensed, but the education and training necessary is vastly different. The states demand various periods of education and training for cosmetology licensing, ranging from 233 days (Massachusetts and New York) to 490 days (South Dakota), with an average of 372 days. In other words, a budding cosmetologist on average needs to complete *more than eleven times* the education and training necessary to serve as an EMT.
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> That difference is stunning. We should expect to see differences among the states regarding the occupations requiring licenses and the type of requirements that entrants must satisfy. One of the benefits of a federal system is that states can explore different regulatory regimes. Yet some differences are inexplicable. It is difficult to imagine a legitimate justification for caring more about whether someone's hair looks "marvelous" than whether his heart can be restarted. Any state that makes it more difficult to become a cosmetologist than an EMT has clearly acted with something other than the public welfare in mind.[17]

If most occupational licensing requirements are irrational, why have they survived challenge in the courts? The next section discusses that point.

Legal Challenges to Occupational Licensing

Alexis de Tocqueville presciently noted that in America, every political controversy ultimately becomes a legal dispute.[18] Occupational licensing is no exception. The legality of occupational licensing came under challenge late in the 19th century, and when it did, the Supreme Court of the United States upheld the constitutionality of state regulation of the practice of medicine.

In *Dent v. West Virginia*, decided in 1889, the Court considered a state law requirement that to receive a license to enter that field, a physician must graduate from a reputable medical school and pass a qualifying examination or prove that he had

practiced medicine in the state for 10 years.[19] Before its decision in *Dent*, the Court acknowledged that every individual has the right to pursue a lawful occupation, a right with deep roots in Anglo–American legal history,[20] one that Justice Joseph Story had acknowledged in his magisterial work *Commentaries on the Constitution of the United States*.[21] Accordingly, because healing the sick or injured was a lawful (indeed, salutary) line of work, the Court explained, a legislature could not arbitrarily deprive someone of that opportunity.[22] Nevertheless, the Court concluded that a state may adopt a physician licensing scheme as a means of protecting the public health and safety against charlatans offering to diagnose afflictions or perform surgery.[23]

Following *Dent*, parties brought a series of legal challenges to the regulation of ancillary fields, such as dentistry, pharmacy, and osteopathy. They hoped to distinguish their occupations from medicine on the ground that they posed less of a risk to the public health and safety. But their efforts went for naught. In the first half of the 20th century, the Supreme Court consistently rejected constitutional challenges to other types of health care programs[24] as well as to other, unrelated occupations.[25] Recent Supreme Court decisions show that the Court remains willing to allow the states considerable leeway to regulate the practice of medicine[26] as well as other endeavors.[27]

The upshot is this: The Supreme Court has rejected most challenges to occupational licensing schemes, particularly ones that hint at an attempt to revive the *Lochner*[28] Freedom-of-Contract Doctrine that the Court walked away from during the New Deal.[29] The Court's decisions in this regard smack of elitism. There is little more than the personal preferences of Ivy League–trained justices that explains why the Court assigned a majority's favored liberty interests to the penthouse while dumping the Court's disfavored property interests into the basement.[30] But the Court may be unwilling to walk back from that room assignment in the immediate future. To remedy the harms and injustice of occupational licensing, therefore, legislation might be necessary. The next section analyzes a good first step.

The ALLOW Act

Purposes of the Act. The ALLOW Act seeks to improve economic opportunity for servicemembers and their spouses, to limit the exclusionary effect of occupational licensing in the District of Columbia code, and to eliminate any occupational licensing requirements for paid tour guides in various federal parks.[31] By eliminating or reducing the suffocating restrictions that licensing often imposes, the ALLOW Act would promote competition, encourage innovation, protect consumers, and promote compliance with federal antitrust law.[32] There is a clear need for reform in this field. Title I enables the spouse of a servicemember to travel from one state to another and use on any military base whatever license he or she received elsewhere. Title II revises the District of Columbia licensing laws to eliminate unnecessary licensing requirements. Title III allows federal park tour guides to operate free from any state licensing law. Each title takes a small but valuable step toward granting parties greater freedom to pursue a chosen line of work.

Title I: Military Installations. Title I addresses a problem commonly experienced by military families. The military transfers a married soldier, sailor, airman, or marine from a base in State A (e.g., Camp Lejeune in North Carolina) to a base in State B (e.g., Quantico Marine Corps Base in Virginia) as part of a normal rotation. The servicemember goes about whatever duties he or she has at the new assignment. The spouse would like to continue working in whatever field he pursued in State A for professional advancement, personal satisfaction, or additional income but finds himself stifled by the occupational licensing laws in State B. Why? "States do not regularly recognize a license issued in the state of origin, forcing an individual to begin anew the oftentimes lengthy and costly education and training process, to abandon a profitable occupation, or to practice it illegally."[33] In some instances, that may make some sense. For example, the laws in State A may differ materially from those in State B, so perhaps it makes sense for someone who has been a licensed attorney for only a very short period of time to apply for admission to the new state bar or otherwise prove his competence. But people have the same hair, the same teeth, and the same heart in States A and B, so it makes little sense to prohibit someone licensed as a barber, dental technician, or emergency medical technician in one state from picking up the same line of work in another state.

The lack of reciprocity injures anyone who moves interstate, but it is a particular burden for military families because the services regularly transfer

officers and enlisted personnel. "Thirty-five percent of military spouses work in licensed fields, and they are ten times more likely than civilians to relocate interstate."[34] Since no one ever became rich working in uniform, state licensing laws make it difficult for a military family to make ends meet, which deters servicemembers from pursuing a career in the armed forces and in turn hampers the effectiveness of our armed forces through the departure of experienced personnel. The result is a loss all around.[35]

The ALLOW Act has a simple solution to that problem. It provides that a person with a valid occupational license in State A can continue to earn a living on any "military installation on land owned by the Federal Government" in State B without needing to obtain a new license in the latter.[36] Any license valid in State A would be deemed valid in State B as a matter of federal law. So, for example, if a military spouse is an athletic trainer, an occupation that requires a license, he or she would be able to move to another military base in another state without acquiring a license for that new state as long as the license is up to date and still valid in the issuing state and the individual is clear of any enforcement actions.[37] As for the relevant scope of practice, a person would be "authorized to sell the same goods and services as are covered by the occupational license or certification in the issuing State."[38]

Title II: District of Columbia Occupational Licensing Reform. Title II is potentially the most valuable part of the ALLOW Act. Section 202 of Title II contains a lengthy list of findings that read like an indictment of the flaws in most occupational licensing schemes.[39] Section 203 lists a series of "least restrictive alternatives" to licensing that a newly created Office of Supervision of Occupational Boards (OSOB) must consider and find ineffective before imposing or maintaining a licensing requirement.[40] Section 205 would create the OSOB and make it responsible for ensuring that other District of Columbia agencies comply with the policies of the ALLOW Act.[41] It also would permit District of Columbia residents to file an objection with the OSOB about "a rule, policy, enforcement action, or other occupational licensure action" by any of the District licensing boards.[42] Finally, Section 205 permits any member of the D.C. City Council to ask the D.C. Attorney General for his opinion whether "a rule, policy, enforcement action, or other occupational licensure action" by any of the District licensing boards is consistent with the policy statement in Section 204. Section 206 would require the D.C. City Council to establish a committee or subcommittee that would periodically review licensing requirements already on the books and report its findings to the full council.[43]

Sections 204, 207, and 208 are the heart of Title II because they afford private parties a right to pursue a lawful occupation and a remedy to escape needless licensing requirements.

- Section 204 of Title II would make it the policy of the District of Columbia that licensing requirements should be adopted only when there is no other regulation that will benefit the community.[44]

- Section 207 states that private parties may pursue a lawful occupation unless the government can prove that a licensing requirement reflects "an important interest in protecting against present and recognizable harm to public health, safety, or welfare" and that the requirement is "substantially related to achievement of" that interest.[45]

- Section 208 enforces Section 207. Under Section 208, if the government brings an administrative or civil action against someone for practicing without a license, the defendant can raise as a defense the claim that the licensing scheme is invalid under Section 207.[46] Once the defendant puts that claim in issue by showing that a licensing rule "substantially burdens" his rights under Section 207,[47] the government must prove by clear and convincing evidence that a licensing requirement is necessary.[48] Section 208 also forbids a generalized statement of benefits from being sufficient to carry that burden. The government must prove the importance of the interest at stake and the necessity of licensing to achieve it.[49]

Title III: Tour Guide Services. The final title of the ALLOW Act proposes a simple amendment to an already existing code.[50] It would state that tour guides for "a national military park, national battlefield, national battlefield park, national battlefield site, or the National Mall and Memorial Parks, including the Lincoln and Jefferson Memorials," need not obtain a license to be paid for their services.[51] That simple provision would eliminate the need

for superfluous government intervention, allowing a large number of people to be paid for giving a tour: retirees, college students, history buffs, individuals looking to pick up a few additional dollars on the side, or someone else.

Benefits of the ALLOW Act

Benefits of Title I. Title I seeks to eliminate a burden placed on military spouses who move to a state that does not recognize their existing license. It takes a valuable step in that direction, but it is also underinclusive. Its reach should be expanded before it is reintroduced.

Title I of the ALLOW Act would only allow a military spouse to work "on a military installation on land owned by the Federal Government."[52] There is a question why that provision applies only to military bases rather than to any property the federal government owns. The federal government owns thousands of properties not used for military purposes, and a military spouse, for example, could use a barbering or cosmetology license just as easily in a shop situated in a civilian office building as on a military installation. Moreover, if the purpose of the act is to avoid penalizing military spouses because of an interstate transfer, Congress could invoke its authority under the Commerce Clause[53] or the Army and Navy Clauses[54] to allow a properly licensed spouse to continue practicing in the new state, on or off federal property.

Perhaps the sponsors wanted to interfere with state licensing authority as little as possible. That would explain why Title I appears to rest entirely on the federal government's authority under the Property Clause of Article IV[55] rather than on the other provisions noted above. Revising the bill to permit any licensed military spouse to continue practicing anywhere in his new state of residence, or at least to apply to any property owned or leased by the federal government on a military installation or elsewhere, would better serve the public. Congress should consider the benefits of a broader reach for the bill.

Benefits of Title II. The District of Columbia is only a city, but it is not exempt from the same type of licensing schemes common throughout the states. For example, a 2015 study by the Institute for Justice estimated that in the District, a person must have 2,190 days of education or experience and pay fees of $925 in order to become an interior designer.[56] The obvious question is, Why? How is that a reasonable exercise of the District's police power? Who would be hurt by leaving this field ungoverned by regulations? After all, no one has ever died from viewing an ugly couch pillow. Even if interior visual blight were a serious health risk—and only people who have never had teenage children could possibly hold that view—there are less costly alternatives to licensing, such as certification.

Title II would take a giant step toward eliminating needless licensing restrictions. It provides in Section 204 that a person may engage in any lawful occupation free from arbitrary, burdensome, and needless regulations. It requires in Sections 205 and 206 that District of Columbia officials consider a range of less restrictive alternatives—such as inspections, bonding or insurance requirements, registration, and voluntary certification—before enacting an occupational licensing regime. In establishes in Sections 207 and 208 a defense to a charge of practicing without a license.

Sections 204, 207, and 208 alone would materially improve life for District of Columbia residents, regardless of whether the District of Columbia government ever established a new supervisory licensing board. Those provisions would make a difference because they subject occupational licensing laws to a more rigorous form of judicial scrutiny than the one that courts normally apply when examining economic and social legislation. Those provisions do so by borrowing from the principles normally used when a law is challenged under the Fourteenth Amendment Equal Protection Clause on the ground that it unlawfully discriminates on the basis of sex.

If a statute uses sex as a basis for denying someone the opportunity to pursue a particular profession, that law is subject to judicial review under what is known as a "heightened" scrutiny standard.[57] That standard is more exacting than the standard courts ordinarily apply to review economic and social legislation based on income or some other anodyne characteristic. Under that looser standard, legislation will be upheld if it hypothetically furthers some legitimate interest of the state, even if there is no evidence showing that the legislature adopted the law for that reason.[58] By contrast, a statute that explicitly discriminates on the basis of sex can be sustained only if the classification "serves important governmental objectives and…the discriminatory means employed are substantially related to the achievement of those objectives."[59] Moreover, the

government must identify those objectives, explain why they are important, how the statute furthers them, and why no other approach could be successful. Justifications manufactured after the fact are inadequate.[60]

If the ALLOW Act contained nothing else but Sections 204, 207, and 208, it would still be a positive step toward occupational licensing reform. One of the most common criticisms of licensing laws is that they exist only to benefit current licensees by preventing would-be competitors from entering an occupation and underpricing incumbents.[61] One of the most common problems that would-be rivals encounter when challenging licensing requirements in court is that the courts do not take their claims seriously. Courts simply treat licensing laws as an example of the type of economic regulation that should never receive any form of heightened scrutiny.[62] Sections 204, 207, and 208 would change that.

That difference in the relevant standard for judicial review makes all the difference in the world to the likely outcome of that review. The Supreme Court finds economic discrimination unconstitutional only once in a blue moon. By contrast, the Court regularly finds sex-based discrimination unconstitutional.[63] By directing the District of Columbia courts to apply a heightened standard of review, Sections 204, 207, and 208 would make it likely that sensible licensing requirements—such as ones limiting who may perform surgery—would survive and that standards whose only purpose is to prevent competition—such as the one forbidding the unlicensed practice of barbering—would fail. District of Columbia residents would be better off under that régime.

In sum, Title II would effectively serve as a Declaration of Independence for Economic Liberty in the District of Columbia.

Benefits of Title III. Today, anyone who is knowledgeable about a national park or battlefield can explain its significance to anyone who cares to listen without charging a fee. The First Amendment Free Speech Clause guarantees everyone that right. Title III would allow tour guides to be paid for providing the same information. It is difficult to imagine an objection to this proposal. The only individuals ever hurt on a Civil War battlefield were the soldiers who fought there, not the people who listened to a tour guide, regardless of how ill-informed he may have been.

Conclusion

Just as the perfect should not be the enemy of the good, the few criticisms noted above should not obscure the fact that, even as introduced in the 114th Congress, the ALLOW Act would take a few steps in the right direction. In particular, Title II would benefit residents of the District of Columbia and also serve as a model act for use by states interested in reconsidering their licensing policies. States so interested would do well to look closely at the ALLOW Act.

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Endnotes

1. The Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW Act) of 2016, S. 3158, 114th Cong., 2d Sess. (2016); The Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW Act) of 2016, H.R. 6312, 114th Cong., 2d Sess. (2016). Hereafter, I will refer to both bills as the ALLOW Act. Those bills did not become law, and new versions have not yet been reintroduced in the 115th Congress.
2. See, *e.g.*, James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 20–22 (3d ed. 2008); Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition?, at xiii (2006); S. David Young, The Rule of Experts: Occupational Licensing in America 9–14 (1987); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 Calif. L. Rev. 487, 494 (1965); Paul J. Larkin, Jr., *A Brief History of Occupational Licensing*, Heritage Foundation Legal Memorandum No. 204 (May 23, 2017), http://www.heritage.org/sites/default/files/2017-05/LM-204.pdf; Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209 (2016) (hereafter Larkin, *Occupational Licensing*); Simon Rottenberg, *The Economics of Occupational Licensing*, *in* Nat'l Bureau of Econ. Res., Aspects of Labor Economics 4 (1962).
3. See Young, *supra* note 2, at 9.
4. See Kleiner, *supra* note 2, at 20; Friedman, *supra* note 2, at 494–501; Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1 (2017) (hereafter Larkin, *Property*); Larkin, *Occupational Licensing*, *supra* note 2, at 212–13.
5. See Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & Econ. 93, 103 (1961).
6. *See*, *e.g.*, The White House, Occupational Licensing: A Framework for Policymakers 4 (2015); Dick M. Carpenter II et al., Inst. for Justice, License to Work: A National Study of Burdens from Occupational Licensing 10–11 (2012) (hereafter WH Occupational Licensing Framework) (table listing 102 occupations requiring a license); *id.* at 36–136 (listing the states and the District of Columbia and their licensing requirements); *id.* at 137–88 (listing each licensed occupation and the states requiring licensure); Morris M. Kleiner, The Hamilton Project, Reforming Occupational Licensing Policies 24 (2015); Adam B. Summers, Reason Found., Occupational Licensing: Ranking the States and Exploring Alternatives (2007); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 Brit. J. Indus. Rel. 676, 676–77 (2010); Larkin, *Occupational Licensing*, *supra* note 2, at 216–18.
7. *See* Paul J. Larkin, Jr., *A Public Choice Analysis of Occupational Licensing*, Heritage Foundation Legal Memorandum No. 205 (May 30, 2017), http://www.heritage.org/sites/default/files/2017-05/LM-205.pdf (hereafter Larkin, *Public Choice Analysis*).
8. *See* Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 Am. Econ. Rev. 941, 946, 966 (1963) (citation omitted) ("When there is uncertainty, information or knowledge becomes a commodity. Like other commodities, it has a cost of production and a cost of transmission.... The general uncertainty about the prospects of medical treatment is socially handled by rigid entry requirements. These are designed to reduce the uncertainty in the mind of the consumer as to the quality of product insofar as this is possible."); *see also*, *e.g.*, Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. Pol. Econ. 1328, 1329–30, 1342 (1979).
9. *See* Larkin, *Public Choice Analysis*, *supra* note 7, at 2–3 ("Public Interest Theory fails to acknowledge that governments are oftentimes as flawed as markets. There is no guarantee that elected or appointed officials are subject matter experts or will select regulatory schemes that will correct market flaws, rather than satisfy the demands of favored constituents. Moreover, statutes are no less difficult to repeal than to pass, meaning that bootless laws (e.g., the Robinson–Patman Act of 1936) can remain on the books far longer than a product that consumers reject will remain on the shelves (e.g., 'New Coke'). [¶] Plus, the theory mistakenly idealizes the motives of public officials by assuming that public officials always act in the nation's best interests even when the evidence is to the contrary. As Professor Peter Schuck has noted, Public Interest Theory stands as a 'vacuous and dangerously naïve' account of public policymaking, both as to how public policy is adopted and how it is implemented. As he puts it, 'rational self-interest (as the actor perceives it) unquestionably drives most political behavior most of the time.' [¶] Finally, Public Interest Theory fails to explain why a licensing regime is superior to a certification program—that is, to a system in which the government issues a certificate to a service provider who has passed a competency test, similar to being board-certified in a medical specialty or to receiving the Underwriters Laboratories certification or Good Housekeeping Seal of Approval. That alternative protects the public without limiting their choices or raising the price of the service they want.") (footnotes omitted).
10. *See* INS v. Chadha, 462 U.S. 919, 944–51 (1983) (describing the Article I process that Congress must follow to pass a law); Clinton v. City of New York, 524 U.S. 417, 438–39 (1998) (ruling that Congress must follow the same Article I process described in *Chadha* to revise or repeal a law).
11. Small, cohesive groups have lower transaction costs than the public, and special-interest legislation benefits them greatly while burdening the public only slightly. *See* Mancur Olson, The Logic of Collective Action (1965); Larkin, *Public Choice Analysis*, *supra* note 7, at 5 n.8; James Q. Wilson, *The Rise of the Bureaucratic State*, 31 Nat'l Affairs 77, 93–94 (Fall 1975).
12. *See* Friedman, *supra* note 2, at 503 (noting that "the licensing urge flowed from the needs of the licensed occupations. The state did not impose 'friendly' licensing; rather, this licensing was actively sought by the regulated.").
13. *See* Larkin, *Occupational Licensing*, *supra* note 2, at 226–34; Larkin, *Public Choice Analysis*, *supra* note 7, at 3–4.
14. *See*, *e.g.*, James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962); Democracy and Public Choice (Charles K. Rowley ed., 1987); Gordon Tullock et al., Government Failure: A Primer on Public Choice (2002); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291 (1974); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715 (2013); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 Va. L. Rev. 265 (1990); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 Cornell L. Rev. 43 (1988); John O. McGinnis, *The Original Constitution and Its Decline: A*

Public Choice Perspective, 21 Harv. J.L. & Pub. Pol'y 195 (1997); W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, 39 Harv. J.L. & Pub. Pol'y 973 (2015).

15. *See* Larkin, *Occupational Licensing*, *supra* note 2, at 216–18.
16. Larkin, *Occupational Licensing*, *supra note* 2, at 228–29 (footnotes omitted).
17. *Id.* at 220–22.
18. *See* Alexis de Tocqueville, Democracy in America 257 (Harvey Mansfield & Delba Winthrop eds. & trans., 2000) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").
19. 129 U.S. 114 (1889).
20. *See*, *e.g.*, *id.* at 260 ("Coke believed that the grant of a monopoly to a business was contrary to 'the law of the land' and void because the monopoly denied a person the opportunity to pursue a profession as part of his life. Blackstone found that, under English law and custom, 'every man might use what trade he pleased.' John Locke wrote that the men created civil society to protect 'property' along with life and liberty. Adam Smith believed that the right to pursue a lawful occupation was an essential element of the right to 'property.'") (footnotes omitted). The right to enter a particular occupation was a component of the broader right to property that the Founders believed every American enjoyed. *See*, *e.g.*, Edmund S. Morgan, The Challenge of the American Revolution 55 (1978) ("Property and liberty were one and inseparable."); Gordon S. Wood, The Creation of the American Republic, 1776–1787 219 (1998) (discussing the historical tradition of combining the property and liberty concepts); Laura S. Underkuffler, *On Property: An Essay*, 100 Yale. L.J. 127, 129 (1990) ("[P]roperty included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being."); *see generally* Larkin, *Property*, *supra* note 4; Larkin, *Occupational Licensing*, *supra* note 2, at 259–72. That attitude was still vibrant when the Fourteenth Amendment became law. *See*, *e.g.*, Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379, 393 (1988) (discussing the development of the substantive due process doctrine within the Fourteenth Amendment, its foundation in historic American ideals of liberty and property rights, and the process they are afforded).
21. *See* 3 Joseph Story, Commentaries on the Constitution of the United States 661 (1833) ("[I]n a free government almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers."). The Court itself recognized that right after *Dent* as well. *See*, *e.g.*, Truax v. Raich, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.").
22. Dent, 129 U.S. at 121–24 (citations omitted).
23. "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses." *Id.* at 122.
24. *See*, *e.g.*, Graves v. Minnesota, 272 U.S. 425, 429 (1926) (upholding state dentistry licensing requirement); Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40, 43 (1926) (rejecting equal protection challenge to state law regulating the practice of medicine); Douglas v. Noble, 261 U.S. 165, 170 (1923) (rejecting due process challenge to state licensing requirement for dentistry); Webb v. United States, 249 U.S. 96, 99–100 (1919) (ruling that the government may prohibit a physician from prescribing morphine for an addict for maintenance purposes); McNaughton v. Johnson, 242 U.S. 344, 349 (1917) (upholding state certification requirement for optometrists); Crane v. Johnson, 242 U.S. 339, 344 (1917) (upholding state licensing requirement for physicians as applied to "drugless" practitioners); Collins v. Texas, 223 U.S. 288, 296 (1912) (upholding state licensing requirement for physicians as applied to osteopaths); Watson v. Maryland, 218 U.S. 173, 177–80 (1910) (rejecting equal protection challenge to state physician licensing requirement); Hawker v. New York, 170 U.S. 189, 200 (1898) (upholding state law denying convicted offenders the right to practice medicine); Gray v. Connecticut, 159 U.S. 74, 77 (1895) (upholding state regulation of druggists). *See generally* Reetz v. Michigan 188 U.S. 505 (1903) ("The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question.").
25. *See*, *e.g.*, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 225 (1949) (upholding state law prohibiting life insurance companies and employees from operating undertaking business and undertakers from serving as agents for life insurance companies); Kotch v. Bd. of River Port Pilots Comm'rs, 330 U.S. 552, 564 (1947) (upholding a state law river pilot apprenticeship requirement even though the law empowered licensed pilots to select only their relatives for apprenticeships); Weller v. New York, 268 U.S. 319, 325 (1925) (upholding state ticket reseller licensing requirement); Lehmann v. State Bd. of Pub. Accountancy, 263 U.S. 394, 398 (1923) (upholding state certificate requirement to practice as a certified public accountant); Bratton v. Chandler, 260 U.S. 110, 115 (1922) (upholding real estate broker licensing requirement); LaTourette v. McMaster, 248 U.S. 465, 470 (1919) (upholding insurance broker residency requirement); Merrick v. N.W. Halsey & Co., 242 U.S. 568, 586–87 (1917) (rejecting due process and equal protection challenges to state licensing requirement for securities dealers); Lehon v. City of Atlanta, 242 U.S. 53, 55 (1916) (rejecting Fourteenth Amendment challenge to municipal ordinance requiring private detectives to be licensed); Brazee v. Michigan, 241 U.S. 340, 343 (1916) (upholding state licensing requirement for employment agencies); Engel v. O'Malley, 219 U.S. 128, 139 (1911) (upholding state licensing requirement for private bankers); New York *ex rel.* Lieberman v. Van De Carr, 199 U.S. 552, 563 (1905) (rejecting due process and equal protection challenges to state licensing requirement to sell milk); Gundling v. Chicago, 177 U.S. 183, 186 (1900) (rejecting due process and equal protection challenges to municipal licensing requirement to sell cigarettes); Wilson v. Eureka City,

173 U.S. 32, 37 (1899) (upholding municipal permitting requirement to move a building on city streets); Smith v. Alabama, 124 U.S. 465, 482 (1888) (upholding state licensing requirement for railroad engineers). Other decisions upheld state laws that went even further and prohibited certain occupations altogether. *See* Murphy v. California, 225 U.S. 623, 630 (1912) (upholding municipal ordinance outlawing billiard and pool halls); Rippey v. Texas, 193 U.S. 504, 510 (1904) (upholding state law prohibiting the sale of liquor in "dry" counties); Booth v. Illinois, 184 U.S. 425, 432 (1902) (rejecting due process challenge to state law forbidding futures contracts).

26. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007) (upholding constitutionality of Partial Birth Abortion Act of 2003); Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) (rejecting due process challenge to state law prohibiting physician-assisted suicide); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–85 (1992) (upholding written informed consent requirement for an abortion); United States v. Moore, 423 U.S. 122, 124 (1975) (ruling that federal drug laws apply to a physician who sought to prescribe a controlled substance outside of his "professional practice"); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam) (upholding state law providing that only a physician may perform an abortion); N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973) (upholding state law requiring that a majority of stockholders in a corporation applying for a license to operate a pharmacy be practicing pharmacists); Williamson v. Lee Optical, 348 U.S. 483, 490–91 (1955) (rejecting due process challenge to state regulation of optometry).
27. *See, e.g.*, Rice v. Norman Williams Co., 458 U.S. 654, 664–65 (1982) (rejecting due process and equal protection challenges to a state law requiring liquor importers to be licensed and to be approved by a distiller to import that distiller's products); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106 (1978) (rejecting due process challenge to a state law prohibiting a motor vehicle manufacturer from opening a new dealership within the marketing area of an existing one without state approval); Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 124–25 (1978) (same for state law prohibiting a petroleum producer or refiner from operating retail service stations within the state); New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (upholding local ordinance limiting the number of push-cart vendors); Ferguson v. Skrupa, 348 U.S. 483, 490–91 (1955) (upholding state law making it a crime to engage in "debt adjustment" without a license to practice law).
28. *See* Lochner v. New York, 198 U.S. 45 (1905).
29. *See* Larkin, *Occupational Licensing*, *supra* note 2, at 280; *see also* Paul J. Larkin, Jr., *A Tale of Two Cases*, 73 Wash. & Lee L. Rev. 467, 471–72 (2016) (hereafter Larkin, *A Tale*) ("To many, the Court's analysis in *Roe v. Wade* was precisely the type of interest-balancing approach that the Court had previously invoked in cases such as *Lochner v. New York* to strike down social and economic legislation that the Court found unreasonable. Since the New Deal Era, however, the Court had largely treated *Lochner* like the plague. The Court had either strolled or sprinted away from constitutional interest-balancing, making clear that the legislature is the proper forum for any balancing that must be done. Yet, *Roe v. Wade* boldly signaled that the Court had returned to its old ways, and therefore raised a serious question to what extent substantive due process had been reborn.") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
30. *See* Larkin, *A Tale*, *supra* note 28, at 475 ("It would be elitist to claim that 'liberty' rights are more important than 'property' rights on the ground that '[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.' After all, life has little meaning for someone who cannot afford its basic necessities. Without protection for the right to earn the money necessary to enjoy the rights that the Court has created, those rights are not worth much; just ask an unemployed and homeless gay couple. As a simple matter of biology, therefore, it is difficult to see how any interest could be more important than pursuing a line of work that enables someone to feed, clothe, and shelter himself and his family.") (footnotes omitted).
31. The ALLOW Act, *supra* note 1.
32. *Id.* pmbl.
33. Larkin, *Occupational Licensing*, *supra* note 2, at 239–40 (footnote omitted); Patricia Cohen, *Moving to Arizona Soon? You Might Need a License*, N.Y. Times, June 17, 2016, https://www.nytimes.com/2016/06/18/business/economy/job-licenses.html (notes that the ability to use licenses across state lines is "an issue of particular importance to military families").
34. Larkin, *Occupational Licensing*, *supra* note 2, at 240 (footnote omitted).
35. *See, e.g.*, WH Occupational Licensing Framework, *supra* note 6, at 10; Nelson Lim et al., RAND Nat'l Def. Res. Inst., "Working Around the Military" Revisited: Spouse Employment in the 2000 Census Data 3 (2007); Executive Office of the President, The Fast Track to Civilian Employment: Streamlining Credentialing and Licensing for Service Members, Veterans, and their Spouses 3–4 (2013); U.S. Dep'ts of the Treasury and Defense, Supporting Our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines 3–7 (2012); Iraq and Afghanistan Veterans of America & Prudential Financial, Inc., Veterans' Employment Challenges: Perceptions and Experiences of Transitioning from Military to Civilian Life 5, 7 (2012); Larkin, *Occupational Licensing*, *supra* note 2, at 239–40.
36. The ALLOW Act, *supra* note 1, Tit. I, § 101(a).
37. *See id.* Tit. I, § 101(a)(1)(2).
38. *Id.* Tit. I, § 101(b).
39. *Id.* Tit. II, § 202. Title II would define the term "occupational regulation" as "a statute, rule, practice, policy, or other law requiring an individual to possess certain personal qualifications to use an occupational title or work in a lawful occupation." That definition would include "a regulation requiring registration, certification, or an occupational license" but would not include "a business license, facility license, building permit, or zoning and land use regulation except to the extent that such a law regulates an individual's personal qualifications to perform a lawful occupation." *Id.* Tit. II, § 203(a)(9). "Personal qualifications" means "criteria related to an individual's personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education." *Id.* Tit. II, § 203(a)(10).

40. The tools are the following: reliance on market competition or on a private certification authority (along the lines of Underwriters Laboratories), creation a specific private civil cause of action to remedy consumer harm, adoption of a deceptive trade practice act, regulation of some aspect of the process by which someone provides the particular services at issue, inspection, bonding or insurance, registration, government certification, and a specialty occupational license for medical reimbursement. A "specialty occupational license for medical reimbursement" is defined as "a nontransferable authorization in law for an individual to provide identified medical services and qualify for payment or reimbursement from a government agency based on meeting personal qualifications established by the government." *Id.* Tit. II, § 203(a)(8).
41. *Id.* Tit. II, § 205(a)–(c).
42. *Id.* Tit. II, § 205(d).
43. *Id.* Tit. II, § 206.
44. *Id.* Tit. II, § 204 ("It is the policy of the District of Columbia that—(1) occupational licensing laws should be construed and applied to increase economic opportunity, promote competition, and encourage innovation; (2) regulators should displace competition through occupational licensing only where less restrictive regulation will not suffice to protect consumers from present, significant, and substantiated harms that threaten public health, safety, or welfare; and (3) an occupational licensing restriction should be enforced against an individual only to the extent the individual sells goods and services that are included explicitly in the statute or Municipal Regulation that defines the occupation's scope of practice.").
45. Section 207 states as follows: "(a) IN GENERAL.—An individual may engage in a lawful occupation without being subject to occupational regulations that are—(1) arbitrary; or (2) unnecessary and substantially burdensome. [¶] (b) PROHIBITION.—The District of Columbia and any covered board within the District may not require an occupational license, certification, or registration for a person, or impose any other occupational regulation that imposes a substantial burden on a person, unless the District government demonstrates that—(1) the government has an important interest in protecting against present and recognizable harm to public health, safety, or welfare; and (2) the regulation is substantially related to achievement of the important government interest described in paragraph (1). [¶] (c) LIMITATION.—Nothing in this section shall be construed to—(1) create a right of action against the District government or a private party; or (2) require the District government or a private party to do business with an individual who is not licensed by, certified by, or registered with the District government." *Id.* Tit. II, § 207.
46. *See id.* Tit. II, § 208(a)(1)) ("IN GENERAL.—An individual may assert as a defense in any administrative or judicial proceeding to enforce an occupational regulation that the standard required under section 207 has not been met.").
47. *See id.* Tit. II, § 208(a)(2) ("INITIAL BURDEN OF PROOF.—An individual who asserts a defense under this section has the initial burden of proof that the occupational regulation being enforced substantially burdens the individual's right to engage in a lawful occupation.").
48. *See id.* Tit. II, § 208(a)(3) ("GOVERNMENT'S BURDEN OF PROOF.—If an individual meets the burden of proof under paragraph (2), the District of Columbia government shall…be required to demonstrate by clear and convincing evidence that—(A) the occupational regulation in question advances an important government interest in protecting against real, substantial threats to public health, safety, or welfare; and (B) the regulation is substantially related to achievement of the important government interest described in subparagraph (A)."
49. Section 208 achieves that result as follows: "(1) IN GENERAL.—The Superior Court shall liberally construe this title to protect the right established under section 207. [¶] (2) REQUIREMENTS.—In reviewing an alleged violation of the right established under section 207, the Superior Court—(A) shall make its own findings of fact and conclusions of law; (B) may not rely on legislative findings of fact presented in admissible form to the Superior Court; and (C) may not grant any presumption to legislative determinations—(i) of harm to public health, safety, or welfare; or (ii) that the occupational regulation in question is substantially related to achievement of the important government interest described in subsection (a)(3)(A)." *Id.* Tit. II, § 208(b).
50. 54 U.S.C. §§ 103301–103306 (2012).
51. *See* ALLOW Act, *supra* note 1, Tit. III, § 301(a) (proposing to add new 54 U.S.C. § 103307).
52. Ownership and jurisdiction are different concepts. The federal government has exclusive jurisdiction over the District of Columbia, the subject of Title II of the bill. *See* U.S. Const. art. I, § 8, cl. 17 ("The Congress shall have Power…[t]o exercise exclusive Jurisdiction in all Cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States[.]"). The government can also acquire land by purchasing it from a state or by using its power of eminent domain. *See* U.S. Const. art. IV, § 8, cl. 17 ("The Congress shall have Power…to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, magazines, Arsenals, dock-Yards, and other needful Buildings[.]"); Kohl v. United States, 91 U.S. 367 (1875) (ruling that the federal government has the inherent power to condemn and take land through eminent domain). Federal law does not require the federal government to have "exclusive jurisdiction" over any land, or any interest in land, that it acquires. *See* 40 U.S.C. § 3112 (2012). Moreover, some states may reserve jurisdiction over land transferred to the United States, and some federal statutes may grant states concurrent jurisdiction over certain federal property. *See* 16 U.S.C. § 480 (2012); Wayne R. LaFave, Criminal Law § 4.2(b), at 206 & n.17 (5th ed. 2010) (collecting cases). Perhaps, the federal government always owns the land used for military installations, so the difference between land owned by the federal government and land over which the United States can exercise jurisdiction would not arise.
53. U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have power…[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").

54. U.S. Const. art. I, § 8, cl. 12 ("The Congress shall have power…[t]o raise and support Armies[.]"); *id*. art. I, § 8, cl. 12 ("The Congress shall have power…[t]o provide and maintain a Navy.").
55. *See* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]").
56. Dick M. Carpenter II et al., License to Work: A National Study of Burdens from Occupational Licensing, Institute for Justice (May, 2012), http://ij.org/report/license-to-work/.
57. *See*, *e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017); United States v. Virginia, 518 U.S. 515, 533 (1996).
58. *See*, *e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993).
59. *Morales-Santana*, 137 S. Ct. at 1690; *Virginia*, 518 U.S. at 533. A statute that expressly discriminates on the basis of race is subject to the highest degree of scrutiny, known as "strict scrutiny." *See*, *e.g.*, Johnson v. California, 543 U.S. 499, 505–15 (2005) (applying the strict scrutiny standard to prison cellmate assignments based on race). Statutes like those almost never survive judicial review.
60. *Morales-Santana*, 137 S. Ct. at 1696–97 ("It will not do to 'hypothesiz[e] or inven[t]' governmental purposes for gender classifications 'post hoc in response to litigation.'") (quoting *Virginia*, 518 U. S., at 533, 535–536).
61. Larkin, *Occupational Licensing*, *supra* note 2, at 235–44, 282–312.
62. *See*, *e.g.*, Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Promise of Limited Government (2013).
63. *See Morales-Santana*, 137 S. Ct. at 1689–90 (collecting cases).