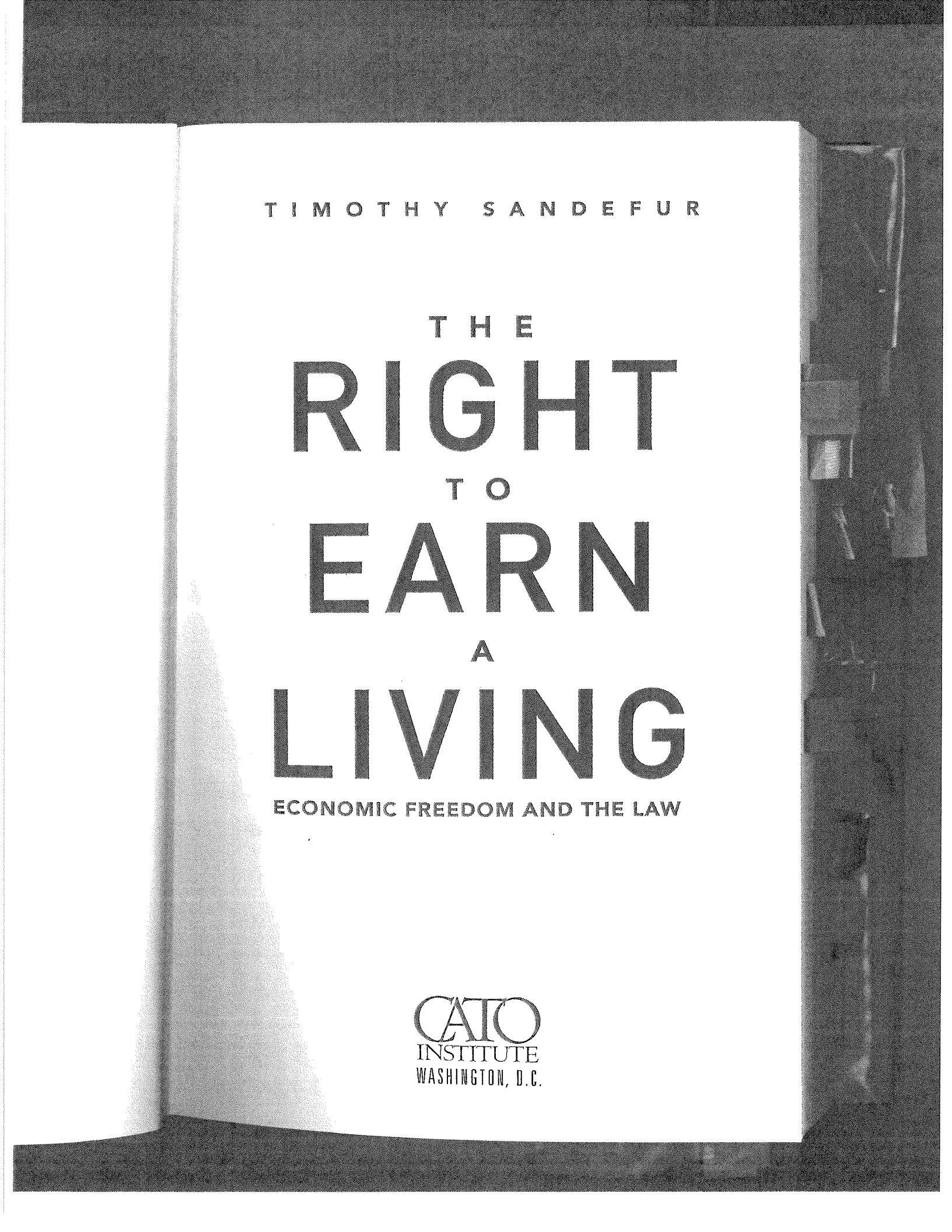
Appendix A



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THE RIGHT TO EARN A LIVING

ECONOMIC FREEDOM AND THE LAW

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WASHINGTON, D.C.

government turned Jones down. Jones filed a lawsuit, pointing out that the city had refused every such application since 1947 and arguing that its refusal to grant new permits arbitrarily created a monopoly at the expense of consumers and honest entrepreneurs. Nevertheless, the trial judge threw Jones's case out of court.[8]

Even where licensing boards are not staffed by owners of competing businesses with an obvious conflict of interest or by bureaucrats with friends or family members in the business, laws like these present problems for entrepreneurs trying to earn a living. The general public is usually unaware of the Byzantine rules companies are required to follow, while the companies seeking protection are very familiar with them. Thus, although regulatory agencies often open their hearings to the public, members of the public rarely attend and are usually not organized. The agencies hear forceful arguments from representatives of existing companies but rarely from consumers, and they are consequently biased. Even ignoring such biases, "certificate of necessity" schemes impose a nearly impossible burden on newcomers. Proving that a new business is "necessary" is virtually impossible, even with extensive polling data and research. Existing companies can always argue that a newcomer is not "necessary" because the existing businesses could handle any increased consumer demand by increasing their prices, adding another office, or getting a government subsidy. What's more, many businesses that consumers enjoy patronizing are not strictly "necessary" but only *convenient*. Are cell phones really *necessary*? What about decorative covers for cell phones, or amusing ringtones? The term "necessary" is itself hard to define, and the notion that a government bureaucracy can decide what businesses are or are not necessary for consumers is a fantasy, and a dangerous one because it plays directly to the self-interest of established businesses that seek protection against competition.[9] The only group capable of deciding whether a business is really necessary for a community, and the only group that can be trusted with the power to make such a decision on behalf of consumers, is consumers themselves.

Although there are any number of ways for interested businesses to use the law to exclude competition, four methods are of particular interest: occupational licensing laws, zoning regulations, "agricultural adjustment," and franchise acts.

Licensing

The justification for modern occupational licensing, as it was developed in the 19th century, was that such laws would protect the public from dangerous or incompetent practitioners. By requiring doctors to prove that they knew how to perform operations safely and effectively, for example, the government could ensure that consumers did not fall victim to quacks and con artists. In 1889, in *Dent v. West Virginia*,[10] the first Supreme Court decision to address occupational licensing, Justice Field held that such laws were a legitimate way to protect "the general welfare of [the] people" and "secure them against the consequences of ignorance and incapacity, as well as of deception and fraud."[11] But if the licensing requirements had "no relation to such calling or profession," or if licenses were "unattainable by . . . reasonable study and application," such laws would "operate to deprive one of his right to pursue a lawful vocation" and thus violate the Constitution.[12] More than half a century later, the Court reaffirmed this conclusion when it held that the state may not bar a person from a profession on the basis of irrelevant factors, such as his political opinions.[13] Unfortunately, despite claims that it would protect the general public, licensing is often used as a tool to prevent competition from disfavored groups.

Abuses started early.[14] In 1878, California called its second constitutional convention at the behest of a powerful political organization called the Workingmen's Party. The party advocated new restrictions on corporations, particularly railroads, as well as an end to what it called the "Chinese Menace": the enormous influx of immigrant labor from China, which increased the supply of available labor and thereby drove down the costs not only of labor but of the goods and services that labor produced. Although the lower prices were good news for consumers, the decrease in the price of labor—that is, wages—made it harder for natives and European immigrants to demand high pay for their work. Whites were explicit about their outrage over this state of affairs. As one delegate to the convention put it, a Chinese worker was "a creature, whose muscles are as iron, whose sinews are like thongs, whose nerves are like steel wires, with a stomach case lined with brass; a creature who can toil sixteen hours of the twenty-four. . . . The white man cannot compete in the field of labor with such a being as that. . . . If the white man is to compete with the Chinaman he must adopt a cheaper style of

dress, must inure himself to the cold, he must labor in the night; sleep shall not come to his pillow until the midnight bell . . . [and he must] arise at the first gray streaks of dawn."[15] In other words, while racists sometimes accuse racial minorities of being lazy, those who attacked the Chinese accused them of being intelligent and hard working. As one railroad laborer later recalled, the Chinese were hated "not for their vices but for their virtues . . . because [they] are so much more honest, industrious, steady, sober, and painstaking."[16]

Hostility to Chinese competition manifested itself in many ways in California: Whites imposed harsh restrictions on the economic freedom of Chinese workers, including special taxes and laws that barred them from carrying laundry on poles or from delivering laundry except on horseback or from fishing in local waters.[17] Often, these restrictions were cleverly designed to impose burdens that white lawmakers knew would be especially difficult for the Chinese, even though the laws did not explicitly identify the Chinese as targets.

The delegates at the constitutional convention proposed many ideas for excluding the Chinese from California, including prohibiting them from owning any property in the state and prohibiting any California corporation from employing a Chinese person. One delegate spoke for many when he explained that he was "willing to go as far as any gentleman on this floor by way of police, sanitary, criminal, or vagrant regulations, or refusing to license this class of aliens to carry on any trade or business whatever, if we can in any way, by statute or otherwise, prevent the same." His goal was "to hamper them in every way that human ingenuity could invent."[18] As this hateful proposal suggests, occupational licensing laws have often been used as a tool for excluding racial minorities from trade, thereby keeping up the income of politically powerful racial groups.

California's abuse of the Chinese led in 1886 to one of the most important early Supreme Court cases regarding economic liberty: *Yick Wo v. Hopkins*.[19] San Francisco had enacted a municipal law requiring laundry businesses to be housed in buildings made of brick. Any laundry in a building made of wood had to be licensed by a city official, who was given complete discretion to grant or to deny such permits. The city claimed the law was intended as a fire-safety measure, but the Supreme Court disagreed. It was plainly meant to persecute the Chinese, who ran most of the city's laundry businesses.

By allowing city officials carte blanche to grant or deny permits, the law made business owners into "tenants at will . . . of their means of living"[20]—meaning that they could in a sense be "evicted" from their jobs at any time. The law put no limits on what officials could do when granting or withholding permits; it gave them unbridled discretion. That was intolerable because "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another" was "the essence of slavery itself."[21] The justices did not buy the argument that the law was intended to prevent the spread of fire; even a law appearing equal on its face could "amount to a practical denial by the state of [the] equal protection of the laws" if the government enforced it "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights."[22] The right to earn a living was one of the rights "secured by those maxims of constitutional law which are the monuments showing the victorious progress of the [human] race in securing to men the blessings of civilization under the reign of just and equal laws."[23]

Yick Wo was, and remains, a milestone in the protection of racial minorities. But while the Chinese business owners were successful in that case, similar abuses continued,[24] not only against the Chinese but against many other minorities. Professor David E. Bernstein has documented the ways that licensing laws were used to bar blacks from earning a living legally during the Jim Crow era.[25] On rare occasions, courageous judges would hold these licensing laws to be unconstitutional. For example, in 1924, the Arkansas Supreme Court invalidated a licensing law for plumbers on the ground that it did not actually protect the public from dangerous or shoddy practices but was instead "passed from other motives."[26] The licensing examination tested obscure knowledge and unusually difficult tasks, which gave the bureaucrats in charge of the licensing scheme "arbitrary and oppressive power" to "deprive one who is thoroughly qualified to do the practical work of plumbing of his constitutional right to pursue his avocation, and perhaps his only livelihood, because, forsooth, he was unable to answer some technical or theoretical question, not in any sense germane to the real and practical trade of a plumber, and not having even the remotest connection with the actual conservation of the public health."[27] But in

general, successful challenges to occupational licensing laws were rare. As Bernstein observes, "The results of judicial acquiescence in the licensing system," along with other factors such as union violence against black workers, "were disastrous for African Americans who sought work as plumbers" or as practitioners of other licensed trades.[28] In fact, racial exclusion played such an important role in economic regulation in the late 19th and early 20th centuries that civil rights leader Frederick Douglass railed against labor unions and similar groups for scheming to bar blacks from earning a living for themselves and their families. And in 1951, Thurgood Marshall, a lawyer for the National Association for the Advancement of Colored People and a future Supreme Court justice, complained that the rational basis test was so deferential toward government that courts were failing to protect the rights of blacks, including the right to earn a living.[29]

Of course, even in the absence of explicit racist intent, many occupational licensing schemes have significant racial biases. JoAnne Cornwell discovered this in the 1990s when she opened her San Diego business called Sisterlocks, devoted to performing a unique hair-braiding method called "locking," similar to traditional African methods of hair care. Like African hair braiding, Cornwell's locking method did not involve chemically treating or cutting the hair. But when California regulators heard about her business, they demanded that Cornwell and all natural hair care stylists get a license from the Board of Barbering and Cosmetology. Obtaining a cosmetology license required applicants to spend 1,600 hours at a state-approved cosmetology school, at a cost of more than $5,000, before even taking the test. And the hairstyling techniques taught in the school had no relation to Cornwell's business since, as a federal court later pointed out, "African hair styling is uniquely performed on hair that is physically different—alternatively described as tightly textured or coily hair—and that this physical difference is genetically determined to be in close correlation with race."[30] The curriculum Cornwell would be required to take, moreover, involved learning hairstyles that had not been popular for decades and that could only be performed on the hair of white customers. Worse, they required the use of chemicals that Cornwell and her fellow hairstylists did not believe in using.

Cornwell and others filed suit in federal district court, arguing that her business was not "barbering" or "cosmetology" and that it was irrational for the state to force her to obtain a barbering or cosmetology license. They claimed that the requirements violated the equal protection and due process clauses of the Constitution by restricting their liberty without any sensible connection to public health and safety. The court ruled in their favor. Forcing Cornwell to "spend nine months attending a cosmetology school, at a cost of $5,000–$7,000, learning skills, 96% of which [she] will never use" violated the rational basis requirement.[31]

Cornwell's victory was unusual. As we have seen, under the "rational basis test," entrepreneurs who challenge the constitutionality of absurd and abusive occupational licensing laws rarely succeed.[32] The Louisiana florist case discussed in the last chapter typifies everything wrong with occupational licensing laws: they represent a thin pretext of public benefit stretched over blatant anticompetitive practices. In 2004, after the Louisiana House of Representatives voted overwhelmingly in favor of a bill to eliminate the florist licensing requirement, the bill nevertheless died in the Senate's Agriculture Committee after intense lobbying by licensed florists. Even the state commissioner of agriculture lobbied against the bill, after interviewing several licensees—but not speaking to any unlicensed, would-be florists—because (as he later testified) "I have committed to the florists when I ran [for office] in 1980 that I would support their desires of either having or get[ting] rid of the law."[33] The Louisiana florist law exemplifies what the "public choice" school of economics calls "legislative capture": the exploitation of government's coercive powers for the benefit of private-interest groups. In this, it is only one of the many examples of the legalized protection racket known as occupational licensing.

Even when licensing is advanced by responsible public-minded groups, the government agencies in charge of licensing are routinely captured by businesses that stand to gain from controlling competition. This is why Milton Friedman contended that licensing "almost inevitably becomes a tool in the hands of a special producer group to maintain a monopoly position at the expense of the rest of the public. There is no way to avoid this result."[34] Economists and lawyers have assembled a mountain of evidence supporting Friedman's

conclusions: licensing raises costs to consumers, with little observable improvement in the quality of many licensed services.[35] Moreover, such laws appear to benefit highly paid practitioners more than those who are paid less, because "more highly educated and influential occupations may be more powerful in state or local jurisdictions and may be able to control supply more effectively."[36]

Some abuses of occupational licensing are remarkably brazen. In 2007, psychics in Salem, Massachusetts, urged the city to create a licensing requirement, allegedly to protect consumers from incompetent psychics, despite the fact that it is literally impossible to be a *competent* psychic.[37] But they sought a licensing scheme both to provide them with sham legitimacy and to shut out competition in what is otherwise an entry-level business with low start-up costs.

Strangely enough, two of the three most important economic freedom cases decided after the New Deal involved occupational licensing for people selling coffins.[38] These cases raised the question of whether the Constitution allows the government to create licensing laws solely for the *explicit* purpose of granting benefits to one business or group of businesses over another or whether licensing laws must be related in even the most abstract way to protecting the public health, safety, and welfare.

The funeral industry was an early convert to occupational licensing.[39] But licensing was only one of the ways the industry sought to raise prices. In 1881, American coffin makers founded the National Burial Case Association, which set prices for the whole industry. Two years later, the National Funeral Directors Association fixed the price of an adult coffin at $15, a large sum in the 19th century. Today, the national casket market is dominated by two corporations, York and Batesville, who together account for two-thirds of American coffin sales. Nationally, the funeral industry takes in about $25 billion per year.[40] This industry benefits tremendously from the fact that many customers are grieving the loss of a loved one when they purchase coffins or funeral services. But the industry benefits even more from excluding competition through occupational licensing.

Beginning in 1984, in response to new Federal Trade Commission regulations, entrepreneurs began selling caskets to the public directly at wholesale prices. By specializing and cutting out the middleman, these businesses could offer caskets to consumers at greatly

reduced rates. The FTC prohibited funeral homes from refusing to accept caskets from outside retailers,[41] and competition began to decrease prices and increase choice.

But this new economic freedom ran up against significant barriers. For many decades, the funeral industry had benefited from special legal privileges. Several states, for example, passed laws prohibiting the sale of caskets by anyone except a licensed funeral director. Under a 1972 Tennessee law, the practice of funeral directing was defined to include "the selling of funeral merchandise."[42] To sell a casket, therefore, one must first hold a funeral director's license. Becoming a funeral director was a major undertaking: an applicant was required either to attend Gupton College's 12- to 16-month training program for funeral directors (at a cost of more than $10,000), as well as serving a year in an apprenticeship, or to serve a 2-year apprenticeship and assist in 25 funerals. Only after these requirements were met could the applicant pay another $200 for the opportunity to take the Funeral Board examination.[43]

Nathaniel Craigmiles, a pastor who became frustrated at seeing his parishioners exploited by funeral homes, decided to open his own business selling caskets at discount prices. But Craigmiles was not a licensed funeral director, so the state soon began enforcement proceedings against him. He filed a lawsuit alleging that the licensing requirement limited his liberty to earn a living but had no sensible connection to public safety. Thus, it violated his constitutional rights as guaranteed by the privileges or immunities, due process, and equal protection clauses of the Fourteenth Amendment.

Although the district court acknowledged that because the Tennessee statute was an economic regulation it was subject only to low-yield "rational basis" review, it nevertheless held a full-scale trial to determine whether the law was actually rationally connected to public health and safety. Concluding that it lacked such connections, the court struck it down.[44] A coffin is simply a wooden box, wrote Judge R. Allan Edgar, and requiring retailers to go through such extensive training for licensure was absurd. Neither Craigmiles nor his partners were officiating at the funerals or constructing caskets. Although public health concerns about pollution of the ground due to faulty caskets might justify regulating their manufacture, no such concern was served by requiring *retailers* to be licensed. In fact, Tennessee law did not actually require that people be buried

in caskets at all, further undermining the allegation that the law protected public health. As the court concluded:

> [T]he purpose of promoting public health and safety is not served by requiring two years of training to sell a box. . . . [N]one of the training received by licensed funeral directors regarding caskets has anything to do with public health or safety. The training and the exam questions regarding caskets relate only to product information and merchandising. These topics have no relationship to health and safety, but might be helpful to one who sells any product. In sum, a casket does not differ from any other product in the marketplace. No health and safety reason rationally relates to requiring an individual to undergo two years of training, pay a fee, and pass a test in order to sell a casket.[45]

On appeal, the state argued that the district court had engaged in "*Lochner*ism" by substituting its own judgment for that of the legislature, but the court of appeals upheld the decision.[46] After reviewing the facts demonstrating that the Tennessee statute had little to do with protecting consumers, the court concluded that the state's proffered explanations for the law came close to "striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"[47] It was simply absurd to see the law as anything other than "an attempt to prevent economic competition."[48] And this was not a proper goal: "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[49] For the first time in almost 70 years, a federal court struck down a state economic regulation using the rational basis test.

But only six days after *Craigmiles* was decided, a federal trial court in Oklahoma issued a directly contrary ruling in an almost identical case. *Powers v. Harris*[50] involved an Internet-based retail casket company called Memorial Concepts Online, Inc., started by entrepreneurs Kim Powers and Dennis Bridges. Like Tennessee, Oklahoma law defines any person selling funeral merchandise as a funeral director and requires such a person to obtain a funeral director's license.[51] Getting a license in Oklahoma is nearly as onerous and expensive as it is in Tennessee: an applicant must complete at least 60 hours of study in an accredited college, graduate from an approved mortuary science program, and serve a year as a registered apprentice.[52]

Unlike the *Craigmiles* court, the trial court in *Powers* found this requirement rational.[53] Using the rational basis standard, the court said that judges must allow "any reasonably conceivable purpose [that the challenged] laws might serve," and not "evaluat[e] the effectiveness of a legislative measure" or "its economic benefits and detriments."[54] The court criticized the *Craigmiles* decision for using *Lochner*-style analysis and then upheld the Oklahoma licensing scheme, even though it was "not persuaded that the provisions in question advance the cause of consumer protection. Maybe they do and maybe they don't."[55] That question was unimportant, the court concluded, because even absent any evidence showing that the law could or did serve the public health, safety, and welfare, it was "readily conceivable that the licensing provisions challenged by the plaintiffs could have been thought by the legislature to promote the goal of consumer protection."[56] And that was all the rational basis test required.

The Tenth Circuit Court of Appeals upheld this decision, but went much further.[57] After a long recitation of the deference accorded to the government under the rational basis test, the court declared that it was "obliged to consider every plausible legitimate state interest that might support [the licensing requirement]—not just the consumer-protection interest forwarded by the parties."[58] The restriction would be upheld not only if it advanced consumer safety but also if "protecting the intrastate funeral home industry . . . constitutes a legitimate state interest."[59] This, the court held, was a proper government function: "intrastate economic protectionism constitutes a legitimate state interest."[60] Thus, the law was constitutional even though it had *nothing* to do with protecting the public: the legislature could also enact the restriction merely to grant economic favors to politically influential economic constituencies.

The *Powers* court based this extraordinary conclusion on three primary considerations. First, it noted that the *Craigmiles* decision had relied on three cases when declaring that mere protectionism was not a constitutional government purpose under the Fourteenth Amendment: *City of Philadelphia v. New Jersey*,[61] *H.P. Hood & Sons, Inc. v. Du Mond*,[62] and *Energy Reserves Group, Inc. v. Kansas Power & Light*.[63] But none of these was a Fourteenth Amendment case. Accusing the *Craigmiles* court of "selective quotation," the Tenth Circuit noted that *Du Mond* and *Philadelphia* involved the dormant

commerce clause, and *Energy Reserves Group* involved the contracts clause.[64] The dormant commerce clause has long been held to forbid states from discriminating against businesses located in other states but has not been read as having any relation to protectionist legislation *within* states. Within state boundaries, laws are subject only to the Fourteenth Amendment, and since the advent of rational basis review, the court noted, judges have frequently upheld laws that protect one industry against another *inside* a state.

But while this is true, the *Powers* court was ignoring the bigger picture illustrated by the cases that the *Craigmiles* court relied on: the ultimate purpose of the commerce clause, the contracts clause, and the Fourteenth Amendment's equal protection clause is to protect individual liberty. As Professor Sunstein has put it, these clauses are "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[65] Although the federalist system does protect state sovereignty, it does so not as an end in itself, but as a means of securing individual freedom.[66]

Second, the *Powers* court held that applying a skeptical analysis of protectionist laws would threaten the validity of the post–New Deal regime: "adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner" would require invalidating countless laws already on the books that perform no legitimate public function but merely protect one interest group from another.[67] Indeed, the court noted that economic protectionism is so common in state legislatures that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[68] In short, because legislatures pass such measures so often, and have done so for so long, they must be constitutional. But this argument is a non sequitur. The mere fact that states frequently act in unconstitutional ways is hardly enough to make those acts constitutional: certainly segregation was a common state policy when it was finally held unconstitutional in the 1950s.

Because the *Powers* decision declares that providing economic favors for preferred groups is itself a legitimate state interest regardless of the effect that such laws may have on the public welfare, it is

not too much to say that the case was the most disastrous economic liberty decision since the New Deal. In previous cases upholding the constitutionality of economic restrictions, courts based their rulings on the theory that the law protected the public in *some* way, even if the connection was tenuous in the extreme. In many cases, such as the Louisiana florist case, the idea that the restriction protected the public was barely plausible, but in the end those cases still declared that economic liberty could be restricted only as a means of protecting the general public from some perceived harm. *Powers* was the first case in which a court held that the government could enact an economic regulation without *any* such connection at all, and *solely* to secure an economic benefit for those businesses the government prefers. If the legislature chooses to grant legal favors to one group over another *just because it wants to*, the law will nevertheless be upheld under *Powers*. The case was, in a sense, the mirror image of the substantive due process cases from a century before: anything the government chooses to do—even if it explicitly serves private interests rather than the general public good—is a legitimate law *simply because the government chose to do it*. In the eyes of the *Powers* court, law is not the use of government force in the service of some independent standard of public good but is instead the use of force in the service of arbitrary legislative will. What one writer has said when describing a different legal issue is equally applicable here: such a theory leads to "the legal enforcement of private bias, casting lawmaking as a kind of Nietzschean struggle of will, with various . . . interest groups trying to gain legal enforcement of their [desires] without having to give reasons."[69]

Obviously, the conclusion that protectionism is a legitimate state interest invites abuses in the service of irrational prejudice or favoritism. If a city chooses to grant a preference to, say, Target by outlawing Wal-Mart for no other reason than that the members of the city council prefer Target, then it can do so. Just as granting protection to licensed funeral directors was somehow a public goal because the legislature chose to adopt it, so protecting Target becomes a public goal simply because the city considers it worthy of protection. Of course, government officials will rarely if ever admit to acting in the interest of a private party; they will virtually always claim their acts are for the public welfare.[70] And whenever a private-interest group demands special favors from lawmakers, it always claims that the

public will ultimately benefit from subsidies to the interest group. If a business wants government to exclude its rivals, it will tell lawmakers that its rival is somehow a threat to the public welfare, or that the public will prosper if a monopoly is given to the private company. For example, the racists who agitated for laws restricting Chinese labor in 19th-century California claimed that white supremacy was good for society and that the Chinese were a "menace" to the public. Such self-serving disguises often dissolve in the light of common sense, but under the *Powers* decision, courts are not expected to apply common sense. If the legislature chooses to confer monopoly power to a lobbyist, that lobbyist's private interest becomes, ipso facto, the public interest.

Pest Control—or Economic Control?

A third illustrative occupational licensing case in the post–New Deal era challenged a requirement that applied to wildlife control workers, and the story of its litigation is an example of how difficult it is for businesses to defend themselves against protectionist schemes that powerful interest groups get translated into law.

Wildlife control workers trap the vertebrate pests that infest buildings, such as pigeons, rats, skunks, or raccoons, or they use spikes or screens to keep birds and squirrels away from buildings. They do not use pesticides, however, which they consider ineffective and dangerous. Alan Merrifield is a widely respected leader in the wildlife control trade. But when he sought a state contract to install anti-bird netting on a state office building in Oakland, California, he learned that under the state's Structural Pest Control Act, no person may install such nets without a "Branch 2 Structural Pest Control Operator" license. That license is only granted to people who pass the state's 200-question licensing examination, and to take the test, an applicant must first show proof that he or she has been employed for two years by a person with a license. More surprisingly, the exam has little to do with an applicant's knowledge of nonpesticide techniques of pest control. In fact, although a person must take and pass this test before putting spikes on a building to keep pigeons away, the examination does not contain a single question about pigeons, or about spikes. Instead, the exam is overwhelmingly devoted to testing an applicant's knowledge of the proper ways of handling, using, and

storing *pesticides*—pesticides Alan Merrifield and his fellow wildlife control workers do not use—and about how to deal with insects, spiders, and moths, which they do not treat.

Perhaps recognizing the perversity of forcing people who do not use pesticides to become experts on the use of pesticides, one state legislator sought to amend the law in 1995 to eliminate the licensing requirement for people who do not use pesticides. But when this proposal was announced, pest control workers who already had licenses feared that they might lose control over the industry, and they opposed the bill. One organization in particular, the Pest Control Operators of California, lobbied heavily against the bill. Its vice president later testified that industry lobbyists finally resolved the controversy by dividing up the pest control market. The expensive and time-consuming licensing requirement would be imposed on anyone dealing with pigeons, rats, and mice, since they make up the most lucrative part of the pest control trade; people like Merrifield would then be allowed to deal with only the less common pests like raccoons and squirrels.[71] This effort to cartelize the market for pest control services succeeded: the legislature altered the 1995 bill so that it allowed pest control workers who chose not to use pesticides to do their business without undergoing unnecessary and expensive training in pesticide use—unless their work involved pigeons, rats, and/or mice! In other words, if Merrifield installed a screen on a building to keep a raccoon out, he did not need a license, but if he installed the *same* screen on the *same* building to keep a *rat* out, he needed to spend two years learning to use pesticides and take a difficult and time-consuming test about the lifespan of insects and the dangers of chemical poisons.

Asked for an explanation of this bizarre scheme, the state's expert witness testified under oath that the law was "a political piece of legislation in order to make a particular constituency happy, *but it harms the consumer* because the consumer ends up with somebody coming in and doing what has traditionally been a behavior that requires a professional license."[72] He acknowledged that it made no sense to require a license for trapping or excluding pigeons, rats, and mice, but not for trapping or excluding any other kind of pest:

> Q: Does it protect the public health and safety to require a person who does pigeon exclusion work without pesticides in structures to have a . . . license?

> Mr. Paulsen: Absolutely.
>
> Q: Does it protect the public health and safety not to require the same license for seagull exclusion work?
>
> Mr. Paulsen: No, it does not.
>
> Q: Would you call this irrational?
>
> Mr. Paulsen: Yes, I would.[73]

Asked a third time to explain the licensing scheme, he reiterated, "[F]rom a public perspective, it might be irrational."[74]

Nevertheless, despite the plain absurdity of the law's requirements and regardless of the fact that the state's own expert witness testified repeatedly that the licensing scheme was positively irrational, the trial court still upheld the law.[75] Requiring a license for excluding pigeons but not seagulls was rational, wrote Judge William Schwarzer, because the legislature might have concluded "that rats, mice, and pigeons are overwhelmingly the most common vertebrate pests infesting structures."[76] Yet if this were the purpose of the restriction, it made no sense that the test included no questions at all about pigeons and next to none about rats or mice. Still, Schwarzer continued, the legislature might have thought that "requiring that pest control operators be knowledgeable about alternative methods of control, about the public health hazards posed by pests, and about ways of protecting themselves and the public from pesticides previously applied by others" would protect the public and advance the public interest.[77] But this rationale was inconsistent with the fact that practitioners dealing with other kinds of animals were not required to have such training—so that a professional might show up at a person's house to treat a bat infestation, knowing nothing whatsoever about the pesticides previously applied to that structure by others.

The *Merrifield* decision shows the lengths to which courts can go and the contortions in logic courts perform under the rational basis test. The undisputed evidence established that the bizarre pest control licensing scheme was designed simply to protect licensed practitioners against competition from outsiders, not to protect the public health and safety. The state's expert witness testified that the

licensing scheme was positively irrational. Yet the rational basis test allowed the court to ignore all the evidence and manufacture its own, self-contradictory justification for the law.

Fortunately for Merrifield, and entrepreneurs in general, the Ninth Circuit Court of Appeals reversed this decision. In a 2–1 opinion, Judge Diarmuid F. O'Scannlain concluded that "just as in *Craigmiles*, the licensing scheme in this case . . . was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield."[78] The justifications that the state offered for the licensing requirements were "so weak that [they] undercut[] the principle of non-contradiction"[79] and revealed that the real purpose of the law was to divide up the trade in a way that benefited political insiders. And this the court explicitly declared unconstitutional:

> [M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. In doing so, we agree with the Sixth Circuit in *Craigmiles* and reject the Tenth Circuit's reasoning in *Powers v. Harris*. . . . We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.[80]

Now that the courts of appeal are in conflict over this issue, with the Tenth Circuit upholding protectionism as a legitimate purpose for occupational licensing and the Sixth and Ninth Circuits disagreeing, the stage is set for the Supreme Court to resolve the issue definitively in some future case.

Zoning

Wal-Mart is one of the great American success stories. Not only does it demonstrate how a new idea can prevail against the common assumptions of the business world, but it also shows how a business can grow by providing customers with the products they need at prices they can afford. Today, it is the largest company in the world, and it employs more people than any other employer in the United States (except the government, of course). Wal-Mart makes more

is whatever result just procedures have led to." Menand, *The Metaphysical Club* (New York: Farrar, Strauss, and Giroux, 2001), p. 432.

36. *Beach Communications*, 508 U.S. at 323 n. 3 (Stevens, J., concurring in judgment).

37. *S.S. Kresge Co. v. Couzens*, 290 Mich. 185, 192 (1939).

38. Ibid.

39. *Meadows v. Odom*, 360 F. Supp. 2d 811, 823–24 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006).

40. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 (1938).

41. Victoria F. Nourse makes a powerful argument that this evolution began with *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), a case invalidating an Oklahoma law that required the forced sterilization of prison inmates. Nourse, *In Reckless Hands:* Skinner v. Oklahoma *and the Near-Triumph of American Eugenics* (New York: W. W. Norton, 2008), especially chap. 9. No single case, however, indicates the Court's change in direction. Beginning in the World War II era, the Court shifted from the almost total deference of New Deal cases like *Nebbia* toward a higher scrutiny—not in cases involving class legislation, as with the pre–New Deal cases, but in cases involving what the justices considered to be important rights of personal dignity or democratic participation. Also indicative of this shift is *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), which abandoned the extreme deference of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). See Epstein, *Progressives*, pp. 100–16.

42. Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (University Park: Pennsylvania State University Press, 1996), pp. 156–57.

43. Laurence Tribe, *American Constitutional Law*, 2nd ed. (Mineola, NY: Foundation Press, 1988), p. 1374.

44. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

45. Cf. Ludwig von Mises, *The Anticapitalistic Mentality* (Grove City, PA: Libertarian Press, 1972); and F. A. Hayek, "The Intellectuals and Socialism," *University of Chicago Law Review* 16 (1949): 417–33.

46. *United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia and Thomas, JJ., concurring in judgment).

47. *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); *Williams v. Attorney General of Ala.*, 378 F.3d 1232 (11th Cir. 2004); and *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988 (7th Cir. 2002). See also *This That and the Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 439 F.3d 1275 (11th Cir. 2006) (challenging law against advertising adult novelties).

48. *Williams*, 478 F.3d at 1322.

49. *Lawrence*, 539 U.S. at 571.

50. *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).

51. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).

52. *Romer v. Evans*, 517 U.S. 620 (1996).

53. Ibid. at 632–33.

54. As one commentator puts it, these are "'true rational basis' cases because they involve a true search for rationality." Donald Marritz, "Making Equality Matter (Again): The Prohibition against Special Laws in the Pennsylvania Constitution," *Widener Journal of Public Law* 3 (1993): 176.

55. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

56. Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *Supreme Court Review*, 1962: 34–62.

57. Ibid.

Chapter 7

1. Quoted in R. H. Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1990), p. 196.

2. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

3. Ibid. at 278–79.

4. Ibid. at 278 (quoting *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513 (1924)).

5. Ibid. at 311 (Brandeis, J., dissenting).

6. Ibid. at 279–80. Justice Jackson would make a similar point almost 20 years later in *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 546 (1942): "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."

7. *Liebmann*, 285 U.S. at 279–80.

8. *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot*, 57 F.3d 921 (10th Cir. 1995).

9. Hadley Arkes, *The Return of George Sutherland* (Princeton, NJ: Princeton University Press, 1994), p. 55.

10. *Dent v. West Virginia*, 129 U.S. 114 (1889).

11. Ibid. at 122.

12. Ibid.

13. *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 239 (1957).

14. Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005), pp. 340–46.

15. *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento: State Printing Office, 1880), vol. 1, p. 633.

16. Quoted in Stephen A. Ambrose, *Nothing Like It in the World* (New York: Simon & Schuster, 2000), p. 153.

17. Jean Pfaelzer, *Driven Out: The Forgotten War against Chinese Americans* (New York: Random House, 2007), especially chap. 2.

18. G. B. Willis and P. K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento: State Printing Office, 1880), p. 727.

19. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

20. Ibid. at 368.

21. Ibid. at 370.

22. Ibid. at 373–74.

23. Ibid. at 370.

24. David E. Bernstein, "*Lochner*, Parity, and the Chinese Laundry Cases," *William & Mary Law Review* 41 (1999): 244–50.

25. David E. Bernstein, *Only One Place of Redress: African-Americans, Labor Regulations and the Courts from Reconstruction to the New Deal* (Durham, NC: Duke University Press, 2001), especially chap. 2.

26. *Replogle v. City of Little Rock*, 267 S.W. 353, 357 (Ark. 1924) (quoting *Lochner v. New York*, 198 U.S. 45, 64 (1905)).
27. Ibid. at 356.
28. Bernstein, *Only One Place of Redress*, p. 35.
29. Thurgood Marshall, "The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws," in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, ed. M. Tushnet (Chicago: Lawrence Hill Books, 2001), pp. 119–20.
30. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105 (S.D. Cal. 1999).
31. *Cornwell v. California Bd. of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277 (S.D. Cal. 1997).
32. See further Clark Neily, "No Such Thing: Litigating under the Rational Basis Test," *New York University Journal of Law and Liberty* 1 (2005): 898–914.
33. Timothy Sandefur, "Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries," *William & Mary Bill of Rights Journal* 14 (2006): 1061.
34. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 148.
35. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Kalamazoo, MI: Upjohn Institute, 2006); S. David Young, *The Rule of Experts* (Washington: Cato Institute, 1987); Mario Pagliero, "What Is the Objective of Professional Licensing? Evidence from the US Market for Lawyers," University of Turin working paper, January 2005, http://www.fep.up.pt/conferences/earie2005/cd_rom/Session%20II/II.G/Pagliero.pdf (accessed June 18, 2005); David E. Bernstein, *Only One Place of Redress*, chap. 2; David E. Bernstein, "Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African-Americans," *San Diego Law Review* 31 (1994): 89–104; Jonathan Rose, "Occupational Licensing: A Framework for Analysis," *Arizona State Law Journal* (1979): 189–202; Lawrence Shepard, "Licensing Restrictions and the Cost of Dental Care," *Journal of Law and Economics* 21 (1978): 187–201; Kathleen Sowle Stolar, "Occupational Licensing: An Antitrust Analysis," *Missouri Law Review* 41 (1976): 66–79; Walter Gellhorn, "The Abuse of Occupational Licensing," *University of Chicago Law Review* 44 (1976): 6–27; Alex Maurizi, "Occupational Licensing and the Public Interest," *Journal of Political Economy* 82 (1974): 399–413; "Note: Due Process Limitations on Occupational Licensing," *Virginia Law Review* 59 (1973): 1097–129; Thomas G. Moore, "The Purpose of Licensing," *Journal of Law and Economics* 4 (1961): 93–117; J. A. C. Grant, "The Gild Returns to America," *Journal of Politics* 4 (1942): 303–36, 458–77; and David Fellman, "A Case Study in Administrative Law: The Regulation of Barbers," *Washington University Law Quarterly* 26 (1941): 213–42.
36. Morris M. Kleiner, "Occupational Licensing," *Journal of Economic Perspectives* 14 (2000): 196.
37. Chris Cassidy, "Salem Struggles to Sort Out Psychic 'Free-for-All,'" *Salem News*, May 24, 2007, http://www.associatedcontent.com/article/283540/the_future_looks_good_for_palm_readers.html; and Dina Cardin, "The Futures Market," *North Shore Online*, June 15, 2007, http://www.townonline.com/northshoresunday/homepage/x504545030.
38. It is ironic, therefore, that one of the most important law review articles on economic liberty in the post–New Deal era was Robert McCloskey's "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *Supreme Court Review* (1962): 34–62.

39. Lawrence M. Friedman, *History of American Law*, p. 341.
40. Institute for Justice, "The Right to Urn an Honest Living: Challenging Tennessee's Casket Monopoly," http://www.ij.org/index.php?option=com_content&task=view&id=767&Itemid=165.
41. 59 *Fed. Reg.* 1592, 1593 (1994). This regulation prohibits funeral homes from charging "handling fees," which are simply surcharges meant to discourage customers from purchasing caskets outside of the fineral home. But the regulation is routinely flouted.
42. Tenn. Code Ann. § 62-5-101(3)(A)(ii).
43. Rules of the Tennessee Board of Funeral Directors and Embalmers, http://www.state.tn.us/sos/rules/0660/0660-03.pdf (accessed April 18, 2003).
44. *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000).
45. Ibid. at 663.
46. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
47. Ibid. at 225 (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001)).
48. Ibid.
49. Ibid. at 224.
50. *Powers v. Harris*, 2002 WL 32026155 (W.D. Okla. December 12, 2002), *aff'd*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005).
51. 59 O.S. §§ 396.2.2.d, 396.3a.
52. 59 O.S. § 396.6.b. Unlike Tennessee law, the Oklahoma law does not appear to allow any way around the apprenticeship requirement.
53. *Powers* therefore was decided in direct contradiction to *Craigmiles*. Although it typically grants certiorari in cases in which the federal courts of appeal are divided, the U.S. Supreme Court denied certiorari in *Powers*, 125 S. Ct. 1638 (2005), and the division remains unresolved.
54. *Powers*, 2002 WL 32026155 at *15.
55. Ibid. at *18.
56. Ibid.
57. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).
58. Ibid. at 1218.
59. Ibid.
60. Ibid. at 1221.
61. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
62. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949).
63. *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983).
64. *Powers*, 379 F.3d at 1219.
65. Cass R. Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (1984): 1689.
66. See Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961), no. 45, p. 288; and Clint Bolick, *Grassroots Tyranny* (Washington: Cato Institute, 1993), pp. 13–52.
67. *Powers*, 379 F.3d at 1222.
68. Ibid.
69. Peter M. Cicchino, "Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?" *Georgetown Law Journal* 87 (1998): 178.

70. During the debates over the ratification of the Constitution, "Brutus" made the point well when discussing the "general welfare" clause of the Constitution: "It is as absurd to say, that the power of Congress is limited by these general expressions, 'to provide for the common safety, and general welfare,' as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves." Bernard Bailyn, *The Debate on the Constitution* (New York: Library of America, 1993), vol. 1, pp. 618–19.

71. Transcript of deposition of Eric Paulsen, *Merrifield, et al. v. Lockyer, et al.*, April 19, 2005, pp. 115–16 (on file with author).

72. Ibid., p. 45 (emphasis added).

73. Ibid., pp. 46–47.

74. Ibid., p. 149.

75. *Merrifield v. Lockyer*, 388 F. Supp. 2d 1051 (N.D. Cal. 2005).

76. Ibid. at 1058.

77. Ibid.

78. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

79. Ibid.

80. Ibid. at 991, n. 15.

81. "Wal-Mart 2007 Annual Report," Wal-Mart Stores, Inc., Bentonville, AR, http://walmartstores.com/Media/Investors/2007_annual_report.pdf.

82. Richard Vedder and Wendell Cox, *The Wal-Mart Revolution: How Big-Box Stores Benefit Consumers, Workers, and the Economy* (Washington: AEI Press, 2006).

83. Eric R. Claeys, "*Euclid* Lives? The Uneasy Legacy of Progressivism in Zoning," *Fordham Law Review* 73 (2004): 731–70.

84. Anthony B. Sanders, "The 'New Judicial Federalism' before Its Time: A Comprehensive Review of Economic Substantive Due Process under State Constitutional Law since 1940 and the Reasons for Its Recent Decline," *American University Law Review* 55 (2005): 457–540.

85. George Lefcoe, "The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes between Wal-Mart and the United Food and Commercial Workers Union," *Arkansas Law Review* 58 (2006): 842; Ted Balaker, "Ban Wal-Mart, Hurt Families," *Los Angeles Daily News*, January 26, 2004; Julian Sanchez, "The Wal-Mart Crusade: Big-Boxing a Mega-Retailer's Ears," *Reason*, March 2006; and RiShawn Biddle, "Sam's Curse: Will Wal-Mart Superstores Really Devastate the City of Angels?" *Reason.com*, March 18, 2004, http://reason.com/archives/2004/03/18/sams-curse.

86. *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 283 (2006).

87. Ibid. at 301.

88. Ibid.

89. Ibid. at 303.

90. Minutes of Hanford City Council, March 4, 2003 (on file with author).

91. Minutes of Hanford City Council, April 15, 2003 (on file with author).

92. Letter from Rusty C. Robinson to Hanford City Council, March 4, 2003 (on file with author).

93. Minutes of Hanford City Council, March 4, 2003 (on file with author).

94. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 296 (2007).

95. Ibid. at 297 (emphasis in original).

96. Adrian Hernandez's case bears a striking resemblance to the notorious decision regarding eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005). There, the U.S. Supreme Court declared that local officials may condemn private property and transfer it to developers to construct shopping centers or luxury condominiums for their own profit because doing so creates jobs, which is a public benefit rather than a private benefit. Yet the Court insisted that taking property for a purely private benefit was still unconstitutional. Ibid. at 477–78. While this sounds nice, it is meaningless because every *private* business will "create jobs" or provide *some* sort of public benefits. If anything that benefits the public in *some* way, no matter how attenuated, can qualify as a "public benefit," it will be impossible to declare any condemnation unconstitutional for serving "private" benefits. The *Hernandez* decision is *Kelo* for zoning laws: government may control or eliminate fair economic competition in whatever way it wants, so long as it claims that some sort of vague public benefit will result from its actions.

97. Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: HarperCollins, 2007), pp. 153–54; and Ashley Sellers and Jesse E. Baskette Jr., "Agricultural Marketing Agreement and Order Programs, 1933–1944," *Georgetown Law Journal* 33 (1945): 123–52.

98. Henry Hazlitt, *Economics in One Lesson* (San Francisco: Laissez-Faire Books, 1996), pp. 79–80.

99. Dennis Pollock, "Raisin Case Awaits a Ruling: Kerman Couple Are Accused of Breaking Rules," *Fresno Bee*, February 12, 2005, p. D1 (2005 WLNR 2050449).

100. Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601–74.

101. Tracy Correa, "USDA Accuses Growers: Kerman Couple Face Complaint over Raisin Marketing Order," *Fresno Bee*, April 3, 2004, p. D1 (2004 WLNR 20529366).

102. Leon Garoyan, "Marketing Orders," *UC Davis Law Review* 23 (1990): 705.

103. Lawrence Shepard, "Cartelization of the California-Arizona Orange Industry, 1934–1981," *Journal of Law & Economics* 29 (1986): 120. See also Dennis M. Gaab, "The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities," *San Joaquin Agricultural Law Review* 5 (1995): 147.

104. Ron Paarlberg, "The Political Economy of American Agricultural Policy: Three Approaches," *American Journal of Agricultural Economics* 71 (1989): 1161.

105. Neil Brooks, "The Pricing of Milk under Federal Marketing Orders," *George Washington Law Review* 26 (1958): 181–213; Kevin McNew, "Milking the Sacred Cow: A Case for Eliminating the Federal Dairy Program," Cato Institute Policy Analysis no. 362, December 1, 1999; William N. Eskridge Jr., "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation," *Virginia Law Review*