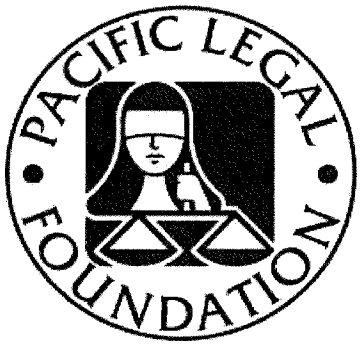
Appendix C



"'Public Convenience And Necessity' And Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry"

by Timothy Sandefur

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Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111

www.pacificlegal.org

Introduction

Starting a business is expensive and time-consuming. Accumulating capital, hiring talent, buying insurance, doing market research—all these tasks and more make opening a small business among the hardest things a person can ever attempt. Yet people surmount these obstacles because the rewards of business ownership can be enormous.[1] Economic independence and opportunity are central components of the American dream, deeply embedded in our nation's history and tradition.[2] The Supreme Court has made clear that the right to engage in a trade or profession is one of the "libert[ies]" protected by the Constitution, and that states may restrict that liberty only so far as necessary to protect the public health and safety.[3]

Sadly, government often obstructs economic opportunity by imposing barriers to entry that bear little relationship to public health and safety. Occupational licensing requirements, for example, commonly force prospective business owners to undergo expensive and time-consuming educational and training requirements before they may legally practice a trade or profession.[4] While the Constitution requires that these restrictions be rationally related to a person's "fitness and capacity to practice" the trade or profession,[5] in practice they are frequently abused to protect established companies against competition from newcomers.[6]

Worse than occupational licensing laws, however, are laws that require a business to obtain a "certificate of public convenience and necessity" or "certificate of need" (CON) before beginning operations. Unlike occupational licensing laws, CON requirements do not purport to determine whether a person is educated, trained, or skilled before going into business. Instead, they are expressly aimed at preventing competition against established companies, regardless of quality or skill.[7] Devised in the late nineteenth century to regulate public utilities and natural monopolies, today they apply to a variety of industries—especially the taxicab industry and moving companies—where they have no economic justification. The consequence, as public choice theory would predict, is that existing firms exploit the power of CON requirements to prevent competition, drive up the cost of living to consumers, and deprive entrepreneurs of their constitutionally guaranteed right to economic liberty.

In this article, I will address the economic and constitutional problems raised when CON requirements are applied to normal, competitive markets. I will focus on a recently abolished CON requirement for moving companies in Missouri.[8] My recent litigation challenging the constitutionality of that statute[9] provides a particularly revealing case study of the abuse of government regulation for private ends, rather than for public welfare. In Part I of this article, I explore the history of CON laws and their application to the moving industry as well as the state of the law regarding their

constitutionality. In Part II, I discuss the Missouri law, as a case study of how established industries exploited the power of these laws to bar legitimate competition. In Part III, I discuss what the Missouri case, which is typical of the rent-seeking dynamics at work in CON regimes can teach us about the application of rational basis scrutiny to cases involving the right to earn a living. In Part IV, I conclude that CON laws, at least when applied to competitive, non-public utility markets, are unconstitutional.

I. CON Laws

A. How CON Laws Work

The "certificate of public convenience and necessity" or "certificate of need" requirement is a type of prior restraint applied to businesses other than the press.[10] A typical CON law forbids any person from engaging in a specified trade without first obtaining a certificate, and establishes, or allows an administrative agency to establish, the procedure for obtaining that certificate.[11] Ordinarily the applicant must fill out some forms describing the service to be provided, the equipment the applicant will use, the applicant's experience, and other details.[12] The applicant must also prove that he or she meets the insurance requirements specified in the statute, and that he or she is familiar with and promises to obey the applicable safety standards and price regulations.[13]

After the application is filed and deemed complete, the agency notifies the existing certificate holders that a person has applied for a new certificate, and gives the existing firms—the opportunity to file objections against the granting of a new certificate.[14] This essentially means that existing firms can veto, or at least significantly burden, their own potential competitors; although, in theory, other members of the public can also object, it appears that this virtually never happens. Objections are usually informal: the existing firm is required only to recite certain statutory language, and is not required to submit legally admissible evidence or sign under penalty of perjury. (A typical example of such an objection appears in Appendix A.) Once such an objection is filed, the agency must typically schedule a hearing to decide whether to grant the certificate. Some CON requirements allow the agency to dispense with a hearing if no application is filed, but others require a hearing in every instance.[15]

At the hearing, the applicant must prove that there is a "public need" for the proposed new service—or some standard to that effect—in order to be allowed to operate. The statute typically does not specify what kind of evidence is required, or what standard of review is applied, or if it does so, it articulates these factors in extremely broad and vague terms.[16] As a result, administrative agencies enjoy nearly unlimited discretion to interpret "public need" (or whatever similar terminology is used) however they wish.[17] They may also take a great deal of time to make their

decisions. Such delay can be very costly to an applicant. So, too, can the cost of legal representation, since the laws of many states require any business organized as a corporation to be represented by an attorney at any administrative hearing; the owner may not represent the corporation herself.[18]

Kentucky is a representative example. That state requires that all movers of household goods obtain a Certificate from the state's Transportation Cabinet Division of Motor Carriers.[19] Operating without a Certificate is a misdemeanor for which the punishment is a fine between $2,000 and $3,500.[20] But when a person applies for a Certificate, the Division notifies existing Certificate holders, giving them the opportunity to file a "protest" against the granting of the application.[21] If a protest is filed, the Division is required to convene an administrative hearing to decide whether or not to grant the Certificate. If no protest is filed, the Division may choose to waive the hearing requirement.

The standards for issuing a Certificate are as follows: the applicant must be

> [1] fit, willing, and able properly to perform the service proposed and to conform to the [statutes regulating the practices of moving companies] and the requirements, [rules and] regulations of the [Division of Motor Carriers], and [2] further that the existing transportation service is inadequate, and [3] that the proposed service…is or will be required by the present or future public convenience and necessity, and [4] that the proposed operation, to the extent authorized by the certificate, will be consistent with the public interest and the transportation policy declared in this chapter.[22]

No statute, regulation, or case law defines the terms "inadequate," or "present or future public convenience and necessity," or explains what types of service are "consistent with the public interest."[23] This lack of definition is a common feature of CON restrictions.[24]

State regulations require any person filing a protest to state the grounds for that protest,[25] but there is no requirement that the protest be sworn, or notarized, or contain admissible evidence of any sort; nor does any rule specify which grounds are or are not a proper basis for invoking the hearing procedure. At the hearing, an applicant organized as a corporation must be represented by an attorney.[26] The applicant bears the burden of proof. If he or she cannot prove that existing services are inadequate, or that future public necessity will require the new service, then the application must be denied.[27] Although considerations of public health and safety factor into the assessment of whether the applicant is "fit, willing, and able properly to perform the service," the other provisions of the statute—regarding "public convenience and necessity" and the "public interest"—are undefined and implicitly encourage discriminatory and

protectionist regulation. That favoritism is explicit in the "adequacy" element, which requires the Division to presume against allowing new firms to enter the market, and to deny licenses even to fully qualified applicants simply because they would compete against existing firms.[28] But even aside from the statutory and regulatory text and the substantial risk that a fully qualified applicant will be rejected, the process itself serves as an effective barrier to entry, since by merely submitting a "protest"—even one which makes no admissible evidentiary claims—an existing firm can force a prospective competitor to undergo an expensive and time-consuming hearing process. This procedural hurdle is often enough to block qualified and conscientious entrepreneurs from entering the market.

B. CON Laws: Public Benefit or Rent-Seeking Bonanza?

CON laws originated in the late nineteenth century, primarily to regulate railroads.[29] In the leading article on the history of CON laws, William Jones identifies the following rationales advanced for such laws: they would promote economic efficiency by preventing "wasteful duplication" of services available in the market; bar "excessive competition"; prevent "cream-skimming"—*i.e.*, the economic incentive to avoid the economically inefficient practices that regulated firms are often required to engage in; protect private investments in public utilities; and protect against environmental damage, the shutting down of desirable public services, or other perceived costs of increased competition.[30] Experience, however, demonstrates that these economic arguments for CON restrictions are either unpersuasive or obsolete, and that the persistence of such regulations is better explained by the rent-seeking behavior predicted by public choice theory.

The first two arguments reflected fashionable economic theories of the time which held that economic competition was wasteful and destructive.[31] The notion of "wasteful" competition held that if, for example, multiple rail lines were established between the same cities, this represented a waste of resources, since only one rail line was necessary.[32] Competition was also seen as destructive because it would drive prices down, progressively forcing firms to cut services and quality in order to stay afloat, and eventually driving profits down to such a degree that the businesses would go bankrupt.[33] These theories were never very plausible. Free competition tends toward efficiency precisely because nobody can know *a priori* whether one railway line or two or more are "needed" between the two cities; this can be determined only by trying it out and seeing how supply and demand function. If, in fact, there is only sufficient demand for one railroad line, the second line will be unable to meet its costs and will go out of business. To call this "wasteful" is to ignore the role that market competition plays in discovering consumer preferences and in the creation and innovation of ways to meet consumer demand.[34] Moreover, the alternative—in which

central planners are charged with the authority of determining what sorts of products or services are "really needed" in a market—would certainly be far less efficient than competition, subject to insoluble problems of knowledge[35] and the perverse incentives we call "rent seeking."[36] Contrary to the charge of "destructiveness," competition is creative precisely because it allows market participants to grope forward to discover what consumers and producers really want, and strives to meet those ever-changing demands in ways that no alternative could ever match.[37] This process is better described as "creative destruction," a dynamic process that disciplines firms and ensures that they meet consumer demand in order to flourish.[38]

The next two rationales for CON laws—preventing "cream-skimming" and protecting private investment in public services—apply only to public utilities. "Cream-skimming" occurs when a business seeks an advantage over its regulated competitors by discarding inefficient business practices that its competitors are forced to comply with. For example, if the government requires a railroad to serve a small, out-of-the-way town at an economic loss, a competing railroad might "skim the cream" by providing service only on those routes that are profitable. The CON law regime would help prevent this by strengthening the regulatory agency's power to compel all railroads to serve the small, out-of-the-way town. Note that this theory contradicts the earlier theory that CON laws would promote economic efficiency; the "cream-skimming" rationale is that CON laws will restrict the competitive pressures that move toward efficiency. Note also that the "cream" is there for the skimming only because the existing firms are legally forced to engage in economically inefficient behavior in the first place.[39] That the market would encourage others to "skim the cream" should be regarded as an example of the strength of markets to resist the inefficiency of such mandates. "Often what is characterized as 'cream skimming' by an incumbent monopolist is really a sign that, because of technological change, the market is becoming competitive."[40]

Protecting private investment in public utilities is a more substantive argument, but in the years since CON laws were devised, its relevance has diminished. During the latter decades of the nineteenth century, public utility services were often provided by private contractors acting under some form of government charter. By giving these licensees a near monopoly, CON laws were thought to encourage private investment in the construction and operation of utilities, similar to the way patents are said to create incentives for innovation. But one of the primary reform goals of the Progressive Era was to eliminate the favoritism and graft that resulted from this scheme by replacing it with a civil service system under which government owned and operated public utilities directly, instead of outsourcing these services to favored private corporations.[41] The shift to government ownership and away from the franchise model largely, though not entirely, mooted the importance of guaranteeing private investment in public utilities. Fewer private investors needed the promise of a near-monopoly provided by

the CON law system, because the utilities which the private investors previously financed were now financed with tax dollars and built by government employees. Of course, in the moving industry, this concern is generally beside the point, since in today's world, private household goods movers do not seriously compete with public utilities like railroads, and since the government does not operate its own moving companies, or issue franchises for moving companies. Nowadays, moving companies are ordinary private businesses in a competitive market.

Even where these concerns are not rendered moot, one must keep in mind that implementing a CON law regime has costs. By deterring competitors from offering more economically efficient alternatives, CON restrictions can deprive the public of just the sort of information it most needs: evidence that there are cheaper and better ways of providing the service than the permitted utility service is providing. Blocking competition may encourage investment in the public utility—but it simultaneously discourages others who might have better ideas from trying to participate. One recent example can be found in the rise of "ride-sharing" enterprises in cities throughout the world, which use smart-phone technology to substitute for traditional taxicab services. Businesses like Uber[42] allow consumers to hire drivers and to pay them remotely through their cellular phones, instead of hailing a taxicab. The service is fast, inexpensive, and offers both riders and drivers a wider array of choices. For precisely these reasons, incumbent taxicab services have filed lawsuits against Uber, alleging among other things that the firm is operating an unlicensed taxicab operation.[43]

Whatever the merits of the "cream-skimming" and incentive rationales, they apply only to public utilities, or perhaps to markets that feature some kind of monopoly characteristics.[44] They do not apply to private markets with healthy competition. In these, "cream-skimming" is simply the ordinary competitive process on which the economy depends for innovation and growth, and encouraging investment where market demand is lacking is rightly seen as foolhardy.

Finally, CON laws were seen as a means of preventing harmful externalities, such as environmental pollution or the shutting down of complimentary or competitive businesses in consequence of competition. Here, too, the CON regime makes sense, if at all, only in the realm of public utilities. In ordinary competitive markets, there is no sense in protecting competitive or complimentary businesses from the consequences of legitimate competition, since that only raises costs to consumer, stifles innovation, and rewards the inefficient while punishing the efficient. Preventing environmental harm may be a worthwhile endeavor, but it is far more sensible to accomplish this through ordinary regulations, pollution controls, nuisance lawsuits, inspections, and the like, than through barring a business from the market—regardless of its quality—simply because public officials believe there are already "enough" such companies.

Restricting the number of firms that may operate in a market on the basis of such bureaucratic calculations of efficiency is impossible, and attempting it is dangerous. It

is not possible for a government agent to determine whether or not the general public "needs" a new business of the sort in question. To measure, let alone to predict, public need in this way would require a mountain of information that even private industry, with all its sophisticated tools for measuring consumer preferences and desires, does not have. Private industry has enormous incentives to measure and anticipate consumer preferences, and yet it frequently gets such questions wrong.[45] To expect a government entity—which has no such incentive to get the question right, and often has fewer resources to measure and anticipate future consumer needs—is nothing short of delusional. It is even more absurd to expect a government entity to determine what the public will deem "convenient," in addition to "necessary." While necessity might conceivably be reduced to some quantitative value that a bureaucratic agency could measure, convenience is a far more complicated and individualistic matter. It is rarely possible for a person to know what is "convenient" even for himself, let alone for another person. It would not have been possible for a government agency to determine whether cell phones or hybrid cars are "convenient" for the general public, let alone whether Starbucks coffee shops or gourmet cupcake stores are "convenient." Yet they evidently are—witness their economic success. This is but a variation on the "knowledge problem" articulated by Friedrich Hayek: to coordinate the economy from the top down, the government would need to have access to a virtually infinite amount of information, which cannot be effectively marshaled by any single mind or agency, in part because that information is often not even known to the consumers themselves.

But it is not only foolhardy to expect the government to determine whether a prospective business is "convenient" and "necessary" for the general public, it is also dangerous to make the attempt. Because CON laws are barriers to entry, creating an artificial shortage of the services at issue, existing license-holders are able to charge above market rates. A license is accordingly valuable, sometimes to an extreme. In New York City, for example, a medallion that allows a person to operate a single taxicab was recently sold for over $1 million.[46]

Public choice theory would predict that because a certificate to operate is worth so much money, it becomes subject to the pressures of rent-seeking. Established firms seek to use the government to prevent competition and to protect their "turf" against new competitors. Such efforts will often be disguised as protections for public health and safety—as Sir Edward Coke remarked of a similar regulatory scheme over four centuries ago, those who advocate such laws "look one way and row another; pretend public benefit, intend private."[47] This is slightly unfair, since many of the existing firms that demand stronger barriers to entry genuinely believe that such barriers will help protect the general public. Ensuring, for instance, that florists have a college degree likely will have some non-zero effect in preventing harm to the public. But it will have that effect only at the cost of depriving the public of services of those who do not qualify under the rule, thus encouraging stagnation and "political entrepreneurship"—

i.e., the diversion of economic resources to political lobbying and away from productivity and innovation.

As a license to operate a business becomes more rare and harder to get, and its value accordingly increases, firms will invest greater amounts of time and money in the effort to obtain (or block) such licenses. The result is less availability of services, lower quality services, higher prices, and less economic opportunity. Public choice theory would predict that a CON regime would lead to these results, instead of the greater efficiency and protection of public enterprises predicted by the older theories on which CON laws were designed. Public choice theory would also predict that as economic and technological circumstances change, CON laws would nevertheless remain on the books—vigorously defended by incumbent firms—long after the economic rationales on which they were based were rendered obsolete even on their own terms. As Judge Posner has written, CON laws

> are worse than superfluous; they constitute a barrier to entry that may perpetuate monopoly long after a market has ceased to be naturally monopolistic. A firm that reckons that cost conditions are now favorable to entry must convince a government agency of the fact. That will require a formal submission, substantial legal and related expenses, and a delay often of years—all before the firm may commence operations. The costs and delay are alone enough to discourage many a prospective entrant. Much more is involved than running a procedural gauntlet, however, for ultimate success is by no means certain. The favor with which regulatory agencies look upon entry varies with the agency and the period, but the predominant inclination has been negative; there is now a good deal of evidence that the certificating power has been used to limit greatly the growth of competition in the regulated industries.[48]

In a field like the moving industry, which features relatively low start-up costs and would otherwise make a prime opportunity for unskilled or inexperienced workers, or workers with few language skills or other obstacles to advancement, the consequences can be particularly inhumane: obstructing economic opportunity for precisely those people who need it most.

Another common justification for CON regimes is that allowing existing firms to participate in the process for determining whether an applicant should be granted a Certificate helps to harness the existing firms' knowledge regarding the applicant. Since officials may not be as familiar with the applicant's business, or with economic factors relevant to the application, the opportunity to challenge an applicant gives experiences businesses the chance to provide the agency with necessary information.[49] But this argument is implausible, given the strong incentives that existing firms have to

block potential competition for self-interested reasons rather than to participate in a disinterested fashion as a guardian of the public interest. The fact that CON restrictions operate as an anti-competitive restraint on trade rather than as a means for harnessing relevant information for a public-spirited assessment of an applicant's fitness is shown by the fact that existing firms are usually not required to prove or even allege any danger to the public in order to object to the granting of an application; indeed, such objections typically need not be signed under penalty of perjury, or contain any legally admissible evidence or allegations whatsoever. Further, CON restrictions generally bar consumers from participating in the proceedings, or at least make no provision by which they may do so,[50] which would make no sense if the process were aimed at obtaining relevant information. Finally, CON statutes often provide that competitive impact on an existing firm is sufficient cause for the denial of the application, even where the applicant is fully qualified and safe.[51]

It appears that nothing but an historical accident is responsible for the initial application of CON requirements to the modern moving industry. In the years following World War I, states and cities began using CON requirements to bar automobile-based taxicab and household goods movers from competition against trolley lines, again in an effort to protect private investment in the trolleys.[52] These laws generally lumped taxicabs and moving companies together, as "carriers of persons or property," apparently without considering whether the two industries presented the same competitive threat to existing trolley companies.

As trolleys vanished from the scene in the latter half of the twentieth century, the CON laws remained in place, partly out of inertia, but also because by that time, they had gained an economic constituency in the form of existing licensees with an economic incentive to bar competition. As a result, the moving industry—which was never a public utility; which had none of the economic features that characterize a utility or a monopoly; which had low start-up costs and was no greater threat to the environment or the public welfare than any other fully competitive industry—found itself under a regulatory regime designed for a pre-Civil Service era of railroads and streetcars, and which even on its own terms made sense only with regard to transportation of persons and not property. Worse, it found itself subject to an anti-competitive legal regime that allows existing firms to exert monopoly powers in an industry that otherwise would be an ideal entry-level job for unskilled workers. If it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"[53] surely it is more revolting to have a rule of law based on economic fallacies, designed for a world that is now long gone, and for a different industry entirely, and which, "[i]nstead of protecting consumers...increases and sustains the power of regulated private entities to influence the pricing, output, and allocative decisions of the intrastate motor carrier market."[54]

II. Missouri's Mover CON Law: A Case Study in Rent-Seeking

Public choice theory predicts that where the government can redistribute wealth or opportunities between private groups, those groups will invest their resources in obtaining favorable legislation that will benefit them or handicap their rivals. Entry restrictions like occupational licenses or CON laws are made-to-order examples. Licensed insiders seek to block competition and to create an artificial scarcity that raises the prices insiders can charge. Public choice theory would predict that under a CON regime, existing firms will engage in rent-seeking behavior such as spending resources on policing rivals instead of improving service and lowering costs, or seeking to make Certificates more difficult or expensive to obtain. They will also try to "capture" the regulatory agency charged with enforcing the restriction, which likely would include exploiting vague statutory language that would expand regulators' power to bar entrants.[55]

In 2010, I filed a lawsuit challenging the constitutionality of Missouri's CON law on behalf of a St. Louis entrepreneur named Michael Munie, and his firm, ABC Quality Moving, Inc.[56] The evidence revealed in that case provides a particularly stark vindication of these predictions.

The Missouri CON law was typical of those found in most states, with a few interesting differences.[57] It prohibited any person from operating a moving service without first obtaining a Certificate from the Motor Carrier Services Division of the Department of Transportation (Division).[58] The statute set forth the following criteria for obtaining a Certificate:

> (1) the applicant must be "fit, willing and able to properly perform the service proposed, and to conform to the [law]"
>
> (2) the proposed company would "serve a useful present or future public purpose," and,
>
> (3) if anyone files an objection to the issuance of a Certificate, the application would be denied if the objector showed "that the transportation to be authorized by the certificate will be inconsistent with the public convenience and necessity."[59]

The statute provided further that whenever an existing firm objected to the issuance of a Certificate, the Division must consider "the diversion of revenue or traffic from existing carriers"[60] when deciding whether the applicant met the criteria for a certificate.

The first thing to notice about these rules is how vague they are. While "fit, willing and able" is relatively objective—and is a common element of CON statutes—the terms "useful present or future public purpose" and "public convenience and necessity" were left undefined.[61] No law, regulation, judicial opinion, employee handbook, or other authority in Missouri provided any definition or explanation of these terms. Indeed, the term "useful present or future public purpose" was unique to this statute, and was not to be found in the law of any other jurisdiction. The statute therefore failed to address what sorts of purposes were "useful" or not, or how the agency would determine "future" as opposed to present purposes.

The process of obtaining a Certificate began when a person submitted an application, called an MO-1 application, which requested information about the applicant's finances, experience, and insurance, as well as the geographical areas in which the applicant sought to provide service. Employees of the Division would first review the application to ensure it was complete.[62] Division staff would then review the applicant's record to see if the person was insured, had safety infractions or a criminal background, and so forth. This determination would satisfy the first criterion above: the "fit, willing and able" test.[63]

The Division then required any applicant to provide "statements of support"—typically a written statement from a potential customer—which would declare that the customer would, if given the chance, hire the applicant to provide moving services.[64] The Division held that these "statements of support" would provide satisfactory evidence that the proposed moving company would "serve a useful present or future public purpose." But the Division did not require any particular number of statements in order to establish "usefulness." Nor did it investigate the truth of any of the claims made in such a "statement," or give greater credence to one kind of statement over another. For example, a statement from a reputable business owner would not be given more weight than a statement from an unknown neighbor.[65]

Upon concluding that the proposed moving service would serve a useful purpose, the Division was then required to publish a notice of the submitted application in a newsletter, called the *Notice Register*, which was distributed to the existing Certificate holders.[66] This notice informed the established moving companies about the application, including the geographical range in which the proposed service would operate, and invited them to file objections—called "interventions"—protesting the issuance of the Certificate.[67] According to the statute, an intervenor was required to specify "its interest" in the application, but not the grounds for objecting; nor were such interventions required to be sworn, notarized, or contain any legally admissible evidence.[68]

Upon the filing of an intervention, the statute mandated that a hearing be convened to determine whether to grant the applicant a CON.[69] This hearing was not conducted by the Division, but by the state's Administrative Hearing Commission

(AHC).[70] The Division would then forward the file to the AHC, which would review the matter *de novo*—allowing the AHC to consider fitness, usefulness, and convenience and necessity.[71] Missouri law required that any applicant that was incorporated must be represented at such a hearing by a licensed attorney.[72] At that hearing, the intervenor, rather than the applicant, bore the burden of proving that issuing a new CON would be inconsistent with the public convenience and necessity.[73] Yet the statute's specification that the hearing officer must consider "diversion of revenue or traffic from existing carriers"[74] when deciding a contested application implied that the existing firm need only demonstrate that a new company would draw business away from the intervenor in order to bar the application from being granted.

The filing of an intervention, therefore, signaled that the applicant for a CON was in for a costly and time-consuming delay. Not only would an applicant that was organized as a corporation be forced to hire a lawyer, but the average wait time for contested applications in 2011 was 154 days, with one applicant forced to wait 1,119 days—more than three years—before obtaining a CON.[75] And given the uncertainty caused by the vague statutory language governing the issuing of CONs, an applicant choosing to proceed through that route despite the costs faced a very significant risk of being denied a certificate in the end. As a result, applicants against whom interventions were filed virtually always chose to narrow their requests for authorization in order to induce existing firms to withdraw their interventions.

Between 2005 and 2010,[76] there were 76 applications[77] for CONs to operate moving companies in the state of Missouri.[78] These applications fell into two categories: 17 sought authority to operate statewide,[79] and all of these applicants were subjected to one or more interventions by existing firms, for a total of 106 interventions.[80] The other 59 sought authority to operate either within a "commercial zone" which was statutorily exempt from the intervention and hearing requirement[81]—such as within the cities of St. Louis, Kansas City, Columbia, among others—or within a small radius, or an isolated or rural geographical area, where they presented little competitive threat to existing firms.

All of the 106 objections were filed by existing moving companies that already had CONs.[82] An example of such an intervention is given in Appendix A. All 106 stated as the *sole* basis for intervention that allowing a new moving company would cause "diversion of traffic or revenue." None of the objections ever alleged any danger to public health, safety, or welfare, in the event that the application was granted, and none provided the government with information relating to public health or safety.[83] Nor were Division officials aware of a single case in which the AHC had rejected an application on the basis of public safety considerations.[84]

Given that the hearing procedure was expensive, time-consuming, and risky, most applicants chose to avoid a hearing whenever possible. In 14 of the 17 contested cases between 2005 and 2011, the applicant responded to the filing of interventions not by going through a hearing and demanding a certificate, but by withdrawing and

amending their applications to abandon their request for statewide moving authority and request instead permission to operate in a small, rural area or within a Commercial Zone exempt from the intervention and hearing procedure. And in every case in which an applicant chose to withdraw its statewide request, the intervenors withdrew their interventions and the requested CON was granted to the applicant. Obviously, if the intervenors had been concerned with public safety, they would not have withdrawn their objections simply because the applicant sought to operate in a smaller area rather than statewide.

For example, when Golden Valley Movers applied for statewide authority, nine Interventions were filed by existing moving firms; the Division referred the application to the AHC, but Golden Valley restrictively amended its application to only request authority to operate in Johnson, Pettis, Henry, Benton, and St. Clair Counties. The intervening companies then withdrew their Interventions "based upon the amendment of Applicant's request of authority to service to, from, and between [these] points."[85] When A Friend With A Truck Movers, LLC, sought authority to operate statewide, objections were filed by four existing moving companies, and the Division referred the application to the AHC. But when A Friend With A Truck Movers agreed to restrict the scope of its requested authority to operate only within the Kansas City Commercial Zone, the Intervenors were "satisf[ied]" and withdrew their objections.[86] This pattern was repeated in all but three cases in which an applicant sought statewide moving authority.[87] In 2010, Billy Holloway, Jr., of Salem, Missouri, filed an application for a CON for his business, Another Smooth Move, Inc., requesting authority to operate within a 75-mile radius of Salem. After a notice of his application was published in the *Notice Register*, three existing firms filed interventions to his application, all stating as the basis for intervention that his company would "divert traffic or revenue" from the intervenors. None stated that Another Smooth Move presented any danger to the public. When Another Smooth Move's attorney advised the company's owner that a hearing would be an expensive and slow undertaking, the owner amended the application to request only a 50-mile radius. The intervenors thereupon withdrew their objections, and the CON was granted.[88]

In only three cases did an applicant persist, after the receipt of interventions, in seeking authority to operate statewide. One of these later chose to withdraw its application and to seek instead authority to purchase an existing statewide CON from another moving company.[89] The intervenors responded to this by withdrawing their interventions, and the applicant was allowed to buy the existing certificate.[90] Only two—Daryl Gaines[91] and All Metro Movers[92]—chose to go through an administrative hearing to seek statewide authority.

These data strongly support a public choice interpretation of the CON requirement, as opposed to a public good interpretation. Had this law been designed to protect the public health, safety, and welfare, it would not have allowed persons to file

interventions that provided no data or allegations regarding the consequences for public health, safety, or welfare if the application were granted. Had the statute been intended to protect the public from dangerous or incompetent movers, such statements would have been required to be notarized or sworn, or to specify admissible evidence relating to public, rather than private concerns. Had it been designed to protect the public, it would not have explicitly instructed the AHC to consider the "diversion of traffic or revenue" when considering an application.[93] Likewise, if the CON requirement were an effective means for protecting the general public, it is unlikely that an applicant's decision to amend his application and seek a narrower region for operation would have resulted in the withdrawal of the objections. Instead of a statutory regime organized around public concerns, the data reveal the Missouri CON as a law which served solely the private interests of existing firms against legitimate competition from newcomers. All of the interventions were limited to established firms' concerns that granting a CON would harm their profits.

Equally revealing were the outcomes of the two cases in which applicants chose to proceed through the hearing process to obtain statewide authorization. Daryl Gaines' application had been subjected to three interventions. After a hearing in 2005, the Administrative Hearing Commission rejected Gaines' application on the grounds that his proposed business would compete with existing firms. While acknowledging that "Gaines is in compliance with applicable safety requirements," and "is in compliance with applicable insurance requirements,"[94] the Commission ruled that "Intervenors...already reliably provide statewide common carrier household goods service throughout the State," and that "Gaines' proposed service would merely duplicate service already provided."[95] Three years later, Gaines filed a new application, again seeking statewide moving authority. Five existing companies intervened, again citing as the sole basis of objection that Gaines' firm would cause "diversion of revenue" from them. But this time, Gaines chose to amend his application and ask for authority only to operate within the city of Columbia—whereupon the five existing firms withdrew their objections, and Gaines was given a Certificate to operate within that city.

All Metro Movers, on the other hand, succeeded in obtaining statewide moving authority. Its application was subjected to nine interventions.[96] The Administrative Hearing Commission found that the company was safe and had all the required insurance.[97] And, as in *Gaines*, the Commission found that All Metro Movers would compete with existing firms.[98] But this time, it concluded that competition was reason for granting the Certificate: "All Metro's evidence is sufficient to show a benefit to the public...from increased competition. The intervenors have focused only on the detriment to themselves."[99] This public benefit, the Commission ruled, proved that granting a Certificate to All Metro Movers—which had obtained a lucrative Defense Department contract—was consistent with public convenience and necessity.

In short, the statutes governing the issuing of CONs for moving companies in Missouri were so vague that a fully qualified, fully insured company could not know whether it would be *granted* a license on the grounds that competition would *benefit* the public, or whether that same competition might count as reason for *refusing* the application. Although it is impossible to measure the *in terrorem* effect that such vagueness had, the evidence is most consistent with the conclusion that would-be moving firms sought to avoid going through a hearing whenever possible—even if that meant accepting a less-than-optimal range of operating authority.

The evidence from the Missouri CON law for moving companies is consistent with the predictions of public choice theory: the law operated exclusively as a barrier to entry that benefitted existing firms. It provided no realistic benefit to the general public in terms of safety, price, availability, or in any other sense.[100] Indeed, the state admitted that it was unaware of any facts to support the conclusion that the intervention procedure had resulted in the government obtaining information that helped to protect the general public.[101]

On July 10, 2012, shortly after the Federal District Court for the Eastern District of Missouri was asked to rule on the constitutionality of this law, the state legislature chose to repeal it, and to replace it with a far more pro-competitive licensing statute which requires only that a mover be safe, insured, and qualified. Specifically, the licensing statute now contains no reference to the protection of existing carriers, and provides only that "[i]f the state Highways and Transportation Commission finds that an applicant seeking to transport household goods or passengers is fit, willing and able to properly perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the state Highways and Transportation Commission established thereunder, a certificate therefor shall be issued."[102] This statute represents a dramatic change from one of the most anti-competitive to one of the most pro-competitive licensing regimes in the nation. In the period since it was signed, the average wait time for a moving license in Missouri has dropped from 154 days to 19 days.[103]

III. The Constitution And Regulation for The Public Interest

A. The Constitution And Private-Interest Lawmaking

While there may be some argument that CON laws promote a genuine public good in the realm of public utilities, or markets with monopoly characteristics, they can have no such justification in normal, competitive markets like the moving industry. In these areas, CON laws only protect established firms against legitimate competition in violation of the Due Process and Equal Protection Clauses.[104]

Those Clauses prohibit government from using its power solely to benefit politically influential groups, as opposed to the general public.[105] While legislatures enjoy broad discretion to define the public interest and to adopt means for securing that interest, regulation that serves only *private* interests is arbitrary and discriminatory and contradicts the principles of due process of law.[106] The Constitution's authors, relying on five centuries of Anglo-American common law tradition,[107] presumed a distinction between the public interest and the private interests of those "factions" which would manipulate the political system for their own advantage.[108] They believed that equal laws guaranteeing individual rights, and a judiciary zealously guarding minorities against legislative exploitation,[109] would be the best protections against factional abuses. Or, in the words of Professor Cass Sunstein, the Constitution contains several provisions that "focus[] 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."[110]

Ideally, courts in constitutional cases scrutinize laws to ask, among other things, whether they reasonably advance a real public interest, or whether they are mere exercises of political power for private interest, and thus unconstitutional. Unfortunately, courts today apply different standards of scrutiny to different types of cases. For example, laws that differentiate between people on the basis of "suspect classifications" or that infringe on "fundamental rights," are subjected to heightened scrutiny, while laws that infringe on "non-fundamental" rights or "non-suspect" classifications are reviewed under the extremely deferential standard of "rational basis." When courts apply meaningful scrutiny, they stand as a significant check against the factional or rent-seeking tendencies that plague the democratic legislative process. But where courts apply excessively deferential review, they blind themselves to such abuses and allow legislative factions to exploit weaker groups and violate their rights for self-interested reasons.[111]

The consequences of variable standards of scrutiny are often perverse. For example, in cases involving the dormant commerce clause, courts apply a searching standard of review to invalidate self-interested legislation that imposes burdens on out-of-state businesses for the benefit of in-state businesses, without any corresponding public benefit.[112] The Supreme Court rightly regards such laws as harmful to consumers and entrepreneurs—as well as the national body politic—and as an abuse of the legislative process for the private benefit of politically well-connected businesses.[113] Such laws are a perversion of legislative power, which ought be devoted to public concerns rather than a scramble for "naked preferences."[114] Likewise, the application of heightened scrutiny in cases involving freedom of speech or religion have largely ensured that the "marketplace of ideas"[115] remains free from government favoritism, and that ideological interest groups do not pervert government powers away from their intended public uses, toward the promotion of ideas preferred by politically powerful

groups, or against the ideas of the unpopular.[116] For example, when religious groups seek to use public schools to propagate their views, courts routinely intervene, declaring that such instances of legislative capture are contrary to the hands-off policy of the Establishment Clause: religious groups must spread their messages in the marketplace of ideas without government assistance.[117]

Yet the advent of rational basis scrutiny in cases involving government regulation of business has resulted in a constitutional "double standard"[118] whereby courts regularly ignore their duty to guard against the exploitation of government power by private interest groups. Rational basis review—which applies generally to government regulation of business or economic transactions—calls for the court to presume the law constitutional and requires the plaintiff to prove its irrationality.[119] Under this test, the government will prevail even where the challenged law is ineffective, has little factual support, or has deleterious side-effects. Although the rational basis test does still bar the government from employing its authority solely to promote the private interests of politically influential factions,[120] its extreme pro-government deference tends to blind courts to the presence of such abuse, and incapacitate the judiciary as an independent and coordinate branch of government.[121] This problem is nowhere more obvious than when it comes to the constitutionality of laws that bar entry into trades or professions.

B. Occupations And Licenses

The Supreme Court first considered the constitutionality of occupational licensing laws in *Dent v. West Virginia,*[122] when it upheld the constitutionality of medical licensing requirements. Justice Stephen Field, writing for a unanimous Court, ruled that although "every citizen has the "undoubted[]" right "to follow any lawful calling, business, or profession he may choose," government may impose "such regulations as, in its judgment, will…secure [people] against the consequences of ignorance and incapacity as well as of deception and fraud." So long as those regulations were "appropriate to the calling or profession, and attainable by reasonable study or application," they would be upheld. But when such requirements "have no relation to such calling or profession, or are unattainable by such reasonable study and application…they can operate to deprive one of his right to pursue a lawful vocation."[123] That standard was reaffirmed in 1957, in *Schware v. Board of Examiners,*[124] when the Court ruled that New Mexico could not bar a person from practicing law because he was a member of the Communist Party. The state could restrict entry into professions, but only if those restrictions must be related to a person's fitness, skills, or knowledge.[125] Otherwise, those restrictions would arbitrarily deprive a person of the liberty to practice a trade—thus violating the Due Process Clause.

Over the past decade, the Fifth,[126] Sixth,[127] Ninth,[128] and Tenth[129] Circuits have addressed cases in which occupational licensing laws were used not to protect the public health, safety, or welfare, but simply to protect established businesses against legitimate economic competition from newcomers. In *Craigmiles v. Giles*,[130] the Sixth Circuit ruled that a Tennessee law that prohibited people from selling coffins unless they were licensed funeral directors violated the Fourteenth Amendment because the licensing requirement bore no realistic connection to public safety. The plaintiffs sought only to sell coffins, not to officiate at funerals or handle corpses, yet the licensing requirement would have forced them to spend years learning these and other skills for which they had no use—a prohibitively expensive burden. This requirement, declared the court, did not have a reasonable connection to a legitimate public interest, but was instead aimed at "protecting a discrete interest group from economic competition," which "is not a legitimate governmental purpose."[131] In *St. Joseph Abbey v. Castille*,[132] the Fifth Circuit struck down a similar restriction on the sale of funeral merchandise in Louisiana, declaring that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[133] In *Merrifield v. Lockyer*,[134] the Ninth Circuit ruled that a licensing requirement for pest-control workers was unconstitutional where it required extensive training in the use and storage of pesticides, notwithstanding that the practitioner did not use pesticides. This requirement applied only to persons dealing with pigeons, rats, or mice, but not to persons dealing with any other kind of pest, which the court found to be strong evidence that the law "was designed to favor economically certain constituents at the expense of others similarly situated."[135] As with the Fifth and Sixth Circuits, the court concluded that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."[136] The Tenth Circuit, on the other hand, has ruled that under the rational basis test, the government *may* enact barriers to entry for the sole purpose of protecting established firms against competition.[137] The Supreme Court has so far chosen not to resolve this conflict.

C. The Constitution And CON Laws

But as we have seen, CON laws differ from ordinary occupational licensing laws in that they do not even purport to restrict entry into a profession based on a person's fitness or capacity to practice. Instead, they exist for the explicit purpose of preventing legitimate competition against a discrete economic interest group. What, then, of their constitutionality?

The Supreme Court has rarely considered CON restrictions in competitive markets.[138] Yet in three cases between 1925 and 1935, the Court invoked the rule that restrictions on a person's right to economic freedom must bear some sensible

relationship to protecting the public safety—and must not be used, as CON laws often are, as a device for creating and maintaining government-run monopolies.

In *Buck v. Kuykendall*,[139] the Supreme Court struck down a Washington state law imposing a CON restriction on bus companies. The plaintiff, a Washington resident, sought to operate a bus line between Seattle and Portland, and obtained an Oregon license, but Washington denied him a certificate on the grounds that existing rail service between the two cities was "adequate."[140] He sued, and in an opinion by Justice Brandeis, the Court ruled that the restriction unconstitutionally burdened interstate commerce, holding that the "primary purpose" of the statute was "not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." The law "determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."[141] A year later, in *Frost v. Railroad Commission*,[142] the Court again struck down a similar restriction for moving companies. The California statute in that case required any private carrier to obtain a CON, and be deemed a common carrier, in order to operate on public streets. In an opinion by Justice George Sutherland, the Court ruled that this law was "in no real sense a regulation of the use of the public highways," but "a regulation of the business of those who are engaged in using them," the "primary purpose" of which was "to protect the business of those who are common carriers in fact by controlling competitive conditions."[143]

But the case that most directly addressed the use of CON laws to restrict competition is *New State Ice Co. v. Liebmann*,[144] a 1932 decision in which the Court, over a single dissent, ruled that an Oklahoma law restricting the operations of ice delivery companies violated the Fourteenth Amendment. That law prohibited the operation of ice manufacturing and delivery to any business not in possession of a certificate of authority. To obtain a certificate, an applicant was required to attend a hearing and prove "the necessity for the manufacture, sale, or distribution of ice" in the locality.[145] If there was already a licensed ice manufacturer in the area, and it was "sufficient to meet public needs," the application would be denied.[146] Although the agency could also consider an applicant's qualifications, the statute authorized the state to deny license to fully qualified, experienced, safe, and efficient ice-makers solely because a new business would compete with existing companies.

When Ernest A. Liebmann began constructing an ice plant, existing ice businesses sought an injunction to prohibit him from entering the business. The District Court refused to issue the license, concluding that the manufacture and delivery of ice was not a public utility, and therefore not properly subject to a CON requirement.[147] Outside the context of public utilities, such laws tended to establish cartels, by enabling existing businesses to block competition and keep up their prices without any corresponding public benefit. Indeed, the District Court noted that the statute had

already caused such consequences: "the act of the Legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice," wrote Judge John C. Pollock. "[T]he act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated."[148] But the more conclusive objection was that applying CON restrictions to a fully competitive market like the ice-making and delivery business created a barrier to entry that benefited private interests—the established ice-makers—and restricted the liberty of entrepreneurs.[149] The statute did not bar fraudulent or unsafe practices, but only allowed existing firms to reap monopoly benefits.[150] The legislature could not simply declare by *ipse dixit* that a fully competitive market like the ice business was a public utility, subject to a CON restriction.

The Tenth Circuit affirmed.[151] As with the District Court—and, ultimately, the Supreme Court's—the Court of Appeals based its conclusion not on economic theory but on a constitutional analysis of individual rights informed by economic realities.[152] The right to practice a trade or profession was among the liberties protected by the Fourteenth Amendment, and although the government could restrict that freedom so as to protect the general public from harm, it could not arbitrarily restrict that freedom, either to benefit politically powerful interest groups, or as a capricious and senseless act.[153] Thus government could regulate all businesses to protect the public safety, but the propriety of regulations depended in part on the characteristics of the markets to which those regulations applied.[154] Businesses that enjoyed a special relationship to the government, or industries featuring certain monopoly characteristics could be more closely regulated than ordinary, fully competitive businesses.[155] But such justifications could not apply to ordinary, competitive industries. In these markets, "the right to engage in a business…is a matter of common right," and "a limitation" on entry would be "[a] great[] encroachment on the rights of the citizen…. [T]o justify such a limitation, there must exist strong[] circumstances, making the regulation necessary in order to protect the public."[156] No such circumstances existed in the ice business, which was a fully competitive industry with relatively low start-up costs and few opportunities for monopolistic behavior that might warrant price regulation or entry restriction.[157]

The law fared no better before the Supreme Court. In a 6-2 opinion by Justice Sutherland,[158] the Court ruled that the manufacture and delivery of ice was not a public utility, but a fully competitive industry, where barriers to entry tended to perpetuate, rather than alleviate, monopoly.[159] Although ice might be an important commodity, the same was true of many other ordinary commodities; that was not enough to make the business a utility like a publicly-owned railroad, or a natural monopoly like a ferry. Government could more closely regulate the latter types of businesses because consumers lacked the full degree of choice that would prevent businesses from taking

advantage, or because government granted such businesses special privileges for which it might impose certain demands in return.[160] But the ice business was not a beneficiary of such privileges, nor did it feature natural barriers to competition greater than those existing in any ordinary business. The Oklahoma law did not, therefore, counteract a perceived market failure, but simply excluded newcomers from the marketplace, for private benefit:

> Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice.... There is no question now before us of any regulation by the state to protect the consuming public.... The [law's] aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.[161]

Two years after *New State Ice*, the Supreme Court began the famous "Switch in Time" line of cases, which among other things created the "rational basis test" for economic regulations.[162] Yet the Court has never repudiated *New State Ice*, and in 1941, well after the new regime was in place, it employed a similar analysis to invalidate a New York law requiring a CON before a business could open a milk processing facility. In *H.P. Hood & Sons v. DuMond*,[163] the Court made clear that the restriction—which was not "supported by health or safety considerations but solely by...limitation of competition"[164]—was unconstitutional. Of course, the state could impose regulations on milk production and shipping so as to protect public safety, but not for purposes of economic protectionism. "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."[165] The concept of "destructive competition," at which the statute explicitly aimed, was not enough to allow the state to restrict the rights of entrepreneurs. True, *DuMond*, like *Buck*, was decided on Commerce Clause grounds.[166] But the Court has elsewhere made clear that the Fourteenth Amendment also bars states from imposing barriers to economic competition that serve solely to protect established industries against legitimate competition.[167]

Yet where *DuMond*'s anti-protectionism rationale is faithfully followed in today's Commerce Clause jurisprudence,[168] *intra*-state discrimination, such as CON laws, which

offend constitutional values of liberty and equality, can often escape the judiciary's notice thanks to rational basis scrutiny. That is because this test is so deferential toward the government that courts presume a challenged regulation constitutional and construe any possible doubts in favor of the government. Some courts have even gone so far as to say that facts are irrelevant in rational basis cases,[169] and that a court may devise its own rationale to support a challenged law, even where no evidence supports that justification, and even where the state itself has abandoned that justification.[170] The Supreme Court has backed away from these extreme interpretations of the rational basis test,[171] but it is clear that the level of deference accorded to economic regulations under rational basis still masks a great deal of private exploitation of government power.[172] If a court must uphold the constitutionality of an economic regulation whenever the legislature might have thought—or even just *claimed*—that it related somehow to a public interest, then laws restricting the liberties of innocent entrepreneurs simply to benefit politically influential insiders can evade constitutional boundaries designed to protect individual rights. Rational basis review thus encourages, if it does not actually require, courts to require the constitutional violations of individual rights categorized as "economic."[173]

The Missouri case provides a good example of how this might happen. Although in the end, no court addressed the constitutionality of that law before it was repealed, one can easily imagine a judge upholding it despite the overwhelming evidence that the law served no genuine public interest. If, as some courts have declared, the question in a rational basis case is not whether the law actually serves a public interest, but whether lawmakers could have believed it would, then a judge might have felt constrained to ignore this evidence, and resolve the case on the basis of a purely imaginary justification of the statute.[174] In fact, a Virginia federal district court recently dismissed a constitutional challenge to a CON law on the grounds that "[t]he concept of" that law was to address "a legitimate government interest."[175] Under the rational basis test, the court ruled, any evidence regarding "the benefits of allowing [the plaintiffs] to engage in their profession" or "about the negative effects of [the challenged] laws" were "entirely beside the point."[176] Thus "[e]ven if plaintiffs had evidence that Virginia's [CON] laws do not in fact advance [the government's asserted] interest," such evidence "would be of no moment."[177] That decision was in error, at least for procedural reasons,[178] but it is hardly the only instance in which a court, applying rational basis deference, has ignored the clear rent-seeking abuses at the heart of a licensing law.[179] Worse yet, the Tenth Circuit has ruled that economic regulations need not bear any relationship to public health, safety, or welfare in order to survive rational basis scrutiny: the legislature may bar competition for the sole purpose of granting a privilege to existing firms.[180] A more realistic rational basis review—and a more balanced understanding of the legitimate state interest prong of that test—would hold that while the legislature has broad authority to regulate economic activities to

protect public health, safety, and welfare, it has no rightful authority to restrict an entrepreneur's economic freedom of choice in order to serve the private interests of politically powerful factions.

Conclusion

While courts defer to the legislature's decision that a certain industry needs regulation, or that a particular kind of regulation is appropriate, they cannot acquiesce in arbitrary restrictions of liberty, or regulations that do not realistically promote public goals. When a law bars a person from engaging in a trade solely in order to promote the private interests of established firms, the courts should intervene to protect the entrepreneur's right to earn a living—a right, after all, which is deeply rooted in this nation's history and tradition,[181] with roots reaching deep into the common law.[182] Indeed, Justice William Douglas called the right to work to support oneself at a common occupation "the most precious liberty that man possesses."[183] The Supreme Court has accordingly allowed states to bar entry into certain professions only where doing so is reasonably related to the applicant's skills and qualifications.[184] Where the restrictions bear no such relationship, but only protect established insiders from competition, the Court has ruled them unconstitutional.[185]

CON restrictions do not purport to relate to a person's qualifications or skills. They exist for the explicit purpose of barring economic competition against established firms. Such restrictions on entry may perhaps have some justification in some special kinds of markets, but they cannot be justified in ordinary, fully competitive markets such as the moving industry. The now-repealed Missouri statute regulating the moving industry provides a prime example of how CON laws operate in the real world. Existing firms wield them as a weapon against competition without regard for public safety considerations, and because the costs of regulation are so severe for newcomers, it is a very effective weapon, indeed. The consequences are higher costs for consumers, and, what is worse, fewer economic opportunities for the wealth-creating entrepreneurs who drive the nation's economy and who need economic opportunity the most.[186] In ordinary, competitive markets, therefore, CON laws are unconstitutional.

Notes

[1] *See generally* JAMES CHAN, SPARE ROOM TYCOON 1-26 (2000).
[2] *Cf.* Dent v. West Virginia, 129 U.S. 114, 121 (1889) ("the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose…may in many respects be considered as a distinguishing feature of our republican institutions.").
[3] *See, e.g.*, Schware v. Bd. of Examiners, 353 U.S. 232, 238-39 (1957).
[4] *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING ch. 7 (2010).
[5] *Schware*, 353 U.S. at 238-39.
[6] *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 228-29 (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978, 991-92 (9th Cir. 2008). *See further* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976).
[7] *See* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427 (1979) ("The essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.").
[8] MO. REV. STAT. § 390.051 (2011).
[9] Munie v. Koster, No. 4:10CV01096 (E.D. Mo. filed Mar. 7, 2011).
[10] Courts strongly presume "prior restraints" to be unconstitutional when applied to the press. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). This is because the First Amendment's authors regarded the pre-publication licensing requirements of the Stuart Monarchy as the prototypical violation of free speech under the British Constitution. Blackstone denounced them as such, on the grounds that requiring permission of a licenser prior to publication "is to subject all freedom of sentiment to the prejudices of one man, and make him arbitrary and infallible judge of all controverted points." 4 W. BLACKSTONE, COMMENTARIES *152. The founders accordingly viewed prior restraints as the quintessential form of censorship. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936); Near v. Minnesota, 283 U.S. 697, 713-14 (1931). But Blackstone's description of the prior restraints of the Stuart era makes clear that these restrictions were business licenses: they operated as before-the-fact restrictions on who could own and operate a press and issue publications. In *Areopagitica,* John Milton described such licensing requirements as a form of monopoly, likening them to the business restrictions so common in mercantilist England:

> I cannot set so light by all the invention, the art, the wit, the grave and solid judgement which is in England, as that it can be comprehended in any twenty capacities how good soever, much lesse that it should not passe except their [*i.e.*, licensers'] superintendence be over it, except it be sifted and strain'd with their strainers, that it should be uncurrant without their manuall stamp. Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and licence it like our broad cloath, and our wooll packs. What is it but a servitude like that impos'd by the Philistims, not to be allow'd the sharpning of our own axes and coulters, but we must repair from all quarters to twenty licencing forges.

JOHN ALIVS, ED., AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 29-30 (1999). The arguments Milton and others leveled against licensing for the press apply equally to CON laws for

industries other than the media. *See further* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 406-07 (2012).

[11] *See, e.g.*, MO. REV. STAT. § 390.051(1) (2011); NEV. REV. STAT. § 706.386 (2012); KY. REV. STAT. § 281.615 (2012); OR. REV. STAT. § 825.100 (2008).

[12] *See, e.g.*, MO. REV. STAT. 390.051(2) (2011);NEV. ADMIN. CODE § 706.1375 (2012); KY. REV. STAT. § 281.620 (2012); OR. REV. STAT. § 825.125 (2008).

[13] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015 (2011); NEV. REV. STAT. § 706.391(2) (2012); KY. REV. STAT. § 281.630 (2012); OR. REV. STAT. § 825.102(2) (2008).

[14] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015 (7)(A) (2011); NEV. REV. STAT. § 706.391(9) (2012); 601 KY. ADMIN. REGS. 1:030(2) (2012). Some states impose a fee on any protest. *See* MONT. ADMIN. R. 38.3.402(c) (fee of $500).

[15] For example, Kentucky statutes requires the state's Transportation Cabinet Division of Motor Carriers to convene a hearing if an objection is filed, but allows it discretion to dispense with the hearing if no objection is filed. KY. REV. STAT. § 281.625(2) (2012). Nevada, on the other hand, requires a hearing in all cases. NEV. REV. STAT. § 706.391(1).

[16] One extreme example is to be found in the City Ordinances of Bloomington, Illinois. Under ch. 40, sec. 206, of the City Code, the City Manager is empowered to issue CONs for taxicab services on the basis, *inter alia*, of whether she "finds that further taxicab service in the City of Bloomington is desirable." No definition of "desirable" is provided. *See further* Timothy Sandefur, *Why do Bloomington bureaucrats get to decide when competition is "desirable"?* PLF LIBERTY BLOG, Apr. 9, 2013, http://blog.pacificlegal.org/2013/why-do-bloomington-bureaucrats-get-to-decide-when-competition-is-desirable/.

[17] Courts have ruled that in the realm of public utilities, at least, the phrase "public convenience and necessity" is a term of art that is not unconstitutionally vague.

[18] *See, e.g.*, MO. CODE REGS. Tit. 1, §15-3.250(3); In re Discipline of Schaefer, 117 Nev. 496, 509 (2001); Ky. State Bar Ass'n v. Henry Vogt Machine Co., Inc., 416 S.W.2d 727, 727-28 (Ky. 1967).

[19] *See* KY. REV. STAT. § 281.615 *ET SEQ.* (2012).

[20] KY. REV. STAT. § 281.990(2) (2012).

[21] KY. REV. STAT. § 281.625(1) (2012). *See also* 601 KY. ADMIN. REGS. 1:030(2) (2012).

[22] KY. REV. STAT. § 281.630 (2012).

[23] Several state cases have reviewed "convenience and necessity" determinations, particularly in cases involving utilities, but not has fashioned a clear definition of these terms. For example, in *Red Star Transp. Co. v. Red Dot Coach Lines*, 220 Ky. 424, 427-28 (1927), the Kentucky Court of Appeals stated that "[i]nconvenience may be so great as to amount to necessity."

[24] As recently as 2008, the Oregon Department of Transportation based its determinations of public convenience and necessity on a 1992 order from the Oregon Public Utility Commission—a different agency entirely—which did not define the statutory terms, but listed only general principles and factors that had been considered relevant in the past. *See* Sandefur, *Insiders, Outsiders*, *supra* note 10 at 403-05. There was no regulatory or statutory authority for relying on that order. Likewise, as noted below, the Missouri Department of Transportation Motor Carrier Services Division used "statements of support" to determine the "usefulness" of a proposed moving service even though there was no statutory or regulatory authority for doing so.

[25] 601 KY. ADMIN. REGS. 1:030(4) (2012).

[26] *Henry Vogt Machine Co.*, 416 S.W.2d at 727-28.

[27] *Cf.* Consolidated Coach Corp. v. Kentucky River Coach Co., 249 Ky. 65, 74-75 (1933) (applying, under predecessor statute, the "rule of prohibition" that so long as an existing company is already adequate, or is likely to become adequate, an application for a competing service must be denied.).

[28] For example, in September, 2012, the Kentucky Transportation Cabinet denied a Certificate to applicant Michael Ball in a written decision that acknowledged that Ball had been in the moving business for 35 years and that even his own competitors acknowledged he "would make a great mover." Report and Recommended Order Denying Application, *In re. Application of Michael Ball Moving & Storage, LLC,* Ky. Transp. Cabinet Docket No. 12-091 (Feb. 19, 2013) at 6 (on file with author). The application was denied solely because "applicant did not prove that the existing household goods moving service in Louisville is inadequate and that his proposed service is needed." *Id.* at 9.

[29] Jones, *supra* note 7 at 439.

[30] *Id.* at 428.

[31] *See, e.g.,* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 13-14 (1963). One example is to be found in DAVID SYME, OUTLINES OF AN INDUSTRIAL SCIENCE 56 (1876): "Every one knows that excessive competition produces enormous waste, and that it leads to the perpetration of fraud, the extent of which is generally in proportion to the intensity or keenness of competition."

[32] *See id.* at 61 (using railroad example).

[33] This latter theory was sometimes used to supplement an additional theory of "predatory pricing," which held that businesses would purposely cut their prices below market levels as the first step in an effort to drive out competitors. The second step would then be to raise prices to monopoly levels. This dubious theory became the basis of various antitrust regulations, *see* DOMINIC T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 63-64, 171-72 (2d ed. 1990). The merits of that theory are beyond the scope of this paper, however, because the theory of "excessive competition" on which CON laws were based was not necessarily part of a "predatory pricing" theory. The theory of "excessive competition" does not see price-cutting solely as part of a monopoly strategy, but rather as an economic incentive that creates a race to the bottom in terms of quality.

[34] *See generally* 3 FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY 67-77 (1979) (explaining how competition is a discovery procedure); MURRAY ROTHBARD, MAN, ECONOMY, AND STATE 575-76 (rev. ed. 2001) (same).

[35] *See generally* Friedrich Hayek, *The Use of Knowledge in Society,* 35 AM. ECON. REV. 519 (1945).

[36] *See generally* JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), especially ch. 19

[37] *See* Richard A. Posner, *Natural Monopoly and Its Regulation,* 21 STAN. L. REV. 548, 611 (1969) ("the fear of ruinous competition seems largely groundless.").

[38] *See generally* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY ch. 7 (New York: Harper, 1975) (1942).

[39] *See* 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 221-23 (1971) (explaining the economic efficiency of "cream-skimming").

[40] Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy,* 32 UCLA L. REV. 719, 761 n.240 (1985).

[41] *See generally The Civil Service And The Statutory Law of Public Employment,* 97 HARV. L. REV. 1611, 1619-32 (1984).

[42] *See* Uber, https://www.uber.com (visited Apr. 25, 2013).

[43] *See, e.g.,* Michael B. Farrell, *Taxi Fleet in Boston Sues over App That Hails Rides,* BOSTON GLOBE, Mar. 13, 2013 (visited Apr. 25, 2013); Ken Yeung, *Uber Faces New Lawsuit from SF Taxi Drivers over Unfair Practices,* THE NEXT WEB, Nov. 14, 2012, avail. at http://thenextweb.com/insider/2012/11/14/class-action-lawsuit-filed-against-uber-by-san-francisco-taxicab-drivers-citing-unfair-business-competition/ (visited Apr. 25, 2013).

[44] See, e.g., Donald N. Zillman & Michael T. Bigos, *Security of Supply And Control of Terrorism: Energy Security in The United States in The Early Twenty-First Century, in* BARRY BARTON, ET AL., EDS., ENERGY SECURITY: MANAGING RISK IN A DYNAMIC LEGAL AND REGULATORY ENVIRONMENT 154 (2004). It is actually doubtful whether CONs make sense in monopolistic markets, since such laws explicitly bar competition and therefore exacerbate the monopolistic features of such markets, if anything. William B. Tye, *The Economics of Public Convenience And Necessity for Regulated Utilities*, 60 TRANS. PRACTITIONERS J. 143 (1993); STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 191 (2000). But perceived monopoly features often lead to government implementing a franchise style of regulation in order to prevent the business from obtaining monopoly advantages. Such restrictions could be imposed without a CON requirement, simply by mandating that firms undertake those obligations, but not requiring pre-approval for entry into the market. After all, if the market really is monopolistic, the CON requirement's barrier to entry would not be necessary. *But see* CHRISTOPHER CASTANEDA, REGULATED ENTERPRISE: NATURAL GAS PIPELINES AND NORTHEASTERN MARKETS, 1937-1954 at 6-7 (1993) (arguing that "intense competition" is present in some such markets).

[45] Readers of a certain age will recall the "New Coke" fiasco of 1985, when the Coca-Cola Corporation, surely among the most sophisticated businesses in the history of capitalism, with all imaginable resources at its disposal to predict consumer desires, concluded that the public wanted a new recipe for Coca-Cola. In fact, the product was such a spectacular flop that Coca-Cola restored its original recipe only two months later, and "New Coke" became a by-word for poor marketing decisions. MATT HAIG, BRAND FAILURES: THE TRUTH ABOUT THE 100 BIGGEST BRANDING MISTAKES OF ALL TIME 8-14 (2011). If Coca-Cola could not anticipate what consumers desired when it came to soda recipes, it seems extremely unlikely that government bureaucrats can determine, without such research, what sort of transportation needs consumers have in a dynamic economy. While the "New Coke" example may seem jocular, this is an extremely serious matter; societies in which decisions about resource use are made entirely, or almost entirely, by the government—that is, communist societies—suffer tremendously in consequence of this "calculation problem." *See generally* Ludwig von Mises, *Economic Calculation in The Socialist Commonwealth* (Joseph Salerno, trans., Mises Institute: 1990) (1920), avail. at http://mises.org/pdf/econcalc.pdf (visited Apr. 25, 2013).

[46] Michael M. Grynbaum, *2 Taxi Medallions Sell for $1 Million Each,* N.Y. TIMES CITY ROOM, Oct. 20, 2011, http://cityroom.blogs.nytimes.com/2011/10/20/2-taxi-medallions-sell-for-1-million-each/. The City has for many years capped the number of taxicab medallions available at 13,237, far below even the number of taxis operating in 1937, when that number was fixed. Robert Hahn and Peter Passell, *Million Dollar Taxis: Another Wall Street Ripoff?* FORBES, Oct. 30, 2011, http://www.forbes.com/sites/econmatters/2011/10/30/million-dollar-taxis-another-wall-street-ripoff/. A recent effort by the state legislature to increase the transportation options available to New York consumers was ruled unconstitutional by a state court judge. Taxicab Serv. Assn. v State of N.Y., 2012 N.Y. Misc. LEXIS 4098 (N.Y. Sup. Ct. Aug. 17, 2012). That case is now on appeal.

[47] Quoted in RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 196 (1990).

[48] Posner, *supra* note 37 at 612.

[49] *Cf.* Juarez Gas Co. v. FPC, 375 F.2d 595, 599 (D.C. Cir. 1967) ("an affected competitor…is deemed to be in position to advance matters which are relevant and material for consideration by the" agency considering the CON application).

[50] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015(7)(A) (specifying that "[a]ny interested motor carrier that transports household goods in intrastate commerce" may file intervention, but not providing for consumers to do so).

[51] *See, e.g.*, MO. REV. STAT. § 390.051(5) (2011) ("In cases where persons object to the issuance of a certificate, the diversion of revenue or traffic from existing carriers shall be considered."); NEV. REV. STAT.

§ 705.391(2) (2012) ("the Authority shall grant the certificate or modification if it finds that...the operation...will foster sound economic conditions within the applicable industry...will not unreasonably and adversely affect other carriers operating in the territory...[and] will benefit and protect...the motor carrier business....").

[52] Jones, *supra* note 7 at 486.

[53] Oliver Wendell Holmes, *The Path of The Law,* 10 HARV. L. REV. 457, 469 (1897).

[54] Paul H. Gardner, Jr., *Entry and Rate Regulation of Interstate Motor Carriers in Missouri: A Strategy for Reform,* 47 MO. L. REV. 693, 707 (1982).

[55] *See* Joseph P. Kalt, *Market Power And The Possibilities for Competition, in* JOSEPH P. KALT & GRANK C. SCHULLER, EDS., DRAWING THE LINE ON NATURAL GAS REGULATION 115 (1987) ("Under [CON] certification, incumbent certificate holders typically argue that public convenience does not require a new entrant into the market if the result would divert traffic away from the incumbent. But 'traffic diversion' is the essence of competition and the weakest fo reasons to block entry into an industry."); *see also* Mark W. Fankena & Paul A. Pautler, *Taxicab Regulation: An Economic Analysis,* 9 RES. IN L. & ECON. 129, 145-46 (1986) ("the agencies that regulate taxis may not be motivated primarily by concern for market failure and efficiency. This is evident from the fact that a number of common regulations (e.g., restrictions on entry and minimum fares) have no persuasive efficiency justification.").

[56] Munie v. Koster, No. 4:10CV01096 (filed June 18, 2010).

[57] A thorough analysis and perceptive critique of the Missouri statute is Gardner, *supra* note 54.

[58] MO. REV. STAT. § 390.051(1).

[59] *Id.* § 390.051(4).

[60] *Id.* § 390.051(5).

[61] In *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm'n,* 527 S.W.2d 390, 394 (Mo. Ct. App. 1975), the Court of Appeals acknowledged that "[f]or some reason, either intentional or otherwise, the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is 'necessary or convenient for the public service.'"

[62] Deposition of Barbara Hague, Nov. 21, 2011, *Munie v. Skouby* No. 4:10-CV-01096-AGF at 6-7 (hereafter "Hague Depo.") (on file with author).

[63] *Id.*

[64] *Id.* at 10. No statute or regulation authorized the Division to do this, or established that such statements would satisfy this statutory criterion. It appears that the Division simply decided to do this on its own as an unwritten regulation.

[65] *Id.* at 10-12.

[66] MO. CODE REGS. tit. 7, § 265-10.015(7)(A).

[67] Hague Depo., *supra* note 62 at 7.

[68] MO. REV. STAT. § 390.062 (2011).

[69] *Id.*

[70] Hague Depo., *supra* note 62 at 7.

[71] The Division would then to intervene before the AHC in order to participate in the hearing as a party.

[72] MO. CODE REGS. tit. 1, § 15-3.250(3).

[73] The allocation of the burden of proof on this question is a significant matter. Placing that burden on the applicant will result in a default rule against allowing new competition, while placing that burden on the intervenor would result in a presumption in favor of competition. *See Consolidated Coach Corp.,* 249 Ky. at 74-75 (applying default against competition). Yet the advantage conferred by a burden of proof can easily be undone. In 2013, New Mexico enacted HB 194, which among other things amended N.M. STAT. ANN. § 65-2A-13 to shift onto objectors the burden of proving that a CON should be denied to an applicant. But the language the statute uses shows that this provides little, if any, protection for

applicants. An existing firm is required only to prove "all *matters of fact* pertaining to its full-service operation within its certificated full-service territory, the burden of proving the *potential* impairment or adverse impact on its existing full-service operation by the transportation service proposed by the applicant." *Id.* (emphasis added). This only means the firm must prove that it currently operates a business and that there might be competition from the applicant. The statute also imposes on applicants the burden of "proving any particular factual matters that the commission...may identify and require," and "the burden of proving any additional allegations and matters of public interest that it may raise." *Id.* This means that once an existing firm shows some potential competitive "impact" from a new firm, the government may then "require" the applicant to prove that its proposed operation is "necessary"—whereupon the burden of proof once again shifts to the applicant. This New Mexico statute is among the most explicitly anti-competitive licensing laws in the United States.

[74] MO. REV. STAT. § 390.051(5) (2011).

[75] Missouri Department of Transportation Motor Carrier Services Division, *2011 Division Tracker* at 6c(1), avail. avail. at http://www.modot.org/mcs/documents/January2012D-tracker.pdf (visited Mar. 27, 2013).

[76] In their document production requests, Plaintiffs sought copies of all applications filed within the period of January 1, 2005 and the filing of the lawsuit on June 10, 2010. This time period was chosen to avoid unduly burdening the defendants.

[77] Defendants provided 75 such applications. A 76th, All Metro Movers, discussed *post*, was discovered prior to the hearing on Plaintiffs' motion for summary judgment.

[78] Plaintiffs' Statement of Uncontroverted Facts, *Munie v. Skouby* No. 4:10-CV-01096-AGF at ¶¶ 59, 62 (hereafter SUF) (on file with author).

[79] Sixteen such firms were identified during discovery, *id.* at ¶59, but the All Metro Movers application was discovered prior to oral argument on the motion for summary judgment. *See supra* note 98.

[80] SUF, *supra* note 78 at ¶ 101.

[81] MO. REV. STAT. § 390.020(4) (2011).

[82] SUF, *supra* note 78 at ¶102.

[83] *Id.* ¶ 113.

[84] Hague Depo., *supra* note 62 at 36.

[85] SUF, *supra* note 78 at ¶ 81.

[86] *Id.* ¶¶ 86-88.

[87] *Id.* ¶ 45. This pattern was so common that the state's Motor Carrier Services Division typically made reference to it in the documents it filed with the AHC. Whenever an intervention was filed, and the case was referred to the AHC, the Division would file its own intervention in order to participate at the hearing (although, as explained above, the hearings were typically cancelled when the applicant chose to withdraw the original application). The Division's interventions were boilerplate documents that declared "[i]n many cases involving contested applications for intrastate operating authority, before or during the hearing, the Applicant may decide to restrictively amend the scope of the requested operating authority, in consideration of an agreement by one or more protesting intervenors to withdraw their opposition to the Application." Entry of Appearance and Motion to Intervene by the Missouri Highways & Transportation Commission, In re. Servant Enterprises d/b/a Action Moving, Sept. 15, 2008, at 1-2 (on file with author).

[88] Declaration of Billy Holloway, Jr., in Support of Plaintiffs' Motion for Summary Judgment, *Munie v. Koster*, No. 4:10-CV-01096-AGF (on file with author).

[89] SUF, *supra* note 78 at ¶ 46.

[90] *Id.*

[91] In re. D. Gaines, Inc., No. 05-0227 MC, 2005 Mo. Admin. Hearings LEXIS 73 (2005).

[92] In re. Application of All Metro Movers, LLC, No. 07-1835 MC, 2008 Mo. Admin. Hearings LEXIS 299 (2008).
[93] MO. REV. STAT. § 390.051(5).
[94] 2005 Mo. Admin. Hearings LEXIS 73 at *12.
[95] *Id.* at **15-16. The Commission also found that no evidence had been presented regarding Gaines' net profits, net worth, and other financial matters which would have shown his "fitness" under the statute. *Id.* at **13-14.
[96] 2008 Mo. Admin. Hearings LEXIS 299 at *1.
[97] *Id.* at *18.
[98] *Id.* at *23.
[99] *Id.* at **23-24.
[100] These findings are consistent with Thomas Gale Moore, *The Beneficiaries of Trucking Regulation*, 21 J. L. & ECON. 327 (1978), which analyzed federal trucking regulations. Those regulations, which included a CON requirement for interstate movers, were reformed in the 1980s—saving consumers billions of dollars. Robert W. Hahn & John A. Hurd, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 268-70 (1991); Nancy L. Rose, *The Incidence of Regulatory Rents in The Motor Carrier Industry*, 16 RAND J. ECON. 299 (1985).
[101] SUF, *supra* note 78 at ¶35. *See also* Hague Depo., *supra* note 62 at 35 (Q: "Do you have any experience of this intervention process being used to prevent fraud?" A: "I know that some of our applicants, whether it was household goods or for transportation of property, have not been someone who would not commit fraud." Q: "And has—in such a situation have intervenors provided you with the information necessary to stop fraud?" A: "I think in those cases staff found out the information themselves through the safety aspects of our reviews." Q: "So you would say that there's safety aspects of your review and then the intervention? You would separate those two out?" A: "Correct.").
[102] MO. REV. STAT. § 390.051(3) (2013).
[103] Missouri Department of Transportation Motor Carrier Services Division, *2012 Division Tracker* at 4c(1), avail. avail. at http://www.modot.org/mcs/documents/jan2013dtracker.pdf (visited Apr. 26, 2013).
[104] They also violate the Privileges or Immunities Clause, but courts have largely refused to enforce that provision since *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *See generally* Timothy Sandefur, *Privileges, Immunities, And Substantive Due Process*, 5 NYU J. L. & LIBERTY 115 (2010).
[105] St. Joseph Abbey v. Castille, 712 F.3d 215, 222-23 (5th Cir. 2013); *Merrifield*, 547 F.3d at 991; *Craigmiles*, 312 F.3d at 224. *Contra*, Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). The *Merrifield* court distinguished between Due Process and Equal Protection principles in the context of licensing requirements. It held that a licensing regime that imposes unnecessary and irrational burdens on a person prior to entering a trade violates only the Due Process Clause, and not the Equal Protection Clause. *See* 547 F.3d at 985-86. But in *Craigmiles*, the Sixth Circuit ruled that the Equal Protection Clause bars government from employing a licensing law in such a way as to grant privileges to some practitioners of a trade over and above other similarly situated practitioners. *See, e.g.*, 312 F.3d at 225 (relevant class was "those who sell funeral merchandise."). While the *Merrifield* court was right that unnecessarily burdensome licensing laws can violate the Due Process Clause even when they do not establish irrational classifications, it appears to have overlooked the fact that a licensing regime necessarily categorizes practitioners into the licensed and the unlicensed—and ascribes benefits or burdens accordingly. If that categorization is not rationally related to a legitimate government interest—that is, if the requirements for obtaining a license are not related to public health and safety—then the licensing law necessarily creates one class with privileges and one class with burdens that are irrational, in violation of the Equal Protection Clause. Whatever may have been true of *Merrifield*, therefore, licensing requirements like CON laws that give licensees the privilege of essentially vetoing the economic

liberty of their would-be competitors do create classifications unrelated to a legitimate state interest, and consequently violate the Equal Protection Clause.

[106] *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or, The Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL'Y 283, 299-307 (2012).

[107] *See id.* at 287-94.

[108] *Cf.* THE FEDERALIST No. 10 at 57 (J. Cooke ed., 1961) (James Madison) (defining faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.")

[109] *Id.* No. 78 at 521-30.

[110] Cass R. Sunstein, *Naked Preferences And The Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

[111] *See generally* Steven M. Simpson, *Judicial Abdication And The Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003).

[112] *See, e.g.,* Pike v. Bruce Church, Inc., 397 U.S. 137, 142-43 (1970); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[113] *See, e.g,* Granholm v. Heald, 544 U.S. 460, 472 (2005) ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

[114] Sunstein, *supra* note 110.

[115] This phrase has its roots in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.")

[116] *See, e.g.,* Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2288 (2012) ("The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.").

[117] Surprisingly little public choice literature has addressed the rent-seeking dynamics surrounding public school curricula. But it is clear that powerful interest groups lobby government entities routinely to manipulate the content of curricula to serve their ideological agendas. The efforts of creationist groups to have evolutionary science removed—or counteracted through "equal time" requirements, disclaimers—is only the most obvious example of this rent-seeking, which is oriented toward an ideological goal rather than an economic one. Court decisions invalidating such efforts hold that while people are free to propagate anti-evolution ideas, they may not use the government to obtain what is essentially a subsidy in that effort. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 714 (M.D. Pa. 2005). Of course, defenders of creationism view it as a subsidy when government-run schools teach evolution. *See, e.g.,* Francis J. Beckwith, *Public Education, Religious Establishment, And The Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 469 (2003) ("excluding non-materialist...accounts of natural phenomena" from public school curricula is "intellectual imperialism.").

[118] Lynn A. Baker & Ernst A. Young, *Federalism And The Double Standard of Judicial Review*, 51 DUKE L.J. 75, 80-87 (2001).

[119] *See generally* Romer v. Evans, 517 U.S. 620, 632 (1996).

[120] As Professor Sunstein has put it, *supra* note 110 at 1692, "[t]he 'reasonableness' constraint of the due process clause is perhaps the most obvious example" of a prohibition on "naked preferences"—i.e., the exploitation of government power for private, rather than for public purposes.

[121] *See, e.g.*, SANDEFUR, *supra* note 4 at 134.
[122] 129 U.S. 114 (1889).
[123] *Id.* at 121-22.
[124] 353 U.S. 232 (1957).
[125] *Dent*, 129 U.S. at 122 ("If [restrictions on entry] are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty.... [But] when they have no relation to such calling or profession, or are unattainable by such reasonable study and application...they can operate to deprive one of his right to pursue a lawful vocation."); *Schware*, 353 U.S. at 239 (restrictions on entry into profession "must have a rational connection with the applicant's fitness or capacity to practice [that] profession."); *see also* Douglas v. Noble, 261 U.S. 165, 168 (1923) ("If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment.")
[126] *St. Joseph Abbey, supra* note 104.
[127] *Craigmiles*, 312 F.3d at 220.
[128] *Merrifield, supra* note 6.
[129] Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005).
[130] 312 F.3d 220 (6th Cir. 2002).
[131] *Id.* at 224.
[132] 2013 WL 1149579 (5th Cir. Mar. 20, 2013).
[133] *Id.* at *5.
[134] 547 F.3d 978 (9th Cir. 2008).
[135] *Id.*
[136] Id. at 991 n. 15.
[137] *Powers*, 379 F.3d at 1221 ("we hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").
[138] Most of the Court's decisions involving CON restrictions have, of course, involved public utilities. *See, e.g.*, Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1988); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983). Such cases are beyond our scope here. A particularly helpful article on early CON law cases is Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405 (1996).
[139] 267 U.S. 307 (1925). *Buck* was decided along with a companion case, *Bush Co. v. Malloy*, 267 U.S. 317 (1925), which invalidated a similar Maryland law on the same grounds. Justice McReynolds dissented, on the grounds that the CON laws were reasonable means of protecting the structural stability of roads built at state expense.
[140] *Buck*, 267 U.S. at 313.
[141] *Id.* at 315-16.
[142] 271 U.S. 583 (1926).
[143] *Id.* at 591-92.
[144] 285 U.S. 262 (1932). A superb overview of the *Liebmann* case is HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 54-61 (1994).
[145] OKLA. STAT. ch. 147 sec. 3 (1925), avail. at http://s3.documentcloud.org/documents/412219/oklahoma-manufacture-and-distribution-of-ice-act.pdf.
[146] *Id.*
[147] 42 F.2d 913, 917-18 (W.D. Okla. 1930).
[148] *Id.* at 918.

[149] *See id.* ("The manufacture and sale of a commodity such as ice is a useful and honorable private business and calling in which any citizen so disposed has the undoubted right under our Constitution and laws to engage by investing his capital and selling his time and energy, at any time, and in any suitable and convenient place his judgment may dictate to him.").

[150] *See id.* (existing firms "would not invite the competition the operation of defendant's plants will bring them.").

[151] 52 F.2d 349 (10th Cir. 1931).

[152] A common accusation against the "*Lochner* era" judiciary is that it based its decisions on "economic theory." In reality, the decisions of this era were based on a robust conception of individual liberty that traced back to the classical liberal views of the Constitution's framers. *See* SANDEFUR, *supra* note 4 at 83. Neither *Lochner* nor the other cases associated with this tradition were based on economic considerations. On the contrary, in these cases, it was the defenders of the legislation who asserted economic theories; in their view, economic factors should trump the long-standing precedent protecting an individual's right to economic autonomy. This is why Louis Brandeis, as an attorney supporting minimum wage legislation, submitted the famous "Brandeis Brief" putting forward economic arguments. *See generally* David P. Bryden, *Brandeis' Facts*, 1 CONST. COMMENT. 281 (1994). In cases like *Muller v. Oregon*, 208 U.S. 412 (1908), or *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), it was the advocates of government intervention—not its opponents—who argued that economic factors justified state intrusion on traditional realms of individual choice. This was the main thrust of Roscoe Pound's famous argument that by rejecting such arguments, the courts were ignoring the "realities" of modern industrial life. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[153] 52 F.2d at 351-52.

[154] *Id.* at 353 ("The inquiry then is whether the manufacture and sale of ice is a business affected with a public interest to the extent required to justify the regulations sought to be imposed. This requires an examination into the nature of the business, the features thereof which touch the public, and the abuses reasonably to be feared.").

[155] *Id.*

[156] *Id.* at 354.

[157] *Id.* at 355 ("while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices.").

[158] 285 U.S. 262 (1932). Justice Cardozo did not participate.

[159] *Id.* at 278 ("the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.").

[160] In *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1877), the Supreme Court held that although the grain silos at issue did not meet the definition of monopoly or utility, they were nevertheless in a unique market position such that they were "affected with a public interest," and thus were similar to monopolies, and could be regulated on that account. *Id.* at 126. In dissent, Justice Stephen Field argued that this theory unduly expanded the concept of monopoly. *Id.* at 140 ("If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."). But Field did not dispute that actual natural monopolies or franchises could be closely regulated by the government. *See further* PAUL KENS, STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE ch. 5 (1997).

[161] *New State Ice*, 285 U.S. at 278-79. Justice Brandeis' dissent, joined by then-Justice Stone, has become a classic, far more often cited and quoted than the majority opinion. *See* Sandefur, *Insiders, Outsiders, supra*

note 10 at 413-15. Although Brandeis' argument that states should be free to "experiment" with regulatory schemes has frequently been cited with approval, few writers have acknowledged the majority's answer, that "experimentation" is not a permissible excuse to violate the Constitution. *See New State Ice*, 285 U.S. at 279-80. It is noteworthy that Brandeis and Stone were the only judges, out of the 12 that reviewed the constitutionality of the Oklahoma law, who found any merit in it. Even then, as Phillips observes, *supra* note 138 at 443-47, Brandeis' argument in favor of the law is notably weak. Brandeis essentially admitted that it was private interest legislation designed to establish a cartel: "Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character." *New State Ice*, 285 U.S. at 292-93 (Brandeis, J., dissenting).

[162] Nebbia v. New York, 291 U.S. 502, 537-38 (1934). *Nebbia*, however, still maintained that "arbitrary or discriminatory" laws would still be unconstitutional under the Fourteenth Amendment. *Id.* at 537.

[163] 336 U.S. 525 (1949).

[164] *Id.* at 531.

[165] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).

[166] It is hard to see why courts should regard interstate protectionism and intrastate protectionism differently. The Constitution contains no explicit prohibition on either; the prohibition on interstate protectionism that is a bedrock of dormant commerce clause jurisprudence is, as *DuMond* makes clear, heavily based on the context and background of the Commerce Clause. But the guarantee of the right of all persons to engage in trades free of arbitrary state interference is equally well-grounded in the background of the Fourteenth Amendment. One author has attempted to distinguish the two on the grounds that "[t]he policy behind preventing interstate economic protectionism is to prevent barriers to the development and maintenance of a national marketplace," and "the textual hook for interstate economic protectionism's unconstitutionality derives from the enumerated [power] of the federal government over interstate commerce." Katharine M. Rudish, *Note: Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism As A Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1525-26 (2012). But the prohibition on interstate protectionism is at least equally rooted in an intent to protect every person's freedom to engage in a trade across state lines. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 101-02 (1980). And the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses were aimed at preventing barriers to the development and maintenance of a free marketplace within states—that is, to protect the freedom of industry. *See* SANDEFUR, *supra* note 4 at 39-44. As the Court recently reminded us, the purpose of the federalist structure is to protect individual freedom. Bond v. United States, 131 S. Ct. 2355, 2364-66 (2011). While the "textual hook" for barring interstate protectionism is Congress' exclusive power over the matter, the "textual hook" for prohibiting protectionism within the state is the Amendment's guarantee against states depriving people of liberty without due process of law, or denying them equal protection, or abridging the privileges or immunities of citizens. This last has a particularly strong connection to anti-protectionism, given that the Fourteenth Amendment's Privileges or Immunities Clause was based largely on Justice Bushrod Washington's anti-protectionist interpretation of the Article IV Privileges or Immunities Clause in *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823). *See* SANDEFUR, *supra* note 4 at 41. One might also contend that the dormant commerce clause is rooted in preventing the economic, political, and social disruption caused by states erecting protectionist barriers. This is no doubt true. *See, e.g.*, Adam Badawi, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331, 1333 (2003) ("Curtailing the economic chaos created by a dearth of centralized power was a prominent motivation for including the Commerce Clause among the

enumerated powers of Congress."). But similar economic, political, and social disruption results from intrastate barriers. *See, e.g.*, Chaddock v. Day, 75 Mich. 527, 531-32 (1889) ("It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts."). Anticompetitive legislation disrupts society, creates resentment, and unjustly deprives people of opportunities *within* states, too. *See* Sandefur, *Insiders, Outsiders, supra* note 10 at 407-08. The Fourteenth Amendment was written to provide federal protection against such disruptions.

[167] *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985).

[168] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 472-73 (2005).

[169] *See, e.g., Beach Communications*, 508 U.S. at 315.

[170] *See, e.g.*, Shaw v. Oregon Public Employees' Retirement Bd., 887 F.2d 947, 948 (9th Cir. 1989) ("courts may properly look beyond the articulated state interest in testing a statute under the rational basis test.... A court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack." (citations and quotation marks omitted)).

[171] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996).

[172] *See* SANDEFUR, *supra* note 4 at ch. 6.

[173] In consequence, plaintiffs often struggle to characterize economic freedom as some kind of preferred freedom, so as to qualify for meaningful judicial scrutiny. For example, a series of lawsuits challenging state laws against the sale of sexual devices failed to convince courts to apply the heightened scrutiny applicable to "privacy" rights; instead, the courts characterized the right at issue as economic, applied rational basis review, and upheld the challenged statutes. Williams v. Morgan, 478 F.3d 1316, 1320-21 (11th Cir. 2007); Williams v. Attorney General of Ala., 378 F.3d 1232 (11th Cir. 2004); Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir. 2002). But while laws against *sale* were held constitutional, laws prohibiting advertisement were held unconstitutional, because the courts applied heightened scrutiny. *See* This That And The Other Gift and Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006) (challenging laws against advertising sale of adult novelties).

[174] *Cf.* Pontarelli Limousine v. Chicago, 704 F. Supp. 1503, 1516-17 (N.D. Ill. 1989) (upholding discriminatory taxi regulation that "just barely" satisfied the Equal Protection Clause); Executive Town & Country Services, Inc. v. Atlanta, 789 F.2d 1523, 1528 (11th Cir. 1986) (upholding a minimum price requirement for limousines which was designed to prevent competition with taxicabs, despite the court's recognition that "[t]he city's reasons for legislating these minimum fare regulations are not very compelling," and "passed the 'rational basis' test...with little room for comfort.").

[175] Colon Health Ctrs. of Am., LLC v. Hazel, 2012 WL 4105063 at *5 (E.D. Va. Sept. 14, 2012).

[176] *Id.*

[177] *Id.* at *6.

[178] The court erroneously dismissed the complaint prior to factfinding, theorizing that under rational basis review, the plaintiffs could prove no set of facts that could entitle them to relief. *Id.* But the Supreme Court has made clear that plaintiffs in rational basis cases are entitled to engage in discovery and introduce evidence to prove their cases, if the complaint is adequately pled. *See* Borden's Farm Products v. Baldwin, 293 U.S. 194, 209 (1934); Nashville, C. & S. L. Railway v. Walters, 294 U.S. 405, 414-15 (1935); Polk Co. v. Glover, 305 U.S. 5, 9-10 (1938). *See further* Timothy Sandefur, *Rational Basis And The 12(b)(6) Motion: An Unnecessary "Perplexity,"* avail. at http://ssrn.com/abstract=2229261 (visited Apr. 29, 2013).

[179] *See, e.g.,* Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006).

[180] *Powers*, 379 F.3d at 1221 ("intrastate economic protectionism constitutes a legitimate state interest.").

[181] *Cf.* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

[182] *See generally* SANDEFUR, *supra* note 4 at 17-25.

[183] Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

[184] *See, e.g., Schware*, 353 U.S. at 239.

[185] *See, e.g., New State Ice*, 285 U.S. at 278-79; *Buck*, 267 U.S. at 313; *Frost*, 271 U.S. at 591-92.

[186] *See* Sandefur, *Insiders, Outsiders, supra* note 10 at 405-08.