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The Land of the Free?: The ALLOW Act and Economic Liberty from Occupational Licensing

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I. Introduction

In January of 1944, President Franklin D. Roosevelt delivered his annual State of the Union Address during one of his famous Fireside Chats from the White House.[1] In the face of the horrors of

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1. *See 1944 State of the Union Address: FDR's Second Bill of*

World War II, with its crimes against humanity and egregious loss of life from battle and other means,[2] Roosevelt stressed the importance of inalienable rights, entrenched in the American Constitution and found deep within the consciousness of American citizens.[3] In the speech, Roosevelt stressed the importance of a greater, more American "standard of living . . . higher than ever before known."[4] This State of the Union Address became better known as the "Second" or "Economic Bill of Rights."[5] Roosevelt called for "new goals of human happiness and well-being" explaining:

> As our nation has grown in size and stature . . . . We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence . . . . We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race or creed. The right to a useful and

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Rights or Economic Bill of Rights Speech, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, http://www.fdrlibrary.marist.edu/archives/stateoftheunion.html (last visited Dec. 1, 2017) ("On January 11, 1944, President Franklin D. Roosevelt delivered his annual State of the Union Address to the Nation as a Fireside Chat from the White House.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. *See* President Franklin D. Roosevelt, State of the Union Message to Congress, AM. PRESIDENCY PROJECT (Jan. 11, 1944), http://www.presidency.ucsb.edu/ws/?pid=16518 ("This Nation in the past two years has become an active partner in the world's greatest war against human slavery. We have joined with like-minded people in order to defend ourselves in a world that has been gravely threatened by gangster rule.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

3. *See id.* ("But I do not think that any of us Americans can be content with mere survival. Sacrifices that we and our allies are making impose upon us all a sacred obligation to see to it that out of this war we and our children will gain something better than mere survival.").

4. *See id.* (discussing the importance of human rights, including those of the economic variety: "We cannot be content, no matter how high the general standard of living may be, if some fraction of our people —whether it be one-third or one-fifth or one-tenth- is ill-fed, ill-clothed, ill housed, and insecure").

5. *See* John Nichols, *Seventy Years on, Let us Renew FDR's Struggle for an Economic Bill of Rights*, NATION (Apr. 14, 2015), https://www.thenation.com/article/seventy-years-let-us-renew-fdrs-struggle-economic-bill-rights/ (explaining the significance of the New Deal to "challenge economic royalists on behalf of the great mass of Americans, and to establish that wider freedom" and expressing concern that this goal has not yet been achieved) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

> remunerative job in the industries or shops or farms or mines of the Nation; The right to earn enough to provide adequate food and clothing and recreation; . . . . The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; . . . . The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and employment.[6]

Decades after this State of the Union and the death of Roosevelt, American institutions continue to experiment with how best to implement these "new goals of human happiness and well-being."[7]

Modern economic regulation has had a profound effect on Constitutional democracy, federalism and individual rights, transformed during the "rights revolution" of the 1960s and 1970s.[8] The rights revolution includes the creation of a set of fundamental legal rights afforded to all Americans, not explicitly mentioned in the framing of the American Constitution, but guaranteed through recognition of a variety of basic human rights.[9] These rights included "rights to clean air and water; safe consumer products and workplaces; a social safety net including adequate food, medical care and shelter; and freedom from public and private discrimination on the basis of race, sex disability, and age."[10] This revolution is suggested to have been "presaged" by Roosevelt's call for this Second Bill of Rights, culminating in

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6. President Franklin D. Roosevelt, *supra* note 2.

7. *Id.*; *see also* Nichols, *supra* note 5 (describing Roosevelt's legacy and his opinion that these goals have yet to be realized in the modern world).

8. *See* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 1 (1990) ("Modern regulation has profoundly affected constitutional democracy, by renovating the original commitments to checks and balances, federalism, and individual rights. The nature and scope of this transformation, which culminated in the rights revolution of the 1960s and 1970s, have not generally been appreciated.").

9. *See id.* at 1–10 (introducing the "rights revolution" as the promotion of rights unknown to the founding generation, including a healthful environment, safe products, and freedom from discrimination).

10. *See id.* at v (listing the catalogue of legal rights established by the President and Congress that, while deviating from the original text of the Constitution, nonetheless have been protected by regulation and statute).

passage of an abundance of statutory rights in the 1960s and 1970s.[11]

Roosevelt concluded in his 1944 State of the Union with a call for Congress to "explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so."[12] Notably, no Congress expressly adopted these rights, but a wide array of federal programs and statues have drastically altered the structure of the American political system and achieved important successes in the Nation's framework.[13] Scholars have noted that in certain aspects, this "rights revolution" has failed to serve the public interest, responding instead to powerful and self-interested private groups.[14] This rights revolution has failed in the face of imperfect economic rights and oppressive occupational regimes.[15]

The Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW Act)[16] presents a potential solution and a response to Roosevelt's seventy-two-year-old call to Congress to promote economic liberty. Occupational licensing is exclusively a state and local function, and has not yet been considered at the federal level until this juncture in United States' policy.[17] The ALLOW Act aims

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11. *See id.* (explaining the renaissance of the "rights revolution," its outcomes, and the progress that has yet to be achieved).

12. President Franklin D. Roosevelt, *supra* note 2.

13. *See* SUNSTEIN, *supra* note 8, at 18–21 (discussing New Deal Constitutionalism and the beginning of regulatory practices that originated during this period).

14. *See id.* at v (articulating the shortcomings of regulatory programs and explaining pitfalls that jeopardize important values, produce inefficiencies, uphold the power of self-interested private organizations and potential "nullification" of beneficial programs by the marketplace).

15. *See* Timothy Besley & Robin Burgess, *Can Labor Regulation Hinder Economic Performance? Evidence from India*, 119 Q.J. ECON. 91, 93 (2004) (asserting that countries with higher regulation of occupational entry perform worst in "an array" of economic indicators, including social, political, and economic).

16. *See* Alternatives to Licensing that Lower Obstacles to Work Act of 2016, S. 3158, 114th Cong. (2016) [hereinafter ALLOW Act] (reducing the anticompetitive impact of licensing requirements by making targeted changes to licensure policies).

17. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL AND ECONOMIC ISSUES IN PRICE MAINTENANCE AND OCCUPATIONAL LICENSING 33 (1975) [hereinafter NAAG] (outlining the occupational licensing framework, or lack thereof, in the federal government).

to create federal licensure policy, restrict the power of licensing regimes implemented at the state level and through the blessing of state government, relieve the burden of taxing requirements throughout the states and eliminate exclusionary practices of various state licensing boards.[18]

The ALLOW Act, if passed, has the potential to relieve occupational licensing burdens for military families and residents in affected industries in the District of Columbia.[19] By harmonizing occupational entry requirements through endorsement of licensing and public certifications issued in any state, the act would promote more opportunities for military families, disproportionately affected by state licensing laws.[20] The Act aims to serve as a model for occupational licensing reforms in the states by making the District of Columbia its example. It is focused on promoting less restrictive requirements and more legislative oversight of licensing boards, many of which have become corrupt and unduly restrictive of entry.[21] Accordingly, this Note discusses the Constitutionality of the ALLOW Act and argues it is Constitutionally defendable, applicable, and necessary to adjust the framework of occupational licensing regimes in the United States, when analyzed on the Commerce Clause, Army

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18. *See* Press Release, Office of Congressman Mark Meadows, Rep. Meadows Introduces ALLOW Act (Nov. 15, 2016), https://meadows.house.gov/media-center/press-releases/rep-meadows-introduces-the-allow-act [hereinafter Meadows Press Release] (explaining the desired outcome of implementing the ALLOW Act) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* BENJAMIN SHIMBERG, OCCUPATIONAL LICENSING: A PUBLIC PERSPECTIVE 8 (1982) (describing previous Congressional attempts to eliminate occupational licensing regimes with exclusionary practices that impact job opportunities of individuals seeking professional licensing).

19. *See generally* ALLOW Act, *supra* note 16 (discussing the possible impact the ALLOW Act can have on occupational licensing burdens).

20. *See ALLOW Act Summary*, MIKE LEE U.S. SEN. UTAH, https://www.lee.senate.gov/public/index.cfm/alternatives-to-licensing-that-lower-obstacles-to-wrok-allow-act (last visited Dec. 1, 2017) [hereinafter *ALLOW Act Summary*] (describing the desired outcome of the senate bill as reducing "the anticompetitive impact of unjustifiable licensing requirements by making targeted changes to licensure policies") (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see generally* ALLOW Act, *supra* note 16 (same).

21. *See ALLOW Act Summary*, *supra* note 20 (explaining the benefits of the ALLOW Act for military families, individuals in the District of Columbia, and those on Federal lands).

Clause, Supremacy Clause, and the Federal Enclave Clause. This Note also suggests that the ALLOW Act should, go further to protect the ability of rightfully qualified citizens to work in their trained occupations across the United States.

This Note explores the remedies provided by the ALLOW Act to curtail restrictive occupational licensing methods that negatively impact low to moderate income families as well as military families and personnel. Section II will define occupational licensing, explore the origins and criticisms of the regulatory practice, summarize the effects and benefits, and finally will outline the practical failures of occupational licensing in modern America. Section III outlines the ALLOW Act, its targeted beneficiaries, and the remedies the Act proposes. Section IV will review the constitutionality of the Act as it stands today. Section V analyzes the limits of any possible expansions of the Act, considering the constitutional limitations under the Tenth Amendment. Finally, section VI concludes this examination with a call to Congress pass the ALLOW Act to protect the professional freedom of thousands of American citizens.

II. Occupational Regulation: Classification, History, Benefits, and Repercussions

Many professionals are licensed by the state, and while some of the professions that require state licenses include professions that one would assume, e.g., doctors, lawyers, architects, and nurses, and licensing administrations typically cover many more professions.[22] Additional professions include a wide variety and

22. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103 (2014) ("Where licensing was once reserved for lawyers, doctors, and other "learned professionals," now floral designers, fortune tellers, and taxidermists are among the jobs that , at least in some states, require licensing."); *see also* MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 21 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [hereinafter HAMILTON DISCUSSION PAPER] ("[S]ome occupations would benefit from lesser forms of regulation, such as certification or registration, or even no regulation. For example, services provided by [some professions] may not pose sufficient risk to health and safety to warrant the full regulation or right to practice of licensure.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

extensive list of specialties including, but not limited to: cosmetologists, polygraph examiners, florists, casket makers, auctioneers, interior designers, real estate appraisers, social workers, cemetery operators, fortune tellers, dental hygienist, mussel dealers, maple dealers, photographers, reptile catchers, and cat groomers.[23] The list is extensive and, at times, seemingly arbitrary and absurd.[24] This extensive list of licensed professions varies between the states, as do the requirements to obtain a license.[25] While regulatory measures do serve an important purpose in ensuring quality services, more often than not, these practices place "burdens on workers, employers, and consumers . . . [that] too often are inconsistent, inefficient, and arbitrary."[26]

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23. *See* Edlin & Rebecca Haw, *supra* note 22, at 1096 ("[N]early a third of American workers need a state license to perform their job legally, and the trend toward licensing is continuing."); *see also* Paul J. Larkin, *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. POL'Y 209, 210 (2016) (listing several professions licensed in the states); *see also* Alexandra Klein, Note, *The Freedom to Pursue a Common Calling*, 73 WASH. & LEE L. REV. 411, 416 (2015) (naming a number of licensed professions and noting the absurdity of a number of the professions that require a license to work); *see also* DICK M. CARPENTER ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 8 (2012), http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf (classifying the requirements for 102 licensed occupations across the United States) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

24. *See* Larkin, *supra* note 23, at 219 ("Some of the occupations found on that list are odd, to say the least. Are the health, welfare, and safety of the community really put at risk if society allows unlicensed florists, interior designers, and frog famers to ply their trades?"); *see also* Klein, *supra* note 23, at 415 ("The list of occupations subject to licensing can be quite absurd . . . ."); *see also* HAMILTON DISCUSSION PAPER, *supra* note 22, at 5 (explaining that occupations in some states require licensing, while in other states, mere certification or registration is required).

25. *See Larkin*, *supra* note 23, at 220 (discussing inconsistencies between the states on licensing requirements generally, exemplified by the barber example, a profession licensed by forty-nine states and the District of Columbia, each state requiring a series of unique tests and certification hours); *see also* Edlin & Haw, *supra* note 22, at 1095–97 (providing the example of cosmetologists, a profession that requires, in some states, more certification hours than Emergency Medical Technicians).

26. *See* THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 7 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [hereinafter WH FRAMEWORK] (explaining the inconsistencies between the states on state licensed professions) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

A. What is Occupational Licensing?

Occupational regulation, including occupational licensing, gained popularity during the twentieth century.[27] Licensing requirements have become one of the "fastest growing labor market institutions in the United States since World War II."[28] Occupational regulation protects both consumers and professionals, ensuring that services are provided only by qualified personnel.[29] These regulations take three basic forms: registration, certification, and licensing.[30] Registration, the least restrictive form of regulation,[31] generally requires individuals interested in pursuing certain employment to pay a fee or post a bond and file their name, address, and qualification with the government to ensure that practitioners can be reached in the event of a complaint.[32] Registration does not deny the right to practice to any

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27. *See* CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 1, 2–3 (1990), https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf (examining a brief history of occupational regulation in the United States and the historical relevance of occupational licensing's relevance throughout the nation's history) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* SHIMBERG, *supra* note 18, at 5 (discussing the history of occupational regulation); *see also* NAAG, *supra* note 17, at 33 ("[Occupational licensing] has gained increasingly widespread acceptance in the United States during the last century and especially in the last fifty years. A review of the state codes for 1968–69 found almost 2,800 statutory provisions requirement occupational licensing, with hundreds of occupations requiring a license.").

28. *See* HAMILTON DISCUSSION PAPER, *supra* note 22 (describing the historical context in which occupational licensing gained increased relevance in the United States).

29. *See* Rafael Gomez et al., *Do Immigrants Gain or Lose by Occupational Licensing?*, 41 CAN. PUB. POL'Y S80, S81 (2015) (articulating the rationale for occupational regulation, the various forms of occupational regulation, and the role of the government to regulate the trade).

30. *See* Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676 (2010) ("Occupational regulation in the USA generally takes three forms.").

31. *See id.* (explaining the process of obtaining registration with the regulating body that oversees the profession).

32. *See* WH FRAMEWORK, *supra* note 26, at 7 n.6 (defining the two "other less restrictive forms of occupational regulation . . ." registration and certification); *see also* Larkin, *supra* note 23, at 210 (outlining the three basic forms of occupational regulation and the regulatory bodies policing threshold requirements).

registered person as long as they pay required fees.[33] Certification is "an intermediate form of regulation"[34] or "right-to-title" regulating professions that allow almost any individual with varied levels of experience to perform the duties of the profession.[35] To prove an attained level of skill and knowledge required for certification, applicants must complete a certifying examination, administered by a state government agency or a private certifying body, proving an achieved level of skill and knowledge for certification.[36] Finally, the most restrictive form of occupational regulation is licensure, often referred to as the "right to practice."[37] As compared to registration and certification, licensure appears frivolously complicated and expansive.[38]

Occupational licensing is the "process where entry into an occupation requires the permission of the government"[39] and "by which governments establish qualifications required to practice [the] trade or profession."[40] The Council of State Governments define licensure as:

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33. *See* NAAG, *supra* note 17, at 33 (noting the registration fee requirement).

34. *See* Larkin, *supra* note 23, at 210 ("Certification . . . permits anyone to practice in a particular field, but the government or a private association identifies an applicant's educational or skill level, typically based on an examination, and issues a certificate to that effect.").

35. *See* Kleiner & Krueger, *supra* note 30, at 677 (discussing the process of obtaining a certification, comparing the practice to the other forms of occupational licensure); *see also* WH FRAMEWORK, *supra* note 26, at 7 n.6 (defining certification, or "right-to-title" regulation, describing that any person who passes an examination is eligible to receive certification); *see generally id.* at 209 (describing the three forms of occupational regulation).

36. *See* Kleiner & Krueger, *supra* note 30, at 677 (explaining the certification process and the administrative bodies that assign certificates for participation); *see also* NAAG, *supra* note 17 ("[C]ertification is not however, a prerequisite to practice of the occupation. Some authorities content that certification or registration are appropriate alternatives to licensing for many occupations.").

37. *See* Kleiner & Krueger, *supra* note 30, at 677 (describing the formulations of occupational regulation and their functions).

38. *See id.* (comparing licensure to registration and certification, and noting that more than 800 occupation require a license in at least one state).

39. *See* Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191 (2000) (analyzing studies and criticism of occupational regulation in America).

40. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 5 (providing evidence of the effects of occupational licensing on a variety of factors, including wages and professional entry).

> [T]he granting by some competent authority of a right or permission to carry on a business or do an act which otherwise would be illegal. The essential elements of licensing involve the stipulation of circumstances under which permission to perform an otherwise prohibited activity may be granted—largely a legislative function; and the actual granting of the permission in specific cases—generally an administrative responsibility.[41]

Due to the explosion of the service sector, an industry widely covered by state licensing, the number of jobs requiring occupational licenses in the United States has rapidly increased, and the trend towards more licensing continues to grow.[42] According to a White House report released in 2015, more than a third of jobs in the United State require some form of state licensing, with the majority of these licenses administered by the states themselves.[43]

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41. THE COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 5 (1952); *see also* PAUL TESKE, REGULATION IN THE STATES 134 (2004) (quoting the Council of State Government's definition of occupational licensing, and providing additional definitional context); *see also* NAAG, *supra* note 17 (explaining the difference between occupational licensing and other forms of state regulation of occupations).

42. *See* Edlin & Haw, *supra* note 22, at 1093, 1095–96 (discussing one of the reasons why the occupational licensing has increased so drastically since the 1950s); *see also* Marlene A. Lee & Mark Mather, *U.S. Labor Trends*, POPULATION BULL. 3, 7 (June 2008), http://www.prb.org/pdf08/63.2uslabor.pdf (describing trends in occupations since the 1950s, including a decrease in manufacturing professions and an increase in service-related professions) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Larkin, *supra* note 23, at 209 ("What you might not expect to hear is that lines of work requiring an occupational license are among the fastest growing types of employment in the United States."); *see also* HAMILTON DISCUSSION PAPER, *supra* note 22 ("Occupational Licensing has been one of the fastest growing labor market institutions in the United States since World War II."); *see also* Kleiner & Krueger, *supra* note 30, at 676 ("One of the fastest growing, yet least understood, institutions in the U.S. labor market is occupational licensing. The movement to a service-oriented economy from manufacturing, where unions and contracts were prominent, created a demand for a 'web of rules' of the workplace that licensing may have provided.")

43. *See* WH FRAMEWORK, *supra* note 26, at 3 ("More than one-quarter of U.S. workers now require a license to do their jobs, with most of these workers licensed by the States. The share of workers licensed at the State level has risen five-fold.").

Further, since 1950, state-administered licenses have increased five-fold.[44] Notwithstanding the number of jobs that require occupational licenses and the historical prevalence of occupational licensing practices, "the study of occupational licensing has gone into partial eclipse."[45] Despite the relative lack of research conducted in this arena, the effects of the regulatory practice are relevant and pertinent policy issues.[46]

An extremely rigorous form of occupational regulation, licensure requires the state to grant permission to an individual to enter a field of employment.[47] This is often referred to as the "right to practice."[48] The majority of these occupations is regulated by licensing boards on the state level and composed of "active professionals, political appointees . . . and members of the public appointed by an executive official."[49] These boards, created by the state legislature, define the qualifications necessary to receive practice certifications within the occupation in question.[50]

State legislatures typically grant professions the right to essentially self-regulate.[51] This led to a self-regulated industry

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44. *See id.* (describing the rate at which the number of state administered occupational licenses grew over the past sixty years).

45. *See* Kleiner, *supra* note 39, at 190 (noting the relatively sparse research conducted on current occupational licensing practices despite its prevalence in the United States).

46. *See* TESKE, *supra* note 41, at 134 ("Occupational regulation covers [a significant] percent of the American work force, so how states regulate, and the effects of such regulation are important policy issues.").

47. *See* Larkin, *supra* note 23, at 211 (explaining the extent of the licensing process, requiring a different procedure at the federal, state, and local levels with different processes).

48. *See* Kleiner & Krueger, *supra* note 30, at 676 ("One of the fastest-growing yet least understood institutions in the US labour [sic.] market is occupational licensing.").

49. *See* Klein, *supra* note 23, at 416 (describing the process by which licensing boards are created and the "hands-off" attitude assumed by the appointing legislative bodies); *see also* Kleiner, *supra* note 39, at 191 (articulating the compilation of boards licensing boards).

50. *See* Larkin, *supra* note 23, at 213 ("States have developed a common licensing apparatus. Ordinarily, legislatures create licensing boards, and governors frequently appoint members to those boards from within the profession itself."); *see also* NAAG, *supra* note 17 (discussing the legislatures role in authorization of occupational licensing regimes); *see generally* S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 9–14 (1987) (discussing occupational licensing in America).

51. *See* TESKE, *supra* note 41, at 135 (describing the traditional role of

with very limited, or completely restricted, roles for bureaucratic commissions and agencies to oversee any function of the professional licensing arena.[52] The boards that do require government appointments typically receive selection guidance from the professional board itself.[53] Despite the domination of these boards by active members of their respective industries, professional boards are sanctioned by the state and are considered a part of the state's infrastructure.[54] Self-regulated boards have been questioned by a variety of economists, raising concern that these boards are inefficient and engage in corrupt practices.[55]

To obtain licensure in one of these professions, these state institutions typically require significant training hours, qualification exams, and fees.[56] Most common requirements include formal education in the targeted profession, prior experience in the form of internships or apprenticeships,

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administrative agency oversight of occupational licensing groups).

52. *See* Larkin, *supra* note 23, at 213 (articulating the different types of commissions that form these administrative licensing boards); *see also* YOUNG, *supra* note 50, at 29 (explaining that legislatures create the licensing boards and the process); *see also* Simon Rottenberg, *The Economics of Occupational Licensing*, *in* ASPECTS OF LABOR ECONOMICS 3, 14 (Universities-National Bureau Committee for Economic Research ed., 1962) (discussing that state governors typically appoint the legislature but they often appoint with guidance from the existing board); *see also* Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 410 (1996) (describing the hypocrisy in licensing board appointment systems and the process in which the system is established).

53. *See* Phillips, *supra* note 52, at 410 (noting that the legislature defines the occupational qualifications, or empowers the board to do so, requiring formal education, prior experience, internship, and evaluation of good character).

54. *See* Edlin & Haw, *supra* note 22, at 1095–96 (drawing comparisons between the creation of licensing boards and commodities boards or product coalition groups and their common practices); *see also* MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 65–96 (2006) (discussing the power that state sanctioned boards have under the state's umbrella); *see also* Kleiner, *supra* note 39, at 191 (explaining the composition of state licensing boards).

55. *See* Edlin & Haw, *supra* note 22, at 1096 ("Some boards use their power to limit price competition or restrict the quantity of services available."); *see also* HAMILTON DISCUSSION PAPER, *supra* note 22, at 12–13 (discussing the negligible influence of occupational licensing on quality of service, if at all).

56. *See* Klein, *supra* note 23, at 416 (describing the licensing statutes and requirements that potentially hinder individuals pursing licensed professions); *see also* CARPENTER ET AL., *supra* note 23, at 8 (indicating that the licensing for professions typically held by low-to-moderate-income workers are typically unnecessary).

examinations, or a certification of character and fitness.[57] In turn, the licensing boards prepare the exams, sets the pass rate, reviews the applicant's qualifications, and adjudicates complaints against individuals within the profession.[58] Variation of the licensing processes described operated consistently since the early 1900s.[59]

As of 2017, states are responsible for regulating these occupations and professions without any significant or direct role for the federal government.[60] These entities are often guarded from any independent review or oversight from the state, as the state typically allows the professional board to establish their own procedures.[61] Theoretically, this regulatory practice serves the public interest by remedying "an information asymmetry market failure in which professionals know far more about their own competence than do their consumers."[62] To encourage these safety measures and objectives, legislatures attempted to authorize certain occupations to license and discipline their own memberships.[63] In practice, occupational regulations provide entry restrictions for these professions, bearing some similarity to

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57. *See* Phillips, *supra* note 52, at 410 (articulating the "phenomenon of occupational licensing" and the requirements involving formal schooling, experience, personal attributes, and residency).

58. *See* Larkin, *supra* note 23, at 617 (explaining the duties of the licensing board).

59. *See id.* ("The process has operated in a consistent manner for more than a century.").

60. *See* TESKE, *supra* note 41, at 133 ("The states regulate occupations and professions with no significant, direct role for the federal government.").

61. *See id.* at 207–08 (noting that reform groups argue for "stronger legislative review of regulations and improvement in the oversight and review of administrative decisions by independent third parties").

62. *See id.* at 133 (describing the imbalance between consumers or applicants and the licensing board itself); *see, e.g.*, Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 28, 45 (2011) (explaining the tendency of groups and individual to further their own interests and the reach of their group's occupation, often to the detriment of consumers, interested applicants, and other occupations); *see also* Edlin & Haw, *supra* note 23, at 1096 ("Licensing boards are largely dominated by active members of their respective industries . . . [and] use their power to limit price competition or restrict the quantity of services available.").

63. *See* NAAG, *supra* note 17 (discussing the objective of licensing regimes and the purpose behind creating licensing associations).

monopoly and competition regulation practices.[64] The outstanding question considers whether occupational regulation serves the interests of the public, consumers and the profession by improving quality; or if the practice merely limits competition, raises prices and furthers the interests of self-serving licensing groups.[65] Notably, both the interests of the consumer and the profession would be furthered if occupational regulatory practices were followed in perfect order and only applied to professions that posed true threats to health and safety.[66] The concern of scholars across the political spectrum is that these regulatory practices have come to serve the profession and the licensing board rather than truly protecting the public's interest or consumer demand.[67]

B. Origins of Occupational Licensing

Occupational regulation practices originate from the ancient Babylonian Code to medieval European guilds.[68] In the United States, evidence of occupational licensing regulations emerged as early as the American colonies, subjecting bakers, ferry workers, leather merchants, and innkeepers to the practice.[69] The creation and growth of "modern day professions," such as teachers, dentists, and accountants, in the nineteenth and twentieth centuries, led to a rise in self-regulating occupations, establishing set standards

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64. *See id.* (paralleling occupational regulation and its comparisons to various free market theories).

65. *See generally* CARPENTER ET AL., *supra* note 23 (evaluating the harms that occupational licensing professions ultimately apply to low-to-moderate-income professions).

66. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 5 (explaining the rationale for occupational licensing boards and that the system would be less complex if training requirements were related to training for improvements in quality rather than arbitrary attempts to increase hours and if they were reserved for occupations that potentially pose risks to public health or safety).

67. *See generally* Edlin & Haw, *supra* note 22 (comparing licensing boards to cartels: colluding, acting purely out of self-interest and unethically blocking competition within their industries).

68. *See* COX & FOSTER, *supra* note 27, at 2 ("Regulation of the professions can be traced to the Code of Hammurabi in ancient Babylon and the guilds in medieval Europe.").

69. *See* Larkin, *supra* note 23, at 213–14 (explaining the prevalence of occupational licensing regimes throughout western history).

and guidelines of practice.[70] Between 1880 and 1930, there was an significant increase of specialized scientific knowledge, giving rise to new specialized fields.[71] This expansion in knowledge led to the ability of fewer individuals to claim to be "generalists" and instead, fell into the category of "specialist."[72] The increasing complexity of scientific knowledge created a call for more individuals to become specialized in certain fields, or "specialists."[73] During this time, universities and other institutions of higher education emerged to meet the demand of the consumer and of those seeking to acquire the skills to pursue specialized professions.[74]

The emergence of specialized professionals during the Progressive Era, as well as integration of the national economy and urbanization, led to significant changes in the labor market seeking expert services from this new class of specifically educated specialists.[75] Before this time, markets relied on and selected "expert" specialists within communities based on reputation.[76] With the rise in urbanization, local reputations were less effective, as services offered became more varied, common, and anonymous.[77] Groups began to develop professional societies to

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70. *See* Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 10467, 2004) http://www.nber.org/papers/w10467.pdf (noting that in 1900, only four percent of Americans were engaged in "learned professions," while the number rose to twenty percent by 2000) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

71. *See id.* at 9 (explaining the context from which occupational licensing was created and noting the rapid expansion in the number of scientific periodicals published from the eighteenth century to the mid-twentieth).

72. *See id.* at 10 (comparing a generalist versus a specialist and discussing the historic relevance of the terms).

73. *See id.* (describing how it may have been possible for someone like Leonardo da Vinci to master several disciplines in the 1500s, but "it was clearly not feasible to be a master of more than one of these fields by the early 1900s").

74. *See id.* (contextualizing the rise in educational institutions that led to educational requirements in occupational licensing regimes, specifically the longer periods of formal educational required to engage in these professions).

75. *See id.* (describing how specialized professional markets before the progressive era in the United States relied heavily on local generalists, chosen through word of mouth and reputation).

76. *See id.* at 10–11 ("This movement of the population out of the countryside and into increasingly dense cities was accompanied by the rise of impersonal exchange as the dominant form of market interaction.").

77. *See id.* at 11 ("Specialization and the rise of impersonal exchange created

substitute for local reputation.[78] Membership requirements in these societies required minimum standards, theoretically allowing community members to readily trust the quality of service members of these groups provided.[79] Membership requirements was often very low, so it became increasingly difficult for service providers to establish a good reputation for the quality of their services.[80]

Occupational licensing requirements established by state governments emerged in response to the specialization of professions and the rise of professional services.[81] As early as 1870, states began to adopt occupational licensing laws.[82] Licensing laws continued to grow over the next several decades, and these early occupational regulation regimes began to crystallize during the early 1900s.[83] Since World War II, "occupational licensing has been among the fastest growing labor market institutions in the United

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problems for producers and consumers in a wide variety of markets.").

78. *See id.* (explaining that membership in professional societies or organization helped to substitute for local reputation, allowing access to specialists in a desired field).

79. *See id.* (noting that relying on members of these societies came with a high level of risk, because the quality of service these individuals provided was quite varied).

80. *See id.* ("Membership in key professional society or associations [was] a partial substitute for local reputation, but in an environment where professional societies were proliferating in nearly every occupation, . . . the requirements for membership . . . were often . . . low, the signalizing value associated with membership in any given society . . . [was not] high.").

81. *See* COX & FOSTER, *supra* note 27, at 11 ("Specialization and the rise of impersonal exchange in the market for professional services were accompanied by a sudden surge in state government occupational licensing regulation.").

82. *See* Larkin, *supra* note 23, at 213 ("In the nineteenth-century America, states and localities licensed barbers, embalmers, horseshoers, boarding house operators, insurance agents, midwives, pawnbrokers, physicians, real-estate brokers, steamboat operators, undertakers, and veterinarians.")

83. *See id.* (describing the increase of occupational licensing in the late nineteenth and early twentieth century and listing the variety of occupations that required licensing at that time); *see also* Law & Kim, *supra* note 70, at 3–6 (outlining the history of occupational licensing and various theories that lead to its creation).

States"[84] and the share of workers with state issued occupational license have risen "five-fold since the 1950s."[85]

C. The History of Free Market Theory and Occupational Licensing's Influences

The history of occupational regulation practices provides context in economic liberty ideals. Economic liberty is defined as the "right to pursue an honest living in a business or profession free from arbitrary government interference."[86] The Founding Fathers protected economic liberty as a natural right, considering the ability to conduct business and earn money among the most important governmental interest.[87] Political theorist Adam Smith believed that governments should not interfere in business, arguing that a free market model without the burden of market subsidies or "favors," would serve the best interests of the consumer and business.[88]

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84. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 2 (explaining the increase in occupational licensing discoveries and their important influence on wage determination, benefits, and employment and prices in ways that impose costs on society with questionable added benefit).

85. *See* WH FRAMEWORK, *supra* note 26, at 7 (quantifying the increase in these occupations).

86. *See* CLINT BOLICK, DAVID'S HAMMER, THE CASE FOR AN ACTIVIST JUDICIARY 98 (2007) (appealing to the reasoning of early American free-market economic theorists). Milton Friedman also described an "essential part of economic freedom" as the:

> [F]reedom to use the resources we possess in accordance with our own values—freedom to enter any occupation, engage in any business enterprise, buy from and sell to anyone else, so long as we do so on a strictly voluntary basis and do not resort to force in order to coerce others. Today you are not free to offer your services as a lawyer, a physician, a dentist, a plumber, a barber, a mortician, or engage in a host of other occupations, without first getting a permit or license from a government official.

MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 66 (1979).

87. *See* Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 137 (2011) (describing the important of economic liberty at the nation's founding).

88. *See id.* at 137–38 (summarizing Adam Smith's theory, promoting business rights without government interference).

Further, in Smith's *Wealth of Nations*, he argued against regulation or restriction of a worker in any capacity, arguing that this regulation hinders the working man from:

> [E]mploying this strength and dexterity [of his hands] . . . is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper. To judge whether he is fit to be employed, may surely be trusted to the discretion of the employers whose interest it so much concerns. The affected anxiety of the law-giver lest they should employ an improper person, is evidently as impertinent as it is oppressive. The institution . . . can give no security that insufficient workmanship shall not be frequently be exposed to public sale.[89]

This sentiment embodies the attitudes toward suggestions of the monopolization of business prior to the nation's founding.[90] In fact, the Founder's mindset was riddled with "concern about the evils of state-granted monopolies."[91] Further, the Framers of the

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89. *See* Kleiner, *supra* note 39, at 189 (furthering the thesis that apprenticeships are not a true method of quality assurance nor are they useful in calculating the skill or workmanship of a potential candidate for licensure (quoting ADAM SMITH, WEALTH OF NATIONS Book I, Chapter 10, Part II (2016))).

90. *See* Clark Niely, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J. L. & Liberty 897, 900 (2005) (explaining the historical lead up to monopolies in American since before the American Revolution). As articulated by Clark Niely:

> Government creation of occupational monopolies like these at the behest of politically powerful special interests has a long, sordid, and well-documented history at common law. . . . Indeed, one of the iconic events leading up to the American Revolution—the Boston Tea Party—was prompted by the colonists' frustration with (and attempts to avoid) the legal monopoly on the importation of tea that had been granted by the Crown to the East India Company.

Id.

91. *See id.* at 900 ("Concern about the evils of state-granted monopolies was so prevalent at the founding that four states—Massachusetts, North Carolina, New Hampshire, and New York—included prohibition against monopolies in their proposed bill of rights when ratifying the Constitution."); *see also* THE DEBATE ON THE CONSTITUTION: PART ONE: SEPTEMBER 1787 TO FEBRUARY 1788, at 944 (Bernard Baylin ed., 1993) (describing the conversation on economic rights in ratifying conventions of the U.S. Constitution).

Fourteenth Amendment's Privileges or Immunities Clause "intended to protect, . . . the traditional right to earn a living free from unreasonable interference."[92] It is argued that the clause was enacted in response to occupational licensing restrictions meant to exclude newly freed slaves from obtaining employment, earning a living, or owning property.[93]

Regulation of entry into occupations date as far back as the Middle Ages, but has gained widespread acceptance in the United States over the last 150 years.[94] Occupational licensing regimes dramatically increased at the turn of the twentieth century, correlating with the decrease in protection of economic liberties due to mass immigration from patterns of Irish immigrants, European Jews, Catholics, Asians, and African Americans.[95] In order for businesses and workers to protect their jobs and livelihoods in light of the arrival and availability of new cheap labor, licensing laws were applied with increased vigor.[96] While these laws were intended to protect the jobs of these classes, they ultimately lead to exclusionary boundaries of these immigrant and recently politically disenfranchised groups, restricting the access to these professions.[97] The application of these laws, initially

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92. *See* Harfoush, *supra* note 87, at 138 (describing the restrictive regime Occupational Licensing imposed on African Americans in the aftermath of the Civil War and the reparations intended by the Fourteenth Amendment to remedy this regime).

93. *See id.* ("[T]he Fourteenth Amendment's Privileges or Immunities clause was 'intended to protect, among other things, the traditional right to earn a living from unreasonable interference.'").

94. *See NAAG*, *supra* note 17 ("The requirement that an individual be licensed in order to practice has been extended to an increasing number of professions and occupations. It has gained an increasingly widespread acceptance in the United States during the last century and especially in the last 50 years.").

95. *See id.* (explaining the correlative shift in occupational licensing practices as related to increased immigration, Irish and other European immigrants, as well as the political establishment of previously disenfranchised groups such as African Americans, Catholics, and, in some cases, women).

96. *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries* 14 WM. & MARY BILL RTS. J. 1023, 1028 (2005) ("The exercise of the police power is available only for the purpose of promoting the general welfare . . . . It cannot be used to promote private gain or advantage . . . . Unfortunately . . . occupational licensing is subject to rent-seeking.").

97. *See id.* ("Contrary to their image as devices for protecting the public, licensing laws frequently do nothing more that "benefit . . . the practitioners who

intended to promote public health and safety, became a perverted tool for hindering competition.[98]

D. Who Feels the Effects of Occupational Licensing?

Despite the eruption in occupational licensing laws in the last several decades,[99] there is little scholarly attention directed to the phenomenon that twice as many workers are covered by licensing statutes than are affected by minimum wage statutes or union labor contracts.[100]

It is undeniable that occupational licensing practices are growing, affecting the livelihoods of thousands of Americans, ranging from "dentists, doctors, lawyers, fortune tellers, and frog farmers [that] are now licensed occupation in either all or some U.S. states."[101] Occupational regulation, seemingly wholly disconnected from party-lines, effect a growing body of workers and occupations.[102] With relatively little scholarship on the issue, the practice irrefutably affects a large number of Americans.[103] Many people, including individuals licensed in these professions,

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are in the industry at the time the restrictions are imposed.").

98. *See id.* ("The result, as we shall see, is that licensing laws, which limit economic opportunity, were originally allowed insofar as they protect the public health and safety—but have, as economists predicted, become perverted into a tool for obstructing competition.").

99. *See* Chris Burks, *The Right to Work: The Rise in Occupational Licensing Litigation Comes to Arkansas* 51-SPG ARK. L. 22, 22–23 (2016) (discussing the growth of occupational licensing in economic theory).

100. *See id.* (describing the findings of various institutions finding the prevalence of the practice despite lack of understanding toward the subject).

101. *See id.* at 23 ("We can now say with certainty that occupational licensing is growing."); *see also* Larkin, *supra* note 23, at 218–19 (explaining the expansive nature of occupational licensing regimes).

102. *See* Burks, *supra* note 99, at 23 (discussing that more than a quarter of U.S. workers now require a license to do their jobs, the phenomena stemming from the increase in the number of professions requiring a license and due to the changing composition of the workforce); *see also* WH FRAMEWORK, *supra* note 26, at 19–23 (describing the uptick and occupational licenses since World War II and the reasons for the phenomena).

103. *See* Burks, *supra* note 99, at 23 ("Occupational regulation seems wholly disconnected from party-specific ideology.").

do not understand the way the system works and how it affects consumers.[104]

Occupational licensing, and regulation generally, is justified by the Public Interest or Market Failure Theory.[105] Developed in the 1930s, "welfare economic theory"[106] or the Market Failure Theory, suggests that government should regulate areas that the market cannot adequately perform due to structural flaws such as externalities, transaction costs, natural monopolies, and other various collection action problems.[107]

Public Interest Theory introduces several concerns.[108] Firs, unwarranted or mistaken government intervention in market issues are difficult to remedy, as the passage of legislation through Congress is a lengthy process and laws remain in effect absent a repeal or sunset deadline.[109] While the issues calling for the regulation "may be transient . . . the statues passed to remedy

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104. *See* SHIMBERG, *supra* note 18, at 11 ("Although there has been a marked increase in public discussion about occupational licensing, many people, including active professionals, do not fully understand how the system works, how it affects consumers, what critics and defenders are saying, and what remedies are being proposed to deal with alleged shortcomings.").

105. Larkin, *supra* note 23, at 224 (describing the Market Failure Theory and how it inspires regulation); *see, e.g.*, Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political influence*, 98 Q. J. ECON. 371, 383 (1983) ("This analysis unifies the view that governments correct market failures with the view that they favor the politically powerful"); *see generally* James M. Buchanan, *Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE-II 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (discussing public choice theory).

106. *See* Larkin, *supra* note 23, at 224 (explaining the welfare economic theory that emerged in the 1930s); *see also* ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 3–22 (4th ed. 1932) (describing welfare economic theory as a form of "republicanism" or "civic virtue" suggesting that government officials should act in the interest of the pubic good rather than their own personal interests).

107. *See generally* Larkin, *supra* note 23, at 224 (providing definitions of the Market Failure Theory).

108. *See id.* at 225 (describing perceived flaws of Public Interest Theory).

109. *See id.* at 225 ("Mistaken government interventions can be more difficult to remedy than market imperfections. The Constitution makes the passage of legislation difficult, so, once enacted, laws do not fade away. Absent an expiration date, laws remain in effect until they are repealed or held unconstitutional."); *see also* District of Columbia v. John R. Thompson, Co., 346 U.S. 100, 113–14 (1953) (stating that local laws should be respected "in the interest of peace and order" and to uphold the sovereignty of the locality).

them may last forever."[110] Secondly, Market Failure Theory also aggrandizes the motives of public officials, assuming that they always act in the best interest of the nation, despite presence of evidence to the contrary.[111] Finally, Public Interest Theory does not explain, especially in the occupational licensing context, that consumers and private individuals do not urge governments to adopt licensing regimes. [112] Contrarily, private firms request that licensing regimes be established, the opposite of what Public Interest Theory predicts.[113]

E. Who Benefits from Occupational Licensing?

Licensing regulation is justified by claims that these statues improve the health and safety of both the consumer and the practitioner.[114] The objective of licensing is to shield the public from potentially incompetent or dishonest practitioners and to

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110. *See, e.g.*, Larkin, *supra* note 23, at 225.

111. *See id.* at 225–26 (discussing the "normative wishings" phenomena, assuming that public officials act in the nation's interest, even with evidence indicating otherwise); *see also* Douglas Ginsberg, *A New Economic Theory of Regulation: Rent Extraction Rather than Rent Creation*, 97 MICH. L. REV. 1771 (1997) ("Once upon a time, people have believed that the government regulated various industries in the 'the public interest.'"); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 124 (3d ed. 2008) ("Reformers rarely acknowledged that much economic legislation, although couched in terms of general benefits, served selfish special interests.").

112. *See* Larkin, *supra* note 23, at 226 (explaining the irony of Public Interest Theory in its application to occupational licensing); *see also* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 503 (1965) ("It has been sufficiently demonstrated how much the licensing urge flowed from the needs of the licensed occupations. The state did not impose 'friendly' licensing; rather, this licensing was actively sought by the regulated."); *see also* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976) ("Licensing has only infrequently been imposed upon an occupation against its wishes.").

113. *See* Larkin, *supra* note 23, at 226 ("Finally, Public Interest Theory does not explain a curious and stubborn fact: Private individuals rarely urge governments to adopt licensing regimes, but private firms often do—conduct that is the exact opposite of what Public Interest Theory predicts.").

114. *See id.* at 211 ("A state adopts registration, certification, and license requirements under its 'police power' the inherent sovereign authority to regulate private conducts for the purpose of protecting the health, safety, and welfare of its residents.").

assure that practitioners have at least a minimum standard of proficiency within the profession.[115] Further, licensing protects consumers, and the public generally, against potentially dangerous practitioners.[116] This is especially relevant to occupations where it is difficult for consumers to evaluate the quality of the provider beforehand or when the evaluation of the specified profession requires a certain degree of expertise.[117] As professions become more specialized, a certain level of expertise, education, and training is essential to the profession.[118] Licensing requirements compensate for the "information asymmetry" between practitioners and consumers.[119]

Licensing requirements therefore reduce "consumer fear" of dissatisfaction or injury by a service. In theory, advocates suggest that this results in enhanced consumer demand for licensed services.[120] Licensing requirements have also been found to

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115. *See* SHIMBERG, *supra* note 18, at 11 ("Although there has been a marked increase in public discussion about occupational licensing, many people, including active professionals, do not fully understand how the system works, how it affects consumers, what critics and defenders are saying, and what remedies are being proposed to deal with alleged shortcomings.").

116. *See* NAAG, *supra* note 17 ("One objective of licensing is to protect the public from incompetent or dishonest practitioners, and to assure the public of a minimum standard of proficiency in the licensed occupation.").

117. *See* WH FRAMEWORK, *supra* note 26, at 11 (explaining when occupational licensing is valued to identify qualified professionals).

118. *See* NAAG, supra note 17, at 33 (admitting the importance and value in training programs, education, and certification in preparing individuals for certain professions).

119. *See* Larkin, *supra* note 23, at 222 ("The classic justification is information asymmetry. Consumers lack the knowledge and expertise required to judge the qualifications of different service-providers and lack the time necessary to acquire such knowledge and expertise. Licensing requirements compensate for that shortcoming by setting minimum qualifications."); *see also* Kenneth Arrrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. L. REV. 941, 946, 966 (1963) ("When there is uncertainty, information or knowledge becomes a commodity. Like other commodities, it has a cost of production and a cost of transmission . . . . These are designed to reduce the uncertainty in the mind of the consumer as to the quality of product insofar as this is possible.").

120. *See* Larkin, *supra* note 23, at 223 ("Because consumers are generally risk averse, licensing requirements may reduce consumer fear of being dissatisfied or injured by a particular service, which would enhance consumer demand, thereby benefitting an entire community as consumers purchase additional local services."); *see also* Kleiner, *supra* note 39, at 192 ("The existence of licenses may minimize consumer uncertainty over the quality of the licensed service and increase the overall demand for the service").

encourage service-providers to invest in additional training to market more favorably to consumers.[121] Licensing practices can therefore elevate the prominence of the profession as a whole.[122] As a result, studies have shown that occupational licensing increases employment prospects of licensed workers and can raise their wages as much as fifteen percent and enhance other benefits, such as health coverage and retirement packages.[123]

Licensing has often been sought by the industry in question itself; arguing that these regimes ensure high-quality professionals, continuing education requirements, as well as some suggestion that licensed individuals earn better wages. As discussed in the next section, however, these benefits to forming occupational licensing regimes are called into question.[124] More

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121. *See* Larkin, *supra* note 23, at 223 ("Also, a licensing requirement could encourage service-providers to invest in their human capital through, for instance, additional education or training, because they will not fear being underpriced by less qualified rivals."); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–91 (explaining that vertical restraints are sometimes necessary to enhance competition within the occupation to prevent outside completion).

122. *See* Larkin, *supra* note 23, at 223 (suggesting quality standards may prevent market failure due to uncertainty of information and may be desirable when a higher price attracts a variety of suppliers).

123. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 4–6 (describing studies that suggest that occupational licensing improves employment prospects and provides additional monetary incentives); *see also* Kleiner & Krueger, *supra* note 30, at 685 (finding that licensed professions earn wages fifteen percent higher than their competitive non-licensed counterparts).

124. *See* SHIMBERG, *supra* note 18, at 6 (quoting Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976)) (explaining the detriments of licensing requirements). Benjamin Shimberg articulates:

> [T]he licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence and dishonesty, but invariably with the consequence that members of the licensed group become protected from the new comers. That restricting access is the real purpose and not merely a side effect can scarcely be doubted. Licensing, imposed ostensibly to protect the public almost always impedes only those who desire to enter the occupation or profession; those already in practice remain entrenched without a demonstration of fitness or probity. The self-interested proponents of a new licensing law generally constitute a more effective political form than the citizens who, if aware of the matter at all, have no special interest which moves them to organize in opposition.

Id.

often than not, these regimes are created to meet self-serving ends.[125]

Undoubtedly, heightened and continued education requirements do improve the quality of professionals, benefitting consumers without creating undue barriers to consumer access.[126] It follows that the practice would be exclusionary to individuals that are unqualified to work. In theory, the requirements found in licensing statutes should be based on careful analysis of the occupation in question to determine what object minimum level of knowledge, skill, ability, or other characteristics are required to meet the demands of the profession.[127] Considering that one of the strongest arguments in favor of licensing includes consumer safety, it follows that the standards should demonstrate a commitment to ensuring that heightened safety standards remain once admitted into the licensing regime.[128]

Surprisingly, there is limited data indicating what measures should determine the minimum entry requirements.[129] Scholars suggest that the requirements found in licensing statues are more often dictated by custom.[130] Further, despite the emphasis on the applicant's dedication to consumer safety, including a standard concerning "good moral character," there is no standard within the statute that applies to current practitioners.[131] In fact, studies suggest that the rise of occupational licensing has in fact reduced employment and increased prices and wages of licensed workers

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125. *See id.* (describing the barriers to entry, transaction costs, and special interests that emerge due to licensing requirements).

126. *See id.* at 35 (discussing the function of occupational licensing to prevent unqualified individuals from practicing).

127. *See* Besley & Burgess, *supra* note 15, at 35 ("Many of the requirements found in licensing statutes are there by dint of custom. They are seldom based on a careful analysis of the job to determine objectively what minimum level of knowledge, skill, ability, or other characteristics are necessary for practice in the given occupation.").

128. *See id.* at 35–36 (questioning why the same high standards are not applied to individuals already in the profession).

129. *See id.* at 35 ("Seldom has research been conducted to establish minimum standards.").

130. *See id.* (explaining that licensing statutes tend to be unspecific and dictated by custom).

131. *See id.* ("Current petitioners are usually exempted from new statutory requirements.").

more often than it has improved the quality and safety of service.[132]

F. Who is Hurt by Occupational Licensing?[133]

Ostensibly, licensing requirements protect public health and safety, and from the risk of hiring an unqualified practitioner.[134] Theoretically, if occupational licensing strictly served as a protection for public health and safety measures as well as a protection against faulty or corrupt practitioners, these groups would prove extremely beneficial to society.[135] While some of the professions should require licensing requirements, strict regulatory overreach should be deemed unnecessary for many of the service-based licensing agreements common throughout the states today.

Licensing establishment systems appear to do more harm than good, especially for low- to moderate-income workers, and the difficulties in entering an occupation often do not align with any public health or safety risk it may possess.[136] Citing protectionist

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132. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 6 (citing economic studies that show that occupational licensing reduces employment and failed to improve the quality and safety of services); *see also* Kleiner & Krueger, *supra* note 30, at 685 (showing evidence where occupational licensing reduced employment, did not increase wages for workers, and did not improve service quality).

133. *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023 (2005) (exploring four case studies which raise "the issue of whether regulations designed for no other purpose than to protect political insiders from fair economic competition meet the standards of the Fourteenth Amendment").

134. *See* Martin Austermuhle, *U.S. Senator Takes Aim at D.C. Over . . . . Occupational Licensing,* WAMU.ORG (July 14, 2016), https://wamu.org /story/16/07/14/us_senator_takes_aim_at_dc_over_occupational_licensing/ ("[T]he purpose of licensing requirements is to protect public health and safety . . . . What about truck drivers, athletic trainers, hair stylists, florists . . . ? It's hard to see why people who want to work in these jobs should . . . obtain government permission before they can legally be hired.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

135. *See generally* COX & FOSTER, *supra* note 27, at 4–5 (discussing the rationale for occupational licensing in addition to the consequences of occupational licensing).

136. *See* WH FRAMEWORK, *supra* note 26, at 13 ("Most research does not find that licensing improves quality or public health and safety . . . ."); *see also id.* at v ("Many occupational licensing schemes do not appear to realize their goal of

public health and safety issues,[137] licensing measures have come to outweigh these concerns and have caused gross reductions in economic growth and entrepreneurship, and, in fact, disproportionately burden blue collar workers, young applicants, minorities, and immigrants.[138] In practice, licensing requirement created restrictive anti-competitive industries across the states.[139] Notably, these licensing regimes have come to harm the very group that they were created to protect: the consumers themselves.[140]

The function of occupational licensing boards has come to serve limits on entrance into the profession, allowing members of the trade to avoid competition and raise prices. Often, the change in price does not correspond with an improvement of service.[141] Considering that these boards are self-regulated, the efficacy of the system has been called into question. One scholar explained:

> If professional groups are made the custodians of professional licensing, then the question should be asked, "who guards these guardians?" Since licensing bodies

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increasing the quality of these professional's services."); *see also* Kleiner, *supra* note 54, at 48–52, 56 ("Overall, few of these studies demand quality show significant benefits of occupational regulation.").

137. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 6 ("Indeed, economic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and safety of services.").

138. *See* CARPENTER ET AL., *supra* note 23, at 5 (describing why these groups are often the victim of these restrictions and the lopsided nature of the legislation).

139. *See ALLOW Act Summary*, *supra* note 20 (framing the problem of occupational licensing for American workers due to economic restraints as well an anti-competition measures); *see also* HAMILTON DISCUSSION PAPER, *supra* note 22, at 12 (explaining that licensing limits the pool of new workers as well as consumer access to competition, therefore creating a selected pool of individuals unduly protected).

140. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 13 ("In fact, standard economic models imply that the restrictions from occupational licensing can result in up to 2.85 million fewer jobs nationwide, with an annual cost to consumers of $203 billion.").

141. *Id.*; *see also* Larkin, *supra* note 23, at 236 (explaining the possibility for a decrease in quality of service when competition is hindered); *see also* Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) ("[P]rivate regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public . . . . [P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.").

> have a public role, then the issue becomes one of ensuring the responsibility of these bodies. In no avenue of life can government give a blank check to any group of men. Nor should one be given to the professions. To the degree to which licensing boards exercise a public function, no phase of their operation can ever be immune from public scrutiny.[142]

Disciplinary actions are rarely ever pursued, despite the extensive investigative, prosecutorial, adjudicatory, and punitive powers typically released by these professions.[143] Rather than increase services to consumers and service providers, the industry itself benefits the most from licensing regimes, especially when demand for the service is "inelastic," when there are limited alternatives, or when the industry can define qualifications.[144]

Active members on the licensing boards are the main beneficiaries occupational licensing professions. They set limits to entry, therefore insulating themselves from competition, burdening professionals seeking entrance, and raising prices of the product, a burden born by the consumer.[145] These boards use their unchecked power to make it more difficult to enter the

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142. R.J. Frye, *Government and Licensing*, UNIV. OF ALA. BUREAU OF PUB. ADMIN. 76 (1958), *reprinted in* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL AND ECONOMIC ISSUES IN PRICE MAINTENANCE AND OCCUPATIONAL LICENSING 33 (The National Association of Attorneys General: Committee on the Office of Attorney General, June 1975).

143. *See* TESKE, *supra* note 41, at 135 (explaining self-regulation as it relates to licensing boards and the lack-luster process of administrative review). Paul Teske also notes:

> Such self-regulation left a limited role—or even none—for the type of bureaucratic commissions and agencies that are influential independent sources of policy and implementation in the other areas of state regulation . . . . [T]he boards, with most appointments usually made by governors based on nominations from the sate professional associations, until recently were composed almost exclusively of members of the regulated profession. As a result, disciplinary action against professionals was quite rare, despite the fact that boards often hold impressive investigative, prosecutorial, adjudicatory, and punishment powers on paper.

Id. at 135.

144. *See* Larkin, *supra* note 23, at 237 (describing the anticompetitive nature of the licensing boards).

145. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 6 (citing the limited benefits of occupational regulation for consumers).

occupation,[146] to limit price competition, or limit the number of services available to the consumer.[147] Many boards have used their power to engage in anticompetitive measures, making entrance into the market incredibly burdensome.[148] These measures include specific training requirements, including hourly or daily minimums, examinations, courses of studies, and fees.[149] For low- to moderate-income workers, these require an average of $209 in entrance fees, an examination, and almost a year of education and training.[150]

These entrance measures prove prohibitive to entry, especially for lower-income practitioners.[151] Many licensed professions throughout the states are well-suited for individuals entering or re-entering the economy, typically composed of young workers, immigrants, minorities, or blue collar individuals.[152] These entrance requirements vary by state. In Arizona, a state infamously ranked as one of the most "onerously licensed state for low- and moderate-income workers" cost of entry nears $800, requires an average of almost 1,500 days of education and experience, and requires passage of two exams.[153] By creating restrictive entry criteria including these education and training

146. *See id.* at 5 ("[E]conomic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and safety of services.").

147. *See* Edlin & Haw, *supra* note 22, at 1095–96 ("Licensing boards are largely dominated by active members of their respective industries who meet to agree on ways to limit the entry of new competitors.").

148. *See* ALLOW Act, *supra* note 16, at 1096 (highlighting the corruption of exclusionary occupational licensing boards).

149. *See* CARPENTER ET AL., *supra* note 23, at 6 (articulating the forms of obtaining an occupational license for a profession); *see also* HAMILTON DISCUSSION PAPER, *supra* note 22, at 11–13 (describing lengthy training requirements for different licensed professions).

150. *See* CARPENTER ET AL., *supra* note 23, at 6 (noting the significant impact these regimes have on workers traditionally considered "blue collar" workers).

151. *See id.* at 20 (discussing the hardship that these requirements have for this group of individuals).

152. *See id.* (explaining as an example, that carpenters and cabinet makers, licensed in thirty states, on average require nearly $300 worth of entrance fees, passage of an exam, and 450 days of training and education.)

153. *See id.* at 40 (noting that Arizona is among the top five most burdensome states for occupational licensing, in addition to Hawaii, Arkansas, Nevada, and Florida).

requirements, the boards control the market, thus creating significant final benefits for the board and for the members of the industry. As a result, occupations requiring a license in these states perpetuate their licensure to an unfair advantage, using measures to "choke out the competition" and demanding "higher prices without delivering improved products or services."[154] Scholars have gone so far as to suggest that these actions violate the Sherman Act,[155] but have gone unpunished, insulated by the act's failure to mention actions sanctioned by the state, and therefore outside of the reach of the act itself.[156]

In addition, occupational licensing requirement restrictions result in more than two million fewer jobs nationwide, costing consumers more than $100 billion annually.[157] This is a result of the burdensome entry requirements, that many skilled low- to moderate-income workers simply cannot afford.[158] In addition, studies suggest that proof indicating quality enhancements do not in fact offset price increases from licensing measures, especially in positions that do not require unique qualifications that could pose a danger to the health or safety of the public, such as cosmetology, frog farming, or casket-making.[159] Low- to moderate-income

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154. *See* Dick Carpenter & Chip Mellor, Editorial, *Breaking Down 'Bottleneckers:' Form Music Therapists to Funeral Directors, Licensing Schemes Keep Out Competition*, WALL ST. J. (Dec. 15, 2016, 3:50 PM), https://www.wsj.com/articles/breaking-down-bottleneckers-1479680470 (scrutinizing occupational licensing regulations that constrain economic growth and indicating that despite bipartisan support for the reform, that the reform will likely face opposition from members of the licensed occupations) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

155. *See* 15 U.S.C. §§ 1–7 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

156. *See* Edlin & Haw, *supra* note 22, at 1096 n.5 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." (quoting Parker v. Brown, 317 U.S. 341, 351 (1943))).

157. *See generally* HAMILTON DISCUSSION PAPER, *supra* note 22, at 6 (describing the economic burden that occupational licensing pushes onto the consumer); *see also id.* at 1099 (discussing the economic harm associated with allowing professions to control their own licensing regimes).

158. *See* CARPENTER ET AL., *supra* note 23, at 9 (outlining the entry requirements prohibitive to low- to moderate income workers and the hypocrisy of the requirements, considering the nature of many of these licensed professions).

159. *See* WH FRAMEWORK, *supra* note 26, at 13 (highlighting the increased harm facing licensed occupations that target service industries, or lower income

workers pursuing the service-based professions—such as a cosmetologist or cabinet maker—face a much different reality than those pursuing higher-paid licensed professions.[160] These individuals often do not have the same resources as those pursuing a career in medicine or the law.[161]

In addition, the occupations that drive up the statistic suggesting that licensed professions receive higher wages include occupations such as lawyer, dentist, or architect.[162] The reality is that there is no significant difference in wages between unlicensed and licensed professionals, traditionally considered to be blue collar.[163] In fact, if an occupation is unlicensed in other states, if the regulatory burdens are high compared to other states, or if the burdens are high compared to other occupation with even greater safety risks, it is suggested that the licensing regime is an unnecessary or needlessly burdensome licensing scheme unjustified by legitimate health and safety concerns.[164] This is often the case for this pool of professions.

Licensing does not guarantee improvements in service quality nor does it protect the consumers from health or safety risks.[165] In

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professions).

160. *See* CARPENTER ET AL., *supra* note 23, at 7 (articulating the variance between states in licensure requirements, as well as, the variance in necessity between the types of professions low- to moderate-income individuals are pursuing and calling into question the need for such severe burdens).

161. *See id.* ("Such licensure hurdles are likely exceptionally burdensome for lower-income workers, particularly compared to higher-paid occupations like physicians, attorneys and the like . . . . [T]ypically [lower-income workers] have fewer resources than those pursuing high-income occupations.").

162. *See id.* (noting that the individuals that do clear the financial and training burdens typically make "markedly less" annually than the national average for the profession or for lower class workers generally).

163. *See id.* at 11 (discussing the large demographic of individuals seeking or engaged in licensed occupations who have a college degree or less).

164. *See id.* at 35–36 (providing a series of threshold questions suggesting that a licensing scheme is unnecessary or needlessly burdensome).

165. *See* Craigmiles v. Giles, 312 F.3d 220, 226 (6th Cir. 2002) (arguing that nothing prevents licensed practitioners from selling poor quality goods at a high price and that licensing requirements bear no rational relationship to increasing the quality of a good or service); *see also id.* at 8 (suggesting that there is little evidence that government licenses protects public health and safety or improve the quality or product of services, but rather that licensing actually reduces opportunity and increases consumer cost); *see also* Klein, *supra* note 23, at 429 ("Occupational licensing does not guarantee public safety or product quality.").

fact, while occupational practitioners often lobby state legislators on behalf of their licensing groups through appeals for the protection of public health or safety, these claims are often erroneous and fail to produce any concrete evidence of how lack of licensing will lead to consumer harm.[166] In fact, while licensing may be beneficial for those that ultimately obtain a license to practice, the cost comes at the expense of consumers, who face reduced service opportunity and higher price points.[167] Economists have found that the effect of licensing on price and quality of service cost consumers up to nearly $139 billion a year.[168] In addition, this high price of licensing for consumers have garnered limited impact on the quality of service received by consumers.[169] In sum, while occupational licensing should theoretically protect the consumer from a variety of dangers, studies have continuously concluded that currently occupational licensing may not actually improve consumer protection as well as once perceived.[170]

In recent years, the public has been alerted to the concerns attached to occupational licensing measures and has called for a "common-sense changes in the Division of Professional Licensure"[171] necessary to improve the business climate across the

166. *See* CARPENTER ET AL., *supra* note 23, at 31–32 ("State agencies have . . . been unable to document a need for licensing [certain professions], and such claims of harm have also failed independent scrutiny.").

167. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 12 ("Most of the literature has shown that licensing is beneficial for those fortunate enough or able to obtain a license, and that these benefits come mainly at the expense of consumers, who are confronted with reduced availability of services and higher prices.").

168. *See* Edlin & Haw, *supra* note 22, at 1098 (citing Morris Kleiner, leading economist on occupational licensing, regarding the high price of licensing for consumers).

169. *See* HAMILTON DISCUSSION PAPER, *supra* note 22, at 15 (explaining a variety of studies on a range of licensed occupations that found that these occupations provided the same or worse value of service for the consumer).

170. *See* ALLOW Act, *supra* note 16, at 15 ("Collectively, these studies indicate that occupational licensing as it is commonly practices may not improve consumer protection.").

171. *See* Edlin & Haw, *supra* note 22, at 1098 (suggesting that politicians and the mainstream media have noticed and begun to campaign for the reform on behalf of the public and their constituents); *see also* Press Release, Massachusetts Office of the Governor, Governor Patrick Builds on Regulatory Reform Success; Files Legislation to Improve Business Climate for Licensed Professionals (Jan. 7, 2013), http://www.maroundtable.com/aroundTable/1301/RegulatoryReform.pdf [hereinafter Builds Press Release] (proposing a list of changes to the licensing

states and defend against excessive licensing.[172] The ALLOW Act provides a targeted solution to the anticompetitive impact of unjustifiable occupational licensing requirements.[173]

III. The ALLOW Act

The Alternatives to Licensing that Lower Obstacles to Work Act, or the ALLOW Act, seeks to make targeted changes to federal licensure policy through the reduction for unnecessary licensing requirements.[174] Senate Bill S.3158 was introduced to the Senate on July 12, 2016, sponsored by Senators Mike Lee (R-UT) (Lee) and Ben Sasse (R-NE) (Sasse) and referred to the Committee on Homeland Security and Governmental Affairs.[175] Representatives Mark Meadows (R-NC) and Dave Brat introduced the bill before the House of Representatives, H.R. 6312, before the House Oversight and Government Reform, Armed Services, and Natural Resources Committee, on November 14, 2016.[176] H.R. 6312 was referred to the Subcommittee on Military Personnel on December 1, 2016.[177] The bills in both houses are nearly identical, and the Senate bill will be widely referenced for the purposes of this Note.

The ALLOW Act seeks to make targeted changes to federal licensure policy by reducing occupational licensing requirements on federal installments as well as to implement a model to review and reduce occupational licensing regimes in the District of

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structure in Massachusetts to improve the economic health and business climate of the state) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

172. *See* Builds Press Release, *supra* note 171, at 1 ("Governor Patrick today announced legislation to streamline and improve the licensing process and business climate for thousands of professional licensees throughout Massachusetts.").

173. *See ALLOW Act Summary*, *supra* note 20 (framing the anticompetitive regime created by licensing boards and outlining the solutions provided by the act).

174. *See* ALLOW Act, *supra* note 16, § 207 (stating that "[a]n individual may engage in a lawful occupation without being subject to occupational regulations that are—(1) arbitrary; or (2) unnecessary and substantially burdensome").

175. *Id.*

176. *Id.*

177. *Id.*

Columbia.[178] The bill establishes that the federal government may establish an individual's authorization to have their license or certification honored in employment on a military installation located on federally-owned land.[179] The bill seeks to:

> [P]romote economic opportunity for military families, to facilitate workforce attachment for military spouses in their chosen occupation across multiple geographical postings, to reduce barriers to work on military installations, to amend the District of Columbia Code to promote greater freedom in the practice of regulated occupations, to combat abuse of occupational licensing laws by economic incumbents, to promote competition, encourage innovation, protect consumers, and promote compliance with Federal antitrust law, and for other purposes.[180]

If Congress passes this legislation, the District will hopefully be the first of many jurisdictions to revoke restrictive occupational licensing regimes. In addition, the legislation could provide economic relief for military families across the nation, who face a heightened risk of falling victim to the expense and restrictions of entering the same licensed occupations within their state.

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178. *See* Meadows Press Release, *supra* note 18 (quoting Representative Meadows, "[I]t's very clear that many of the rules and requirements go beyond protecting health and safety standards and instead serve as a barrier to jobs . . . . [T]his bill can refocus our licensing requirements on only the most pertinent situations") (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Press Release, Office of Senator Mike Lee, Sens. Lee, Sasse Introduce Alternatives to Licensing that Lower Obstacles to Work (ALLOW) Act (July 12, 2016), http://www.lee.senate.gov /public/index.cfm/2016/7/sens-lee-sasse -introduce-alternatives-to-licensing-that-lower-obstacles-to-work-allow-act ("Sens. Mike Lee (R-UT) and Ben Sasse (R-NE) introduced legislation . . . that would make it easier for many Americans to begin("Sens. Mike Lee (R-UT) and Ben Sasse (R-NE) introduce legislation . . . that would make it easier for many Americans to begin work in their chosen field by reducing unnecessary licensing burdens.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

179. ALLOW Act, *supra* note 16, § 101.

180. *Id.*

A. Importance of the Act

The ALLOW Act's primary goal is to reform occupational licensing in the District of Columbia and on other federal property, such as national parks and military bases.[181] The bills in both houses of Congress suggest that requiring the government's permission to work through obtainment of a license should be reserved for occupations that potentially pose true threats to public health and safety.[182]

Most importantly, the ALLOW Act will assist the federal government in removing "a government-imposed barrier to opportunity."[183] In a statement released by cosponsors, Lee and Sasse, the Senators stress that the legislation would lower the burden for many Americans by allowing them to begin work in their chosen fields, without the constraints of licensing regimes.[184] Lee described the underlying motivation for the passage of the act:

> The principle at the heart of the American economic system is equality of opportunity. In practice, this mean eliminating all forms of legal privilege and political favoritism, so that the economy rewards hard work, initiative, good judgement, and personal responsibility . . . . Unfortunately, too many localities have allowed licensing requirements to become a barrier to prevent younger and less fortunate workers from getting better and higher-paying jobs.[185]

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181. *See* Jared Meyer, *New Congress Can Limit Occupational Licensing*, FORBES (Jan. 23, 2017, 4:26 PM), http://www.forbes.com/sites/jaredmeyer/2017/01/23/new-congress-can-limit-occupational-licensing/#7009587e3cd1 [hereinafter Meyer] (describing the reasons for the Act and the importance of the shifting viewpoints regarding occupational licensing) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

182. *See id.* (interviewing the House Representative Meadows (R-NC) regarding the changes that the ALLOW Act proposes).

183. *See id.* (explaining that licensing is supposed to be the last resort of regulators, reserved only for professions that pose a serious potential harm to public health and safety).

184. *See* Press Release, Office of Sen. Mike Lee, Sens. Lee, Sasse Introduce Alternatives to Licensing that Lower Obstacles to Work (ALLOW) Act (July 12, 2016), http://www.lee.senate.gov/public/index.cfm/2016/7/sens-lee-sasse-introduce-alternatives-to-licensing-that-lower-obstacles-to-work-allow-act (describing the introduction of ALLOW Act legislation and the primary goals of the Act) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

185. *See id.* (discussing one of the motivating factors in pursuing occupational

To achieve these means and promote America's entrepreneurial spirit, the Act leverages Congress's Article I authority over federal enclaves to advance models for licensing reforms.[186] By rethinking the approach to occupational licensing regulations, Lee expresses his hope that the Act will help the American economy to grow and make "room for the full range of human talents, aspirations and imaginations to flourish"[187] by rethinking occupational licensing laws and to ensure "that our economy is set up to benefit the hard work of all Americans."[188]

B. What the ALLOW Act does for the District of Columbia and Federal Lands

The focus of the ALLOW Act centers around reforming occupational licensing requirements within the District of Columbia,[189] with the hopes that it will serve as a legislative reformative model throughout the states.[190] The Act will expressly limit the creation of new occupational licensing requirements in the District of Columbia and federal property, such as national parks and military bases.[191]

The Act seeks to limit creation of occupational licensing requirements in the District, and other federal property, only to circumstances where the profession may truly affect public health,

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licensing reform measures).

186. *See generally id.* (describing the ALLOW act as a model to states for occupational licensing reform).

187. *See* Senator Mike Lee, Remarks on Occupational Licensing, The ALLOW Act at The Heritage Foundation (July 12, 2016), https://www.lee.senate.gov/public/index.cfm/2016/7/remarks-on-occupational-licensing-the-allow-act (remarking on the importance of the Act to encourage and promote the entrepreneurial spirit of the American people) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

188. *Id.*

189. *See* Meyer, *supra* note 178 (describing the primary purpose of the ALLOW Act and the impact it may have on the District of Columbia).

190. *See ALLOW Act Summary*, *supra* note 20 (explaining one of the key goals of the Act as it is related to reforms in the District of Columbia).

191. *See* ALLOW Act, *supra* note 16, § 201 (describing the scope of the Act as recognizing any state occupational certification as valid on federal lands, including military installations and the District of Columbia).

safety, or welfare.[192] In doing so, the Act mandates policy limiting enforcements of license requirements only to services that meet standards expressly identified in the statute.[193] The Act also promotes less restrictive requirements including certification and regulation practices and establishes a dedicated office within the District Attorney's Office to establish active supervision of the occupational boards.[194]

The Act also calls for legislative oversight of licensed industries. Specifically, the act calls for a "sunrise review" of any new proposed licensing requirements, calling for a full evaluation of any of the possible impacts on workers or economic growth, as well as an analysis of whether the less restrictive regulations could be applicable.[195] The Act calls for a sunset review as well, applying similar analytical frameworks to existing occupational licensing laws in the District.[196] Together, these processes seek to review existing occupational licensing laws over a five-year period and implement new proposals for appropriate, less burdensome alternatives.[197] While only applicable to the District of Columbia, military bases and federal enclaves, the drafters of the legislature envision the proposed Act as a model for state reform.[198]

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192. *See* Meyer, *supra* note 178 (quoting Rep. Meadows on the goals of the Act on federal lands).

193. *See* ALLOW Act, *supra* note 16, § 206(b)–(c) (outlining the guideposts of what may professions may remain licensed and the review process).

194. *See id.* § 205 (describing the functions of the oversight offices within the District Attorney's office).

195. *See* ALLOW Act Summary, *supra* note 20 (describing the sunrise and sunset reviews of current and proposed occupational licensing professions tasked to the legislature to consider other less restrictive, regulatory means); *see also* ALLOW Act, *supra* note 16, § 206(b)(2)(A) (outlining the factors to consider during the sunrise review of new proposed licensing requirements).

196. *See* ALLOW Act, *supra* note 16, § 206(c)(2) (listing factors to consider doing the sunset review process).

197. *See id.* §§ 204–06 (discussing the policies regarding occupational licensure, the duties of the office of supervision of occupational boards, and time tables periodic analysis of occupational regulations).

198. *See* ALLOW Act Summary, *supra* note 20 ("The Act: Serves as a model for reform in the states by limiting the creation of occupational licenses requirements in the District only to those circumstances in which it is the least restrictive means of protecting the public health, safety or welfare.").

C. Benefits for Military Families

Veterans and military families face especially unique challenges in the labor market.[199] For the families of military personnel, frequent moves combined with varying occupational licensing requirements across state lines make it exceedingly difficult and expensive.[200] These issues also affect former military personnel.[201] Veterans often struggle to find jobs in the private sector, despite their valuable military experience that is oftentimes relevant and transferrable to high growth civilian jobs.[202] Many occupational licensing boards refuse to recognize or transfer the education and experience obtained in service, requiring veterans to invest in specific educational and training institutions to secure civilian credentials and licensing.[203] Military families are more than ten times more likely to have been moved across state lines in the past year compared to their civilian counterparts, and nearly thirty-five percent of military spouses in the work force hold occupations in professions that commonly require licensing or certification.[204]

The ALLOW Act serves essential functions for members of military families. If enacted, the Act would provide significant

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199. *See id.* (explaining how military spouses are effectively blocked from pursuing their chosen field of work "[t]hirty-five percent of military spouses in the labor force work in professions that require a state issued license and they are 10 times more likely to have moved across State lines in the last year").

200. *See* EXEC. OFFICE OF THE PRESIDENT, MILITARY SKILL FOR AMERICA'S FUTURE: LEVERAGING MILITARY SERVICE AND EXPERIENCE TO PUT VETERANS AND MILITARY SPOUSES BACK TO WORK 1 (May 31, 2012), https://obamawhitehouse.archives.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf [hereinafter EXEC. OFFICE OF THE PRESIDENT] (describing the regular challenges that military and their families face in obtaining employment) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

201. *Id.*

202. *See id.* (discussing the difficulty veterans face when looking to transfer their credentials to the private sector).

203. *See id.* (explaining the historical lack of opportunity faced by veterans in obtaining civilian credentials and licensing requirements).

204. *See id.* at 8 (noting that 15.2 percent of military spouses moved across state lines annually, compared to 1.1 percent of civilian spouses and that nearly 35 percent of military spouses in the work force are trained in professions that commonly require occupational licensing); *see also* ALLOW Act Summary, *supra* note 20 (noting the relatively high percent of military spouses trained in professions that typically require an occupational license).

protection for military families, often burdened by inconsistent licensing requirements or lack of reciprocity for professions across state lines, as they travel to join their spouses at their respective stations.[205]

The Act seeks to harmonize occupational entry requirements on military bases by actively endorsing reciprocity between states and baes to promote workforce attachment for military spouses.[206] In doing so, the ALLOW Act aims to endorse "occupational licenses and certifications granted by any State, regardless of whether the military installation is located in the issuing State."[207] The license or certification will remain honored so long as the license has not expired, been revoked, or been suspended by the issuing state and that there are no outstanding disciplinary or enforcement proceedings posed against the individual brought by the certifying authority or licensing board.[208]

IV. Is the ALLOW Act Constitutionally Defensible

There is wide spread recognition of the economic harms associated with overt occupational licensing boards and professions.[209] The power of occupational licensing regimes has been recognized by many politicians, and there has been widespread bipartisan support to address these oppressive regimes.[210] The ALLOW Act takes an important step in the direction of occupational licensing reform in this country, reducing unnecessary regulatory overreach and restrictions to hundreds of

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205. *See* ALLOW Act Summary, *supra* note 20 (explaining the burdens faced by military families in particular).

206. *See id.* (discussing the endorsement of military bases to accept occupational licenses from other states).

207. *See* ALLOW Act, *supra* note 16, § 101(a) (mandating that military bases and other federal lands, including the district, honor the valid licenses of other States).

208. *See id.* § 101(a)(1)–(2) (outlining reasons when a license from another State may not be honored).

209. *See* Edlin & Haw, *supra* note 22, at 1099 (pointing out the recognition of the potential harms associated with occupational licensing).

210. *See id.* at 1098–99 (naming politicians, including Massachusetts Governor Deval Patrick, Florida Governor Rick Scott, and Former First Lady Michelle Obama, who have taken stands against excessive licensing on the state and level and attempted to implement measures to combat the practice).

professions. As written, the ALLOW Act is Constitutionally defensible in its authority to implement the act both in Washington, D.C., on military bases, and on federally owned lands.

Licensing boards and local officials alike are not thrilled about the prospect of reducing licensing requirements. It is understandable that licensing boards would be opposed to such reform, as their ability to control their markets within the states would be reduced.

The Interior Design Lobby has been particularly vocal in opposition to reducing any movement towards reducing licensing requirements.[211] Interior designers near the top of the list of the most difficult occupation to enter in the three states and the District of Columbia where practice requires a license.[212] Aspiring interior designers in these jurisdictions require passage of a national exam, pay an average of nearly $400 in entrance fees and devote six years to education and internship requirements before beginning to work.[213] Multiple state commissions have conducted studies and produced findings that "there is simply no need to license interior designers."[214] The Interior Design Lobby is notorious for waging a thirty year campaign within state legislatures, seeking greater regulation and establishment of licensing boards throughout the states.[215] The basis of the Interior Design Lobby's argument depends on an alleged threat to public health and safety that may result from unlicensed practitioners of

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211. *See generally The Advancement of Our Profession is in Jeopardy: The ALLOW Act is a Threat to the Profession of Interior Design and those who Practice It!*, ONE VOICE, p2a.co/huzTYIF (last visited Dec. 1, 2017) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

212. *See ALLOW Act Summary*, *supra* note 20 ("In the District, for example, time consuming and often expensive licensing requirements are imposed on would be entry-level interior designers, tour guides, cosmetologists, florists, and pest control workers, to name a few—with little or no legitimate public purpose served.").

213. *See* CARPENTER, *supra* note 23, at 14 ("Aspiring designers must pass a national exam, pay an average of $364 in fees and devote an average of almost 2,200 days—six years—to a combination of education and apprenticeship before they can begin work.").

214. *See id.* at 25 ("[M]ultiple state commissions have studied the issues and have concluded that there is simply no need to license interior designers.").

215. *See id.* at 29 (describing the lengths to which the Interior Design Lobby has gone to establish occupational licensing regulatory boards throughout the states).

interior design, despite failure of the group to provide any evidence indicating such a danger.[216] The Interior Design Lobby has reacted aggressively to the ALLOW Act.

The Interior Design Lobby launched a website campaigning against the ALLOW Act, calling for citizens to contact their senators through an email form included on the website itself.[217] The website threatens that the ALLOW Act "puts the practice rights of any firm or individual doing business in Washington, D.C. in the cross-hairs of being taken away. More importantly, it jeopardizes the public's safety, health, and welfare by calling into question the necessity of an interior designer on a construction/renovation project!"[218] The website uses additional scare tactics and threatens that the Act "could lead to outlawing the rights of *any* interior designer to practice, not just those with a license or those trying to obtain one."[219] Reviewing the text of the ALLOW Act itself, it appears that this threat misleads the reader and is ill-founded. The Act would merely review the licensing requirements of the profession and review whether the profession even needs the restrictive regulation, and would likely replace licensing requirements with less-inhibitive certification requirements.[220] These measures would actually allow more individuals to learn the skillset required to engage in interior design, as is permitted in much of the country, not endanger practice of the profession, as the site seems to address.[221]

While the Interior Design Lobby has not enjoyed widespread success in their state campaign encouraging greater regulation for their profession, in the states that it has had success in establishing heightened regulations, entrance into the profession

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216. *See id.* at 29–30 (indicating that the Interior Design Lobby has failed to implement this legislation in all but Florida, Louisiana, Nevada, and the District of Columbia).

217. *See generally The Advancement of Our Profession is in Jeopardy: The ALLOW Act is a Threat to the Profession of Interior Design and those who Practice It!*, *supra* note 211.

218. *See id.* (arguing reasons why the ALLOW Act could plausibly effect the practice of their profession).

219. *See id.* (warning interior designers that the ALLOW Act could have these effects on their practice).

220. *See generally* ALLOW Act, *supra* note 16.

221. *See* CARPENTER ET AL., *supra* note 23, at 6 (indicating that only three states and the District of Columbia have implemented licensing measures).

has become one of the most onerous.[222] ALLOW Act legislators should take note of the Interior Design Lobby and its focus on eliminating this bill in the District, but, if the bill passes, the lobby will likely not pose a large threat to additional state adoption of similar acts.

Despite the threats from the Interior Design Lobby, a more valid concern over passage of the ALLOW Act resonates from state and local officials. Officials have raised concerns that the Act will "undemocratically alter the District of Columbia's local laws concerning occupational licensing."[223] These proponents argue that passage of the act would impose on decisions that should be in the hands local officials with the District, "not by politicians who are unaccountable to local residents."[224] These arguments give rise to concerns over the constitutionality of a locality's sovereignty over its own economy.

Courts have recognized that decisions regarding occupational licensing fall under a state's police powers.[225] The ALLOW Act merely serves as a suggestive model for the states to adopt under their respective of their legislative processes. It does not attempt to override the states' ability to regulate occupations as they see fit.

The ALLOW Act directly affects the District's governance over occupational licensing rules.[226] Pursuant to Congress's Article I

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222. *See id.* at 30 (stating that the interior designer lobby has failed to enjoy much success, but has imposed the greatest barriers in the jurisdictions it has established itself in).

223. *See* Austermuhle, *supra* note 134 (describing the trepidation and the concerns local officials have over a quintessentially local decision).

224. *See id.* (quoting D.C. Delegate Eleanor Holmes Norton (D) in a statement concerning the ALLOW Act effect on the District's economic governance, arguing that it is an "imposition" on decisions that should be decided by the District's local government).

225. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curium) (explaining that states have autonomy over the regulation of their local economies under their police powers); *see also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 438 (concluding that a State is free to allocate its governmental power to subdivision as it wishes including with regard to regulation of its local economies, under its police power); *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791–93 (establishing that states have a compelling interest to govern professions that practice under their jurisdiction and therefore have the ability to set licensing standards and regulate professions).

226. *See* Austermuhle, *supra* note 134 (citing Senator Mike Lee in regards to the ability of the act under the Federal Enclave Clause to establish control over

authority over federal enclaves, which includes the District of Columbia, military bases and National Park, the ALLOW Act, if passed would provide Congress broad Constitutional authority over occupational licensing in the District and over federally owned lands.[227]

The Federal Enclave Clause grants Congress an extraordinary amount of power over federal enclaves, including military bases and the District of Columbia, insulating the state from applying its own laws to these regions.[228] The federal enclave doctrine states that, absent congressional consent, a state or local political subdivision cannot levy a direct tax on property located on federal land and acquired exclusive jurisdiction from the state.[229] The federal enclave doctrine states:

> Congress shall have the power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten Miles square) as may, by cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.[230]

The Enclave Clause empowers Congress to exercise exclusive jurisdiction over federal enclaves.[231]

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all the jurisdiction the act attempts to control); *see also* Senator Mike Lee, *supra* note 176 (remarking the power that Congress must implement the change under Congress's Article I Constitutional powers).

227. *See* U.S. CONST. art. I, § 8, cl. 17 (subjecting lands purchased by the federal government to the exclusive federal jurisdiction and control of congress, exclusive of the state government).

228. *See* Emily S. Miller, *The Strongest Defense You've Never Heard of: The Constitution's Federal Enclave Doctrine and its Effect on Litigants, States, and Congress*, 29 HOFSTRA LAB. & EMP. L. J. 73, 74 (2011) (describing the power of the Federal Enclave Clause).

229. *See generally* George H. Pretty, II & P. Scott Manning, *The Federal Enclave Doctrine—Property Tax Exclusion based on Constitutional Principles*, 24 J. MULTISTATE TAX'N 26 (Sept. 2014) (articulating the purpose of the federal enclave doctrine).

230. U.S. CONST. art. I, § 8, cl. 17.

231. *Id.*

The Federal Enclave Clause is perhaps best known for establishing the District of Columbia.[232] The Federal Enclave Clause awards Congress the power to "exercise exclusive Legislation in all Cases whatsoever over the District of Columbia."[233] The use of the phrase "in all Cases whatsoever" emphasizes the unquestionable administrative authority that Congress exercises over the District and its internal conditions and operations.[234] Considering the extent of the clause, it seems undeniable that Congress has Constitutional control over the District's occupational licensing boards, if the ALLOW Act is enacted.

The Representative status of the District of Columbia within Congress remains one of Congress's oldest controversies,[235] and is a concern at issue with local governments in regards to the ALLOW Act.[236] The nonvoting status of the District within the United States' representative system "is fundamentally at odds with the principles and traditions of our constitutional system"[237] as the right to vote is one of the most basic and precious rights as citizens in a free country.[238] Despite the Constitutional ambiguity concerning the issue of whether the District should have voting authority and representation within Congress, this issue has yet

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232. *See* Miller, *supra* note 228, at 75 (discussing the genesis and most notable quality of the Federal Enclave Act).

233. *See* Paul v. United States, 371 U.S. 245, 263 (asserting that Congress has the power to enact and control legislation in the District of Columbia).

234. *See* Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 319 (emphasizing the administrative and operation character of the power given to Congress in the Federal Enclave Clause and establishing that Congress does appear to have Constitutional ability to exercise its power over the District).

235. *See id.* at 305 ("When the Democratic majority took control of the 110th Congress, one of the first matters on the agenda was one of its the oldest controversies: the representational status of the District of Columbia in Congress.").

236. *See* Austermehle, *supra* note 134 (conveying the concerns of District officials, voicing their wishes to be autonomous over the economies of the District).

237. *See* Turley, *supra* note 234, at 306 (stressing the constitutional ambiguity posed by the Federal Enclave Clause).

238. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

to be resolved. Congress has yet to grant the District of Columbia representation within Congress, and the ALLOW Act could potentially be applied with ease in the District.

Beyond establishing the Federal government's jurisdiction over the District of Columbia, the Federal Enclave Clause also upholds implementation of the Act in the additional targeted jurisdictions.[239] Regarding Congress's ability to exercise its jurisdiction over military bases and other Federal Lands, there is little doubt that the Federal Enclave Clause allows Congress to apply this Act to these areas. The Federal Enclave Clause grants Congress an extremely powerful jurisdiction over entities, including military bases, national parks, post offices, and federal courthouses.[240] When the United States purchases property from a state for purposes set forth in this article of the Constitution with the consent of the state legislature, the property is controlled by federal jurisdiction, "exclusive of state authority."[241]

After a state transfers authority over a tract of land to the federal government, a federal government, "the state may no longer impose new state laws on these lands."[242] The federal enclave doctrine also preempts any existing state law contrary to the mandate or act of Congress.[243] Under the Federal Enclave

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239. U.S. CONST. art. I, § 8, cl. 17.

240. *See* Miller, *supra* note 228, at 73 (introducing the potential of the federal enclave doctrine to create a powerful defense for entities operating on what is technically federal land).

241. Pretty & Manning, *supra* note 229, at 28 (discussing the process when the federal government purchases state land). George H. Pretty, II and P. Scott Manning write:

> Courts have interpreted the phrase "other needful buildings" broadly to include whatever structures are found to be necessary in performing the function of the federal government. When the United States purchases property from a state for purposes set forth in Article I, Section 8, Clause 17 of the Constitution and the state legislature consents, the property is generally subject to federal jurisdiction exclusive of state authority. Land over which the United States government exercises federal legislative jurisdiction is a "federal enclave."

Id.

242. *See* Allison v. Boeing Laser Technical Services, 689 F.3d 1234, 1235 (10th Cir. 2012) (concluding that federal government has jurisdiction over federal enclaves).

243. *See* Paul v. United States, 371 U.S. 245, 268 (1963) ("Since a State may not legislate with respect to a federal enclave unless it reserved the right to do so

Clause, Congress undoubtedly can implement this Act on military bases and National Parks, as it proposes.

Finally, apart from Congress's ability to apply this Act constitutionally to military bases under the Federal Enclave Clause, Congress also secures constitutional authority under the Militia Clauses of the Constitution (Militia Clauses).[244] The ALLOW Act directly applies reciprocity to certain professions that require an occupational license.[245] The Militia Clauses grant Congress the authority "to raise and support Armies"[246] and provide for the military organization, arming and discipline by any means necessary.[247] The court have held that regarding the Militia Clauses, the Constitution grants Congress unlimited power to provide for organizing, arming and disciplining the militia.[248] Courts have given Congress broad discretion in determining what constitutes as an action necessary to provide for the nation's military, as the issues typically invoke questions of policy.[249] The

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when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws.") (citations omitted); *see also* Brookhaven Sci. Assocs. v. Donaldson, No. 04-4013 (LAP), 2007 WL 2319141, at *1, *5 (S.D.N.Y. Aug. 9, 2007) (stating that any claim brought by the state on a federal enclave is preempted by the Constitution).

244. U.S. CONST. art. 1, § 8, cl. 12; U.S. Const. art 1, § 8, cl. 16.

245. *See* ALLOW Act, *supra* note 16.

246. U.S. CONST. art. 1, § 8, cl. 12.

247. *Id.* § 8, cl. 16.

248. *Accord* Donn v. A.W. Chesterton Co., Inc., 842 F. Supp. 2d 803, 813–14 (E.D. Pa. 2012) (finding that procurement of goods and materials for military operations fall within the federal government's exercise of war powers because their role was to supply Naval vessels, therefore protecting their actions, despite the fact that they were not involved in military operations during wartime); *see* Perpich v. Department of Defense, 496 U.S. 334, 349 (2009) (concluding that, pursuant to the U.S. Constitution, Congress may provide for the common defense, raise and support armies, make rules for Armed Forces operations, and enact necessary and proper laws, for such purposes, granting additional powers to Congress); *see also* Houston v. Moore, 18 U.S. 1, 9 (1820) (finding that Congress has unlimited power to provide for the organization, arming, and discipline of the militia).

249. *See Donn*, 842 F. Supp. 2d at 814 (finding that the issue in the case implicated policy issues and therefore gave rise to the political question doctrine, which excludes controversies which revolve around policy choices and value determinations reserved for Congress (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986))).

political question doctrine preempts courts from judicial review of controversies that involve policy choices.[250]

In upholding the constitutionality of the ALLOW Act's section regarding acceptance of occupational license from other states, one could argue that providing opportunity for military spouses to secure employment falls under the purview of the Militia Clauses and is protected under the political question doctrine. Congress has the authority to raise and support the armies and to provide for the general military organization as necessary.[251] The courts have found that this applies to issues not only involved in military operations during wartime, but also in Congress's capacity to support military acts.[252] The ability to keep military families together and ensure employment for spouses after transferring to various military posts across state lines to support the service member in their family could arguably serve as a verifiable Congressional act to "support" the military. Applying this logic, the ALLOW Act would allow the spouse to overcome licensing requirements on the military base, preempting state preference to deny a military spouse employment on these grounds. In addition, the policies the ALLOW Act pursues regarding encouragement of family autonomy with this reciprocity would fall under the Political Question Doctrine, preempting judicial review of any challenge to applying the policy on military installments.[253] The ALLOW Act would likely pass constitutional muster under the Constitution's Militia Clauses and the Political Question Doctrine.

A. Can the ALLOW Act Go Further?

Occupational licensing regimes have undoubtedly created incredible burdens on individuals seeking employment across the

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250. *See id.* at 818 (discussing the types of claims the political question doctrine precludes from judicial review, including requiring courts to evaluate the wisdom of military policy).

251. U.S. CONST. art. 1, § 8, cl. 12; U.S. CONST. art 1, § 8, cl. 16.

252. *See Donn*, 842 F. Supp. 2d at 814 (concluding that actions that supported the military, even during non-wartimes, fell under the purview of Congressional oversight under the militia clause).

253. *See id.* at 815 (determining that a political question is found when the issue is inherently political in nature or would cause the court to make a policy determination on behalf of Congress).

states. Reform is necessary to address, evaluate, and remedy these issues, especially for the majority of professions that impact low- to moderate-income workers, as their professions typically do not pose possible repercussions to the general public's health and safety.[254] In addition, the commitment of the previous administration in improving the ability of former military personnel and their families as well as the focus seem to, at least, seem to call for occupational licensing reciprocity beyond military bases.[255] The ALLOW Act likely could not be expanded to encompass and address these concerns entirely.

Pursuant to the United States Constitution's Tenth Amendment, any power "not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively."[256] Accordingly, occupational licensing falls under the purview of the state's right to control its local economies and is found amongst the state's police powers.[257] Further, in balancing between an individual's interest in the right to choose their own profession, courts have often sided with the states' licensing boards, granting deference to licensing, that has traditionally been considered a function of the state.

While courts have begun to notice and take action on restrictive and absurd occupational licensing requirements,[258] the

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254. *See* Kleiner, *supra* note 39, at 189 (agreeing that some occupations do require a higher level of oversight, especially when failure to properly train individuals can create hazardous circumstances that could be deadly or dangerous, but that the majority of professions subject to licensing do not fall within this category).

255. *See generally* EXEC. OFFICE OF THE PRESIDENT, *supra* note 200 (asserting the importance of providing professional opportunity for former military personnel as well as active duty military families).

256. U.S. CONST. amend. X.

257. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (establishing that states are able to regulate their own economies under their police powers); *see also* License Cases, 46 U.S. 504, 583 (1847) (describing the extent of what police powers cover within the state, including the power to govern all things "within the limits of its dominion"); *see also* Klein, *supra* note 23, at 415 (stating that occupational licensing is controlled at the state level and falls within a state's police powers).

258. *See* Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 90 (Tex. 2015) (ruling that irrelevant tasks labeled as training hours, egregious training expense, and various other practices proved that the licensing requirements were unreasonable, harsh, and violated the state's Constitution, interfering with citizen applicant's enjoyment of their life and liberty).

clearest and most expeditious way for occupational licensing reform falls to state legislatures. By adopting the suggested reforms outlined in the proposed ALLOW Act, states can begin what is sure to be a slow process of reforming occupational licensing boards and its requirements.

V. Conclusion

As it stands today, the ALLOW Act is Constitutionally defensible. Occupational Licensing has imposed a restrictive regime on both the consumer and the worker, created arbitrary barriers designed to increase the power of the licensing board and restrict competition. While necessary and useful in some professions, in the clear majority of licensed occupations, the need for legislative review is essential to determine less restrictive and workable means for individuals to obtain the right to work. The ALLOW Act provides a valuable legislative model for reviewing these regulatory regimes. Further, the ALLOW Act provides relief for military families,[259] who often feel the effects of occupational regulation most harshly, as they are more often subject to undergoing additional and duplicate training, education and lofty fees to obtain licensing for a profession they are already licensed in elsewhere.[260] While there are limits to expanding the legislation on the federal level, it is imperative that state officials passionate about protection the economic rights of their citizens look to the model legislation laid out in the ALLOW Act. Though progress may begin slowly, considering the backlash surely to come from existing professional boards upon dismantling these regimes, state legislators should remain diligent. By drafting their own legislation, states can truly promote their citizens' right to work.

259. *See* ALLOW Act, *supra* note 16 (stating one purpose of the act is "To promote economic opportunity for military families").

260. *See generally ALLOW Act Summary*, *supra* note 20.