

Policy Analysis

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THE CASE FOR A FREE MARKET IN LEGAL SERVICES

by George C. Leef

Executive Summary

Every state except Arizona prohibits the unauthorized practice of law (UPL); a person must possess an attorney's license to hold himself out as a lawyer. UPL prohibitions restrict the right to pursue a legitimate occupation and the right to contract with others. By imposing a costly barrier to entry, they distort the market for legal services. Consequently, consumers face higher prices and fewer choices.

UPL prohibitions are part of a wider phenomenon: governmental limitations on freedom to engage in voluntary economic transactions. Before the New Deal, the Supreme Court regarded economic liberty as worthy of constitutional protection. Since 1937, however, the Court has drawn a distinction between "fundamental" and "nonfundamental" liberties, with economic liberties consigned to the latter category.

Governmental interference with fundamental liberties faces "strict scrutiny" from the courts and is frequently invalidated, whereas interference with economic liberties receives only minimal scrutiny, implying that legislatures may do virtually anything in the field of economic regulation. That distinction is without any constitutional basis.

UPL prohibitions are neither necessary nor sufficient to protect consumers from incompetence. A competitive market, reinforced by remedies for fraud, breach of contract, and negligence, offers the optimal combination of price and quality.

Because they infringe upon individual freedom and serve no legitimate public purpose, UPL prohibitions should be repealed or struck down by the courts as unconstitutional.

George C. Leef is president of Patrick Henry Associates in East Lansing, Michigan, and adjunct professor of law and economics at Northwood University.

Introduction

Rosemary Furman had for years openly and flagrantly violated the laws of Florida. Her final appeal was turned down by the Florida Supreme Court, which ordered that she be jailed.¹ Her crime was to have helped, by preparing and filing the necessary legal papers, people who wanted a divorce. Her customers sought her services and willingly paid for them. None had ever complained about her work.

Before engaging in that "criminal activity," Furman had been a legal secretary doing exactly the same paperwork, but under the "supervision" of an attorney. He charged clients \$300 to handle a divorce, then paid her a small fraction of that amount for her work. Furman thought that high price for filing for divorce was unconscionable, particularly in cases where battered women were unable to obtain a divorce because they could not afford the attorney's fees. So she decided to go into business for herself, charging only \$50 for divorce filings. At first, she worked only with battered women. Later, however, she expanded her business to assist anyone who wanted her services. She did a large volume of business.

Despite her success--doubtless, because of it--Furman was headed for trouble: she was acting in violation of the law. Under Florida law, only licensed attorneys may engage in "the practice of law." She was not a licensed attorney, and the preparation of divorce papers was regarded by the Florida Bar as work only attorneys could do. After the bar brought action against her, she was ordered to cease and desist from her illegal conduct. She refused. For her unwillingness to stop doing work she wanted to do and her clients wanted her to do for them, she was ordered by the Florida Supreme Court to serve 120 days in jail, 90 of which would be suspended if she promised not to violate the law again. Subsequent intervention by the governor kept her from doing actual jail time. The point was made, though; she never again competed in the market for legal services.

The case of Furman, hardly unique, raises several important questions. Should it be illegal for individuals to enter a field of work and contract with willing clients without first obtaining governmental permission to do so? Does the U.S. Constitution give the states unchecked power to restrict the freedom to choose one's occupation, by imposing onerous and arbitrary licensing requirements? Does the licensing of attorneys (and other service providers) rectify some market failure and improve consumer welfare, or

does it merely restrain competition and waste resources? This study will endeavor to answer those questions.

Every state in the nation except Arizona has a statute or judicial rule that limits the practice of law to licensed members of the legal profession. So-called unauthorized practice of law (UPL) prohibitions make it illegal for any person who does not hold an attorney's license to assist another person if that assistance is deemed "practicing law." The statutes or rules do not define exactly what constitutes the practice of law, so it has been up to the courts to determine on a case-by-case basis what actions are illegal. Violations are usually misdemeanors, although they may be punishable as contempt of court. Aggrieved individuals may bring UPL cases, but that is extremely rare. UPL actions are virtually always brought by a bar organization seeking a permanent injunction, as in Furman's case, to keep the violator out of the legal services market in the future.

It is through UPL prohibitions that the legal profession maintains its "closed shop." They allow state and local bar organizations to control entry into the market. No one can obtain bar membership and the accompanying license to practice without passing the state's bar exam, and in most states no one is allowed to sit for the exam without having graduated from an "approved" law school.² To be approved under American Bar Association standards, a school must have a three-year course of study.³ Whether one wants to litigate the most complex cases or draft simple wills, the rite of passage is the same. While UPL prohibitions do not eliminate competition within the ranks of attorneys, they restrict competition from the outside.⁴

The desire for a closed shop is certainly not unique to the legal profession;⁵ given the profession's powerful influence on the law itself, however, it is not surprising that lawyers have been among the most successful of special interests in using government to accomplish that objective.

Although some prominent members of the profession have criticized UPL prohibitions and argued for a free market in legal services,⁶ support for them remains strong and unquestioning in bar organizations. Legislation that would open the market for legal services is certain to meet with their vehement opposition.

This study will take a critical look at UPL prohibitions from both a constitutional and an economic perspective.

The Constitution and the Right to Pursue an Occupation

Whether state governments have authority to deprive people of the right to pursue a chosen occupation or engage in other economic endeavors is a question that has arisen repeatedly in the United States. To prevent an individual from engaging in a trade or occupation altogether, or to impose onerous conditions upon his freedom to do so, raises serious constitutional questions. The Supreme Court has twice done an about-face on the degree of constitutional protection that must be given to economic liberties, including occupational freedom.

The Fourteenth Amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ratified in the aftermath of the Civil War, the amendment imposed broad federal restrictions on the exercise of state power. As is true of all constitutional language, however, the Supreme Court's interpretation of the Fourteenth Amendment would be crucial. Would it read the words as a sweeping protection for the civil and economic liberty of all citizens; or would it read them restrictively, thereby allowing the states considerable latitude to enact legislation circumscribing the freedom to engage in commercial activity? Just five years after the ratification of the Fourteenth Amendment, the Supreme Court adopted a very restrictive reading in what have come to be known as the Slaughterhouse Cases.⁷

The Louisiana legislature had passed a statute granting to the Crescent City Company a 25-year monopoly on the slaughtering of livestock in New Orleans and surrounding parishes. A suit was brought by butchers and other parties adversely affected by the statute on the ground that it infringed upon liberties guaranteed them under the Privileges or Immunities Clause. A sharply divided Supreme Court, in an opinion by Justice Samuel F. Miller, upheld the statute, declaring that the amendment protected only the privileges and immunities of citizens of the United States-- as opposed to citizens of a state. The Court held that the former were few and did not encompass such matters as earning a livelihood, which could be regulated by state governments. With that holding, the Privileges or Immunities Clause became a dead letter.⁸

The Court also found no merit in the argument that the Louisiana statute violated the Due Process Clause. Viewing "due process of law" as a mere procedural requirement, Justice Miller dismissed the argument that it barred the legislature from forcing people out of their occupations and outlawing businesses in which they had invested their money. Fearing that to decide the case otherwise would make the Court "a perpetual censor upon all legislation of the states,"⁹ the justices allowed Louisiana's monopolistic, freedom-restricting statute to stand.

In a powerful dissent, Justice Stephen J. Field wrote, "The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."¹⁰ Justice Joseph P. Bradley also dissented, writing, "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property."¹¹

The dissenters would have extended constitutional protection to the economic liberty of the excluded owners and workers. In the majority view, however, there was nothing constitutionally impermissible in state legislation that deprived citizens of the freedom to pursue their chosen businesses and occupations.

The Era of Constitutional Protection for Economic Liberties

The Court's acquiescence in allowing states to deprive individuals of economic liberty, as expressed in the Slaughterhouse Cases, would shortly be called into question. In 1887 the Court reviewed a Kansas statute that put liquor dealers out of business. The Court upheld the statute, but Justice John Marshall Harlan's majority opinion announced that state economic regulation would not pass without careful scrutiny of the fit between means and ends:

It does not follow that every statute enacted ostensibly for the promotion of [public morals, health, or safety] is to be accepted as a legitimate exertion of the police powers of the State. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the

public morals, or the public safety, has no real or substantial relation to those objects, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.¹²

The Court thus signaled that it would not assume that every statute or regulation claimed to be necessary to protect the public in some way actually did so, or was even intended to do so. Understanding the proclivity of legislatures to enact liberty-destroying measures that do nothing to advance the public interest, Justice Harlan warned that the Court would strike down legislation infringing upon "rights secured by the fundamental law." The Court's indifference to economic liberties was about to change.

The change became explicit in 1897. Louisiana had enacted a statute making it illegal for any individual or business in the state to obtain marine insurance from an out-of-state insurance company not licensed to do business in the state. The Allgeyer Company, which had contracted for marine insurance with an unlicensed New York insurance company, was charged with a violation of the statute. Allgeyer argued that the statute was invalid under the Fourteenth Amendment's Due Process and Equal Protection Clauses. After the Supreme Court of Louisiana had upheld the law, Allgeyer appealed to the U.S. Supreme Court.

Justice Rufus W. Peckham's opinion for the Court, declaring the statute unconstitutional, ushered in what has come to be known as the era of substantive due process. In the opinion, he laid out a broad understanding of the Fourteenth Amendment:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹³

The Court thus extended the reach of the Fourteenth Amendment, holding that it encompasses the rights to work, production, contract, and trade. Those rights are included in

the liberty protected by the Fourteenth Amendment and entitled to judicial protection against legislative interference no less than rights specifically mentioned in the Constitution, such as freedom of speech. After Allgeyer, legislatures were on notice that statutes interfering with economic liberties would face hard analysis from the courts.

The decision in Allgeyer was grounded in the Due Process Clause. Due process of law, the Court held, was not merely a procedural concept, a requirement that government correctly follow certain steps before taking life, liberty, or property from individuals. Due process was also a substantive concept: even if enacted and enforced following correct procedures, a statute would still run afoul of the Fourteenth Amendment if its substance unjustifiably deprived people of their economic liberties. In this interpretation, the Court followed Justice Thomas Cooley of the Supreme Court of Michigan, who wrote in 1868,

When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defense which have become established in our system of law and not by any rules that pertain to forms of procedure merely.¹⁴

Substantive due process would become the principal constitutional shield for economic liberties for 40 years after Allgeyer.

Arguably the most important and controversial case in that line was decided in 1905. Lochner v. New York¹⁵ involved a New York statute that prohibited bakery employees from working more than 10 hours a day or 60 hours a week. The statute was described by counsel for the state as a public health and safety measure, designed to protect the welfare of bakery employees by putting a reasonable ceiling on the number of hours they could work.¹⁶ The Court's majority, however, held that workers have a right, protected by the Fourteenth Amendment, to contract to work as they think best, not to be overridden by paternalistic legislation. Justice Peckham, writing the Court's opinion, asked, "Is this a fair, reasonable and appropriate exercise of the police power . . . or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or

necessary for the support of himself and his family?" His answer: "There is no reasonable ground for interfering with the liberty of a person or the right of free contract, by determining the hours of labor, in the occupation of a baker."¹⁷ Freedom of contract trumped this paternalistic exercise of the police powers.

Nor could the statute be saved by an appeal to an alleged need to ensure good quality bread for the public. Justice Peckham dismissed that argument, writing, "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."¹⁸ Thus, the mere assertion that a law was intended to have a favorable impact on public health or safety was not sufficient. Where constitutionally protected rights were involved, the Court would insist on much more than assertions and intentions. Finding scant connection between the purported objective of the statute and the liberty-restricting means employed, the Court declared it unconstitutional.

Lochner has been a much criticized opinion.¹⁹ It is attacked as an example of an arrogant judiciary substituting its own social policy for that of the democratically elected legislature. But that criticism misses the mark. The Court was not substituting its own policy for that of the New York legislature on the number of hours bakers could work; rather it was declaring that under the Constitution there could be no policy on the matter at all, that people have the right to decide for themselves how many hours they want to work and the right to contract accordingly.

Liberty guaranteed under the Fourteenth Amendment secures the rights of individuals to set their own policy when contracting out their labor. In Lochner, the Court held that such decisions are not subject to political control. Defending individual rights against overreaching legislative power is exactly what appellate courts are supposed to do. In a similar manner, striking down a law under the First Amendment doesn't establish an alternative publishing policy; it says government may not have a policy about what can be published.

Allgeyer and Lochner were followed by many other cases upholding individual rights over state attempts to legislate them away.²⁰ In Louis K. Liggett Co. v. Baldridge, for example, the Court held that a statute providing that only licensed pharmacists could open pharmacy businesses was "an unreasonable and unnecessary restriction upon private business" that had "no real or substantial relation to the public health."²¹ And in New State Ice Co. v. Liebmann,²²

the Court struck down a statute prohibiting anyone from entering the ice business unless he could demonstrate to a state commission that existing facilities were inadequate to meet the public's needs.

During this period, however, the Court was not entirely hostile to economic regulation. Thus, in Muller v. Oregon,²³ it sustained a statute regulating the number of hours women might work, and in Bunting v. Oregon,²⁴ the Court extended Muller by upholding a statute that established maximum hours for all factory and mill workers. The case distinctions are not very compelling. Nevertheless, before the New Deal, legislation that curtailed economic liberties faced difficult constitutional obstacles, and the "substantive due process" cases, in the words of Christopher Wonnell of the University of San Diego, "helped prevent a regression toward a medieval economy of privileged merchants and guilds."²⁵

The Decline and Fall of Constitutional Protection for Economic Liberty

Substantive due process came to an end during the national upheavals of the Great Depression, when legislators turned to liberty-constricting measures in an attempt to restore prosperity. Economic liberty was the principal casualty of the movement toward governmental control and planning.

The first case indicating a change in the Supreme Court's view of the relationship between the Fourteenth Amendment and economic liberty was Nebbia v. New York in 1934.²⁶ After New York had established a Milk Control Board empowered to determine milk prices in the state, a grocer named Nebbia was convicted of having sold two quarts of milk at a price below the board's established minimum. Adopting the state's theory that price control was necessary to save the dairy industry from "destruction," a five-member majority upheld the constitutionality of the statute. Justice Owen J. Roberts declared, "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."²⁷ Rejecting Nebbia's due process argument, he wrote that "due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."²⁸ New York, therefore, could punish dealers for selling their property to willing customers at prices different from those

decreed by the state. Nebbia's freedom to set his own prices and contract with customers was swallowed up by the Court's willingness to defer to the legislature's presumed competence.

Justice James C. McReynolds's dissent expressed the now-abandoned view that freedom to trade was a right of constitutional magnitude: "Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisal of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires the dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts."²⁹ The tide, however, had turned against the philosophy of limited government and the view that the Constitution protects the citizen's liberty to make business and occupational decisions for himself.

With the Nebbia decision, the Court's resistance to legislative interference with economic liberties began to crumble. In the following years, a dizzying array of statutes and regulations telling people what they must or must not do in the marketplace was enacted. Most of the federal legislation, when challenged, was upheld under the Court's new and expansive reading of the Commerce Clause of Article I, Section 8, of the Constitution. Originally, congressional power to regulate "commerce among the states" was limited to trade that crossed state lines; it was not thought to reach the conditions under which the traded goods were produced. But in N.L.R.B. v. Jones & Laughlin Steel,³⁰ the Court held that the regulatory power of Congress extended to anything that might affect interstate commerce. Since almost anything a producer may do can conceivably "affect" interstate commerce, the decision virtually eliminated any constitutional restraint on congressional regulatory power.³¹

With Nebbia, Jones & Laughlin Steel, and decisions that followed them, the Court demoted economic liberties from their older, protected status--which required government to cite an objective of great public importance and demonstrate that the regulation was the least intrusive means of achieving that objective--to a new, unprotected status--which only required government to allege that there was some reason to believe the legislation would achieve a legitimate end. The demotion was made explicit in United States v. Carolene Products Co.,³² a decision upholding a federal statute outlawing the sale of "filled milk" (milk with nonmilk fats added). Justice Harlan Fiske Stone wrote that "regulatory

legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis."³³

The "rational basis" test proved to be exceedingly easy to meet. In numerous cases following Carolene Products, the Court upheld statutes that curtailed economic liberty, uncritically accepting government rationales offered in their defense, and sometimes even itself suggesting rationales that might have animated the legislators. In Railway Express Agency v. New York,³⁴ the Court sustained a New York traffic ordinance that prohibited the sale of advertising space on trucks but allowed truck owners to advertise their businesses on their own vehicles. Challenged as a denial of equal protection by Railway Express, which wanted the freedom to contract to sell advertising space on its trucks rather than just advertise itself, the ordinance was upheld by the Court. Justice William O. Douglas wrote, "The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."³⁵ The contrast with Allgeyer and Lochner was striking. Freedom of contract can be restricted, under the "rational basis" test, provided only that the justices can imagine some reason that the legislators might have had in mind when they enacted the law.

Similarly, in Williamson v. Lee Optical Co.,³⁶ the Court rescued a patently anti-competitive statute with its own speculations on what the legislators might have thought. In that case, an Oklahoma statute prohibited opticians from fitting new lenses into old eyeglass frames unless they first obtained a prescription from an optometrist or ophthalmologist. The Court brushed aside the Fourteenth Amendment challenge to the law. It was enough for Justice Douglas to muse that the legislature might have thought the enactment would do something to "protect public health." One critic caustically observed that a "state statute that, on grounds of public health, forbids opticians to replace eyeglass frames without a prescription signed by an optometrist or ophthalmologist can have no real purpose other than to increase the income of optometrists and ophthalmologists at the expense of opticians--and consumers."³⁷ The special-interest nature of the law must have been apparent to the members of the Court, but they were adamant in wanting to preserve legislative authority in the economic realm.

A case that is particularly relevant to UPL prohibitions is Ferguson v. Skrupa,³⁸ involving a Kansas statute prohibiting the business of debt adjusting. Under that practice, a debtor and a debt adjuster enter into a contract whereby the debtor makes periodic payments to the debt adjuster, who then pays creditors pursuant to an agreed-upon plan, keeping a percentage for himself. The statute allowed only lawyers to practice debt adjusting, if done pursuant to the "practice of law." Skrupa, who had been in the debt-adjusting business, challenged the statute, arguing that a complete prohibition was unreasonable, since the occasional abuses that might arise in debt adjusting could be remedied in other, less restrictive ways than putting nonlawyer debt adjusters out of business. The federal court that heard the case agreed and struck down the statute as a violation of the Fourteenth Amendment.³⁹

Kansas appealed to the Supreme Court, knowing that under the rational basis test it was certain to win. It did. Justice Hugo L. Black, writing for the Court, scolded the lower court for having "adopted the philosophy that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. . . . [I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation."⁴⁰ Hammering home the point that the Court was utterly indifferent to assaults on economic liberty, Black added, "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."⁴¹

Skrupa had also argued that because the statute permitted lawyers to engage in debt adjusting, his right to equal protection of the law was violated. Justice Black dismissed that argument under the rational basis test: Kansas legislators might have thought that it was reasonable to allow lawyers to engage in debt adjusting because the debtor might need legal advice that a layman could not lawfully give him under the Kansas UPL statute.⁴² One monopoly served to justify another.

The Court's message in Ferguson v. Skrupa could not have been more clear: If legislation destroys honest businesses and creates monopolies for favored interest groups, the judiciary must allow it because courts are not to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."⁴³ The precedent of deferring to the legislature whenever there is

or might be some rational basis for assaults on economic liberties continues to this day.⁴⁴

Fundamental Rights and Strict Scrutiny

The Court's rubber stamping of legislation restricting or abrogating economic liberties contrasts sharply with its strict scrutiny of legislation affecting what the justices regard as fundamental rights. Consider, for example, Griswold v. Connecticut,⁴⁵ which declared a statute forbidding the sale of contraceptives unconstitutional. Justice Douglas, writing the majority opinion, justified the result on the ground that the statute violated the "fundamental" right of privacy that he found in "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments. For the majority, privacy, although not mentioned in the Constitution, was a fundamental right, which the ban on the sale of contraceptives violated. Because the Court regarded the right of privacy as fundamental, it applied strict scrutiny in analyzing the case.

Statutes analyzed under strict scrutiny are doomed. Under this analysis, the government is required to show (a) that it is attempting to achieve an objective of vital public interest, (b) that the statute in question will in fact do so, and (c) that it has chosen the least intrusive means possible of doing so. The presumption is strongly against the constitutionality of the law. Just as the rational basis test makes it easy to find a reason to uphold a statute, strict scrutiny makes it easy to find a reason to strike it down. As Justice Douglas wrote, if regulations "sweep unnecessarily broadly and thereby invade the area of protected freedoms," they are invalid.⁴⁶ Connecticut's statute banning the pill "swept too broadly" and was therefore unconstitutional.

It is instructive to compare Griswold with Ferguson v. Skrupa. The Kansas statute banning debt adjusting was allowed to stand, even though it could easily be argued that less restrictive means could have been employed. The Connecticut statute was declared unconstitutional because it did not employ a less restrictive means. The outcomes are explained solely by the fact that the Court pinned the "fundamental" label on the "right of marital privacy" in Griswold but did not pin it on Skrupa's right to continue in business.

Another right the Court has graced with the "fundamental" designation is voting. State laws that fail to comply

with the Court's rules on voting rights and optimal apportionment will be invalidated. Thus, in Reynolds v. Sims,⁴⁷ a case involving the apportionment of the Alabama legislature, Chief Justice Earl Warren wrote, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."⁴⁸

Whether the right to exercise the franchise in a free and unimpaired manner is "preservative of other basic civil and political rights" is debatable. What is not in debate is that a large percentage of Americans eligible to vote do not choose to do so. A right that the Supreme Court considers fundamental is one that many citizens view with complete indifference. Voting, privacy, freedom of speech, and other rights for which the Court shows great solicitude may indeed be fundamental, but most people regard the right to engage in a chosen occupation, the right to contract for the purchase or sale of goods and services, and economic liberties generally, as being at least as important to their success and happiness as are the Court's preferred rights. Unfortunately, the Court has not seen fit to protect those other rights.

Arguably, that rights dichotomy reflects the prejudice of jurists, educated in elite law schools, who apparently believe that voting, privacy, speech, press, and other rights denominated as fundamental are of far greater significance to people and the well-being of the nation than are mere economic rights. Nobel laureate Ronald Coase offers this view on the reason for the Court's hierarchy of rights:

The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads intellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them.⁴⁹

The Court's distinction between fundamental personal, political, and intellectual rights, which the government must respect, and nonfundamental economic rights, which the gov-

ernment may disregard under almost any pretext, may appeal to some intellectuals, but does it have any basis in the Constitution?

The Importance of Economic Liberty

F. A. Hayek has argued that economic rights, reduced by the Supreme Court to conditional privileges, are as essential to human welfare and progress as are fundamental rights. Human well-being depends as much on the freedom to work, to trade, or to contract as on the freedom to think, to speak, or to vote. In Hayek's words,

The importance of freedom . . . does not depend on the elevated character of the activities it makes possible. Freedom of action, even in humble things, is as important as freedom of thought. It has become a common practice to disparage freedom of action by calling it "economic liberty." But the concept of freedom of action is much wider than that of economic liberty, which it includes; and what is more important, it is very questionable whether there are any actions that can be called merely "economic" and whether any restrictions on liberty can be confined to what are merely "economic" aspects.⁵⁰

Economic liberty is the foundation for the realization of nearly all human goals. The ability to earn a living and thereby acquire the goods, services, and resources that we need for everything from raising a family and enjoying a vacation to supporting the fine arts and writing political tracts is impeded, and sometimes eliminated, by the kind of statutes that easily pass by the Court's rational basis test.

Consider, for example, the case of Nancy Dukes. She had operated a hot-dog pushcart business in New Orleans until the City Council enacted a law that prohibited pushcart vendors who had not been licensed and operating continuously for eight years. Dukes was forced out of business because she had only operated for two years. One hot-dog vendor was "grandfathered" in under the eight-year rule and thereafter enjoyed a monopoly.

Dukes challenged the law, arguing that it was an unconstitutional deprivation of her liberty and property. The Fifth Circuit Court of Appeals agreed with her,⁵¹ but this victory for economic liberty was short-lived. New Orleans

appealed and the Supreme Court reversed. Again emphasizing the constitutional insignificance of economic liberty, the Court declared that "in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."⁵² Duker was deprived of her livelihood because the Court did not regard the New Orleans law to be "wholly arbitrary."

The Court's distinction between rights it treats as fundamental and those it consigns to the nether regions of constitutional jurisprudence is untenable. Voting rights, freedom of speech, and other political-intellectual rights are indeed important, but no more so than the right to pursue one's chosen livelihood and engage in other economic activities. The Founders took pains to protect the liberty of the citizens in all its many aspects, not just those that the Court has chosen to favor. As Professor Bernard Siegan of the University of San Diego observed,

When the Constitution was framed, separation of powers, checks and balances, and judicial review were political and economic ideas. They would safeguard the individual in his personal, business, or professional life from governmental oppression. Society would benefit because liberty was regarded as the greatest encouragement to wisdom, productivity, creativity, and contentment.

The same reasoning remains applicable today. We still rely on freedom to advance understanding and culture as well as to supply food, clothing, and shelter. But those constitutional aspects now operate to augment liberty in one area and not the other.⁵³

Economic liberties were unquestionably important to the framers of the Constitution. Professor Richard Levy of the University of Kansas notes that "economic rights are fundamental in terms of the importance attached to them by the framers, their role in the traditions and collective conscience that underlay our conceptions of ordered liberty, and their contribution to individual and societal well-being."⁵⁴ Applying the rational basis test and taking Justice Black at his word--that the Court should remain indifferent to any and all economic controls a legislature may want to enact--leaves a vast sphere of liberty entirely at the mercy of majoritarian politics. That is at odds with the letter and spirit of the Constitution.

The best approach for the Court to take in restoring economic liberties to their proper constitutional place is an inquiry beyond the scope of this paper.⁵⁵ What is vital is that, wherever in the Constitution the Court chooses to ground protection for freedom to engage in economic transactions, including the freedom to pursue an occupation, the Court abandon the minimal scrutiny standard that has so often allowed legislation to deprive people of economic liberty upon the flimsiest of pretexts. When a legislative body seeks to place obstacles in the way of people who desire to earn an honest living, it should be prepared for judicial review asking whether the law in question is one that is necessary to advance an important public purpose and does so in the least intrusive way.

The Court has never decided a case challenging the constitutionality of UPL prohibitions. Under the current rational basis analysis, the outcome of such a case is obvious--the state wins. But when the state wins, a large number of individuals lose. People who might have become successful legal practitioners, such as Rosemary Furman, are compelled to pursue some other line of work. People who might have benefited from their services, as those who dealt with Furman did, will have to choose among fewer and more expensive service options. The freedom to decide who is authorized to serve another is removed from the hands of the would-be contracting parties and placed in the hands of an organization of practitioners with a strong interest in limiting competition and protecting the status quo.

The freedom to engage in useful work should not be treated as simply a matter of legislative prerogative, like setting speed limits. It is a matter of liberty and justice. As James Madison wrote in 1792,

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of the citizenry that free use of their faculties, and the free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so-called.⁵⁶

If the Court were to restore constitutional protection for economic liberties and ask hard questions about UPL prohibitions, could they survive the scrutiny? To that question, we now turn.

UPL Prohibitions and Enforcement--A Brief History

Early American history was characterized by a laissez faire attitude toward labor and the market for services. During the colonial period, bar organizations in some cities succeeded in establishing a measure of control over entrance into the legal services field, but in the years after the Revolution, most restrictions on legal practice were abolished. Legal historian Barlow Christensen writes that "the close of the Revolutionary War saw a concerted attack upon the privileges of the legal profession, a movement that was exacerbated by the rising spirit of 'Jacksonian democracy.'"⁵⁷ By the time of the Civil War, no significant restrictions remained, and several states had statutes or even constitutional provisions specifically stating that every citizen was entitled to practice law.⁵⁸ The market for legal services was virtually free of government regulation.

Individuals who wanted to earn a living (or merely supplement other income) by providing legal assistance were free to decide how to prepare themselves: One might read law on his own, as Abraham Lincoln did; serve an apprenticeship with a lawyer, as Clarence Darrow did;⁵⁹ or attend one of the small number of law schools then in operation.⁶⁰ No law specified the kind or duration of preparation for legal practice and, according to legal historian Albert Harno, "A substantial portion of the practicing bar was unconvinced, if not distrustful, of the benefits that might flow to a lawyer from either a university or law school education."⁶¹

Aspiring lawyers weighed the costs and benefits of the various human capital investments they could make to further their careers and chose among them, searching for the optimal education and training investment, given their particular circumstances.

Beginning in the latter decades of the 19th century, the legal profession began to assert its growing political influence and pressed for legislation to set minimum educational qualifications for bar membership.⁶² By 1902, 27 of the 45 states had established such qualifications. The argument made by the bar in favor of minimum educational requirements was that they would improve the quality of legal representation. Although that public-interest rationale may have been sincerely believed by some, raising admission standards was clearly in the interest of lawyers. During the laissez faire years, the lawyer-to-population ratio had been steadily rising, leading lawyers to complain about overcrowding at the bar. Christensen comments that "the effort to impose and to raise educational standards for admission to law practice carried with it the added attrac-

tion of limiting the number of new lawyers admitted. That it in fact did so is perhaps reflected in the drop in the lawyer-to-population ratio in the years following."⁶³

Reducing the number of lawyers, however, left the bar facing increasing competition from laymen and corporations, such as title insurance companies. The legal profession next turned its attention to that "problem." In 1930 the ABA appointed its first Committee on Unauthorized Practice of Law; many state and local bar organizations also did so and began to lobby for the enactment of statutes prohibiting "unauthorized" practice of law. UPL prohibitions were sought, successfully in every state, by the bar, with the argument that they were needed to prevent consumers from being harmed by incompetent practitioners. The consumer protection rationale, however, has met with much skepticism.

Professor Deborah Rhode of Stanford University, for example, has written, "Although the organized bar has often suggested that the campaign against lay practice arose as a result of a public demand, the consensus among historians is to the contrary."⁶⁴

The UPL statutes effectively cartelized the legal profession. Only licensed attorneys were thereafter permitted to "practice law," a term that was never carefully defined, which left it up to a generally sympathetic judiciary to determine on a case-by-case basis just where a person's conduct encroached upon forbidden turf. Many courts took their lead from a very general formulation by then-judge Justice Benjamin N. Cardozo, that "the practice of law encompasses all those services traditionally rendered by lawyers."⁶⁵ The law and zealous unauthorized practice committees would shield lawyers from unwanted outside competition as much as possible.

Over the years, courts have identified many activities as UPL⁶⁶ and, less frequently, ruled some lay activities to be free of UPL restraints.⁶⁷ No case, however, can do more than fix a single point on the boundary between the practice of law and activities that laymen may undertake. The imprecision of the law makes it easy for unauthorized practice committees to threaten legal action against nonlawyers whose activities could plausibly be called "services traditionally rendered by lawyers."

For the most part, the bar has tried to make its UPL enforcement unobtrusive. Rhode explains, "By design or neglect, the organized bar has settled on an approach involving low-visibility enforcement efforts by state and local unauthorized practice committees, attended by as

little public discussion as possible."⁶⁸ Where UPL cases have garnered media attention, they have been a public relations headache for the bar. The Florida Bar's prosecution of Furman, as noted earlier, is a case in point.

In recent years, the bar's attempts to expand the boundaries of UPL have led to "turf wars" with other professions. In 1996, for example, the State Bar of Virginia managed to get legislation introduced that would have declared real estate closings to be unauthorized practice if handled solely by real estate agents. When it became apparent that the bill would fail in the legislature, the bar sought an opinion from the Virginia Supreme Court to the effect that real estate closings could not be done without an attorney.

The Virginia Bar's effort was opposed not only by a coalition of realtors and bankers but by the Federal Trade Commission and the Department of Justice. Anne Bingaman, head of the Antitrust Division, and William J. Baer, director of the Federal Trade Commission, argued in a joint letter to the executive director of the Virginia State Bar, "By ending competition from lay settlement services, the Opinion would likely increase the cost of real estate closings for consumers. . . . The restriction would adversely affect all consumers who might prefer the combination of price, quality, and services that a lay settlement service offers."⁶⁹ Bingaman and Baer cited the New Jersey Supreme Court's 1995 ruling, in a similar controversy, that competition benefited consumers, who saved money but suffered no demonstrable harm from conducting real estate closings without legal counsel.⁷⁰ After the Virginia legislature passed a bill declaring that real estate closing work was not the practice of law, the Virginia Bar withdrew its proposed ruling to the contrary.

Notwithstanding that setback, we can anticipate an ongoing effort by bar associations to prevent consumers from contracting with nonattorneys for legal services, always in the name of consumer protection. As we shall see, however, UPL restrictions do not protect or benefit consumers; on the contrary, they harm them.

Do UPL Prohibitions Protect Consumer?

Do UPL prohibitions serve any valid purpose? Although it is commonly believed that they improve consumer welfare by ensuring standards of competency, we will see in this section that they are in fact counterproductive.

Occupational Licensure, Market Standards, and Quality of Service

In the United States, many occupations are subject to licensing requirements.⁷¹ Licensing statutes provide that only those individuals who have obtained a license as prescribed by law are permitted to offer their services to others. If an unlicensed individual attempts to enter the market, he can be enjoined from doing so and may be subject to other penalties, whether or not any person he serves suffers an injury. The legal profession is just one of many service markets to which entry has been foreclosed to anyone who has not undertaken a politically determined course of preparation.

Among economists, licensure is widely understood as a form of rent seeking by special-interest groups--that is, an endeavor to use the power of the government to secure higher earnings than would be possible in a free market. Thomas Sowell writes,

Escalating qualification standards in the licensed occupation almost invariably exempt existing practitioners, who thereby reap increased earnings from the contrived scarcity, without having to pay the costs they impose on new entrants in the form of longer schooling, tougher qualifying examinations, or more extended apprenticeship. . . . Although "the public interest" is a prominent rhetorical feature of occupational licensing laws and pronouncements, historically the impetus for such licensing comes almost invariably from practitioners rather than the public, and it almost invariably reduces the quantity of new practitioners through various restrictive devices, and the result is higher prices.⁷²

Licensing thus leads to higher earnings for a few and higher costs for many.

With less competition, licensees can charge higher prices. Because there are fewer lawyers than clients, monopoly gains are concentrated while costs, higher prices, and reduced contracting options are widely diffused among the public. As public-choice economists have pointed out, in the arena of democratic politics, organized interest groups seeking concentrated benefits for their members have a great advantage over their opponents. The interest group is well informed about the issue and will devote considerable resources to lobbying and public relations to sway

legislators, but members of the public who will be made worse off as a consequence of the licensing statute will have little incentive to organize opposition. Few even know about the legislation, much less comprehend its adverse impact on them.⁷³

The public rationale given by the profession seeking restrictive licensure and the politicians who sponsor and advance the legislation is that it is needed to protect consumers against harm they might suffer from dealing with incompetent service providers. In the absence of licensing, the argument goes, there would be no guarantee that individuals holding themselves out as competent to perform certain services would in fact be competent. Licensing, its defenders argue, protects consumers by imposing standards where there would otherwise be none.

On a superficial level, the argument seems plausible. Without licensing statutes, no legally articulated standards restrict entry into a business or profession. If there were no attorney licensing statutes backed up with UPL prohibitions, it would be legal for a person with little or no training in the law to hold himself out as an attorney. Still, the absence of statutory standards does not mean there are no standards at all. The market imposes the unarticulated--but very real--standard that those who enter it must be able to meet the competition. This is the test of the marketplace: can you earn enough, in the face of free choice among consumers, to remain in the field?

The market's standard is one of performance. The consumer is usually not concerned with the means by which practitioners acquire their skills. He cares only that he receives good value for his money. In any occupation, licensed or not, practitioners have to prepare adequately or they will quickly find themselves unable to handle the demands made on them. Failure to satisfy enough customers will threaten the ability to remain in business. Some new practitioners prepare by serving an apprenticeship with an established professional; others choose to take courses. In either case, each individual has a strong incentive to prepare well enough to be able to perform satisfactorily when he is on his own.

How do practitioners-in-training know when they are competent to handle work on their own? Schools that provide training courses, whether in law, hair cutting, truck driving, or anything else, have an incentive to provide an adequate level of preparation. It would be ruinous to their reputations to be known as places that took money from stu-

dents but failed to train them well enough to succeed. Schools might desire to overtrain students to increase their revenues, but competing schools would eventually arise to offer more cost-effective alternatives. A competitive market for training drives out training programs that are not a good value for the time and money the student invests.

In the free market, ineffective education and training programs can no more survive than can any other product that doesn't work.

The question is not whether there will be standards but whether they will be politically determined or market determined. The weakness of politically determined standards is that they are set by people who do not bear the cost of, and indeed may gain from, setting them too high or basing them on irrelevant criteria. The politically determined licensing standard for beauticians in Oregon mandates 2,500 hours of training. In California, candidates for an architect's license must be able to discuss the tomb of Queen Hatshepsut. After analyzing many licensing requirements, S. David Young wrote that written exams often "test little more than the ability to memorize irrelevant facts."⁷⁴ Whereas the nonarticulated standards of the market focus on the ability to do satisfactory work, political standards are too often motivated by the desire to artificially raise costs and restrict entry into the field.

In the legal services market, the licensing criteria are fulfilled by law school graduation, passage of the state bar exam, and (in most states) membership in the state bar association. A free market in legal services, according to a typical statement, would "result in the most unwary, guileless members of the public being incompetently represented and advised, if not victimized and defrauded."⁷⁵

The demand for high standards to protect the public seems appealing. As we shall see, however, the benefit to consumers of having government--or, more accurately, the organization that represents legal practitioners--set training and competence criteria is exaggerated, if it exists at all. Moreover, the consumer protection rationale overlooks the significant costs that this policy imposes. UPL prohibitions are, in fact, neither necessary nor sufficient to protect consumers from incompetent or unscrupulous practitioners.

UPL Prohibitions Are Not Necessary

A free market in legal services combined with consumer remedies for fraud, breach of contract, and negligence gives consumers at least as much protection against incompetent and unscrupulous practitioners as does the prohibition against UPL.

The need to pass the test of the market imposes unarticulated, but nevertheless powerful, standards on those who wish to succeed. To enter any service market requires an investment of time and capital. Self-interest drives people to search for the most profitable uses for their time and capital. An ill-considered investment will mean, at the minimum, forgoing better opportunities; often, it entails partial or complete loss of the individual's capital. The prospective cost of failure deters people from entering markets in which they are not competent. Someone who can barely play a C major scale does not invest the time and money necessary to enter the market as a piano teacher, despite the absence of any licensing requirements for that profession. People rationally spend their time and money in pursuit of the career that is most apt to be profitable and eschew the many that are apt to end with dissatisfied customers suing to get their money back.

Because people do not want to fail, they desire information about the standards that the market has established.

How good is good enough? They also desire the training necessary to reach that level of ability. Those demands give rise to a supply of training opportunities to develop the human capital needed for success. To prepare to enter the legal services market in 1900, for example, a person could have chosen from full-time or part-time law schools offering courses of study ranging from one to three years. Or he might have chosen to become an apprentice in a law office and learn the law in a more hands-on setting. That choice was left to the individual, yet there is no evidence that public dissatisfaction with the services rendered by lawyers was higher then than it is today.

In the states where UPL prohibitions have been repealed or relaxed,⁷⁶ unlicensed legal practitioners, mostly paralegals and legal secretaries, handle work that is within their capabilities and commonly refer more difficult or unfamiliar legal work to lawyers. They do so for the same reason that lawyers refer cases outside their area of expertise to other lawyers, even though they are not legally bound to do so: it is not in their interest to try and possibly fail at work that is beyond their capabilities.

There is no law to prevent a patent lawyer from handling litigation under the Uniform Commercial Code, for example, but lawyers very seldom take cases in fields in which they have no expertise.⁷⁷ More time is required to prepare a case in an unfamiliar area of the law; the risk of malpractice is increased; and unsatisfactory performance could damage the lawyer's reputation.⁷⁸ Those same considerations deter other legal practitioners from straying outside of their areas of competence.

Marketplace incentives and disincentives work to filter out most incompetence prospectively. Individuals rarely enter a field unless they know they are good enough to compete. Moreover, consumers have a further protective resource--their own information-gathering ability. Self-interest drives them to search for information about the reliability of service providers with whom they would contract. Consumers can and do obtain such information by asking others who have needed the same kind of service. They can check with the Better Business Bureau or the state Office of Consumer Protection. They may inquire about the length of time a service provider has been in business, duration being an indicator of success. The presence or absence of advertising is another. Service providers probably would not invest in advertising only to squander that investment by performing incompetently. When consumers search for evidence of reliability, they are usually able to screen out charlatans.

The market process thus minimizes the problem of incompetent practitioners. The likelihood of incompetent service is greatest where the consumer does not go into the market for help but instead seeks advice from persons not in the market--friends or relatives, for instance--who are not concerned about repeat business because they are not trying to earn a living in that field. Market incentives will not deter nonmarket transactions.

Neither, however, will laws prohibiting such dealings deter them. If Person A asks Person B (a friend or relative) for legal assistance, B is not apt to consult the statute books to find out whether he may help A without violating state law. Such random cases of unauthorized practice almost never come to light, and even when they do, prosecution accomplishes nothing either for A (if indeed he is injured) or for other persons seeking advice from B (if indeed there would be any). Rather than deterring nonmarket legal assistance, which has the strongest likelihood of resulting in consumer harm, UPL prohibitions actually en-

courage it by raising the price of legal services on the free market.

Self-interested behavior in the free market, in sum, efficiently deters and eliminates incompetence. It does not guarantee that no consumer will ever receive bad advice or service, but it minimizes the instances of consumer harm.

As Milton and Rose Friedman have written, "On the whole, market competition, when it is permitted to work, protects the consumer better than do the government mechanisms that have been increasingly superimposed on the market."⁷⁹

Studies that have been done on unlicensed legal practitioners support the argument that market competition leads to suitably high performance standards. In California, where UPL prohibitions are on the books but not enforced, the Committee on Public Protection of the California Bar, including both lawyers and nonlawyers, concluded unanimously that unlicensed legal practitioners pose no danger to consumers and fill an important role in assisting people who would otherwise find it difficult to afford legal assistance.⁸⁰ Similarly, a Canadian study concluded that "the great majority of clients of independent paralegals feel that they have received satisfactory legal services. In fact, the information assembled by the Task Force suggests that any intimation of large scale incompetence or fraudulent activity by independent paralegals is incorrect and misleading."⁸¹

Furthermore, there are a number of areas in which consumers are free to choose legal assistance by a nonlawyer, and in those areas nonlawyers evidently perform capably. Many federal regulatory agencies permit parties to be represented by nonlawyers in disputes before them that often involve difficult legal issues. A 1984 ABA study concluded that lay representatives perform satisfactorily before such agencies.⁸² To cite one example, the Patent Office limits practice before it to those who can pass its exam in patent law and procedure, but the exam is open to lawyers and nonlawyers alike, and there is no evidence that parties choosing nonlawyer representation fare any worse than those choosing lawyers. In Sperry v. Florida, the Supreme Court rebuffed an attempt by the Florida Bar to prevent nonlawyers from representing Floridians before the Patent Office. The Court quoted approvingly a study by the Patent Office stating that "there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct."⁸³

Where allowed, nonlawyers do competent legal work ranging from the drafting of wills to the handling of patent applications. That sharply calls into question the assumption behind UPL prohibitions that only individuals who have graduated from law school and passed the bar exam can be competent legal representatives. The great proliferation of communication and learning technologies over the last decade has made it easier than ever for people to acquire knowledge. Nontraditional education and training programs abound in fields where government policy has not locked in a particular course of study to gain entrance--for example, M.B.A. programs in finance or marketing that efficiently train individuals to compete in those areas. In both fields, the market sets the standards for training and competence, yet there is no clamor for higher standards for M.B.A.s.

Because the free market creates strong incentives for competence and strong disincentives for incompetence and could efficiently train prospective legal practitioners to meet its standards, government need not establish politically determined standards or enact UPL prohibitions.

High Standards--And High Costs

The inevitable cost of government intervention is high legal fees--higher than they would be in a free market. Requiring a costly three-year course of study as the precondition to licensure increases the investment needed to enter the legal services field. Roger Cramton of Cornell Law School comments,

The ABA's efforts to assure the competence of new entrants have had the effect of increasing the cost as well as the quality of legal education. When the opportunity costs of foregone income are taken into account, the investment in human capital presently required to become a lawyer amounts to at least \$100,000. A serious question, infrequently discussed, is whether the required preparation and its cost are essential in all areas of law practice. Some types of routine client service, such as sales of residences, simple wills, and uncontested divorces, may not require lawyers who are as thoroughly educated and as costly as lawyers are today. If these and other areas are opened to competition from other service providers, a market test of price and quality would be provided.⁸⁴

That very few law schools offered three-year programs before they were mandated is evidence that the mandate is inefficient. It compels what is for many an overinvestment in legal education. Limiting the practice of law to those who can afford the high entry cost reduces competition and drives up legal fees.

To illustrate the impact, let us perform a thought experiment. Suppose that standards for legal education, already high, were raised even higher. If three years of law school help lawyers to analyze and argue cases, spot arguments, avoid mistakes, and give their clients good representation, why should we not make it six? Imagine that we have done so. As a further measure to ensure competence, suppose that bar exams were made longer, harder, and a perfect score was required to pass.⁸⁵ What would the results be?

The cost of entrance into the legal services market would be significantly higher than it is today. Fewer individuals would prepare for legal practice, but those who managed to obtain licenses would be magnificently trained. With fewer suppliers of legal services, the price of their services would rise. Many people who could barely afford the services of a lawyer today would be priced out of the market. They would have to choose among three alternatives: (a) attempt to handle their legal problem themselves, (b) contract with an unauthorized practitioner, or (c) leave the problem unresolved. Any of those alternatives could prove harmful to the individual; all three are more risky than contracting with a practitioner good enough to pass the test of the market. Thus the quest for higher standards would lead to more cases of consumer harm.

If our hypothetical doubling of the human capital investment to become a legal practitioner has the effect of pricing some people out of the market, so does the current high-standards policy. A study commissioned by the ABA found that, in 1987, 40 percent of low-income Americans experienced civil legal problems for which they obtained no professional help.⁸⁶ Derek Bok, former president of Harvard University and dean of the Law School, writes, "The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens."⁸⁷

Economic theory instructs that decreased competition raises prices and increased competition reduces them. Rarely, however, do we have anything like a laboratory experi-

ment to prove it; but a change in the law in England several years ago demonstrates that legal fees do fall with increased competition.

Conveyancing--the legal work associated with transferring real estate titles--had long been a monopoly of the legal profession. Then in 1984, Prime Minister Margaret Thatcher's administration announced that the monopoly would end in 1987, at which time "licensed conveyancers" would be allowed to compete for conveyancing business. They would not have to be members of the bar; they would simply have to demonstrate proficiency in conveyancing work on an examination.

After the announcement of that change, the prospect of increased competition had a dramatic impact on the market for conveyancing services. Economists Simon Domberger and Avrom Sherr studied the effects and observed that fees charged by lawyers for conveyancing began to fall almost immediately--three years before the influx of new competitors. The imminence of a freer market led to significant benefits for consumers: "Price discrimination has been reduced, conveyancing costs have fallen in real terms, and there has been a measurable improvement in consumer satisfaction."⁸⁸

It is not possible to precisely quantify the cost savings to consumers from a free market in legal services, but anecdotal evidence on the cost differential between the fees charged by lawyers and the fees charged by nonlawyers suggests that, for some services at least, the differential is considerable. Consider this instance, reported in Arizona Attorney:

Bob Haves knew he needed help in filing for a divorce when a nine-year search finally turned up his wife in Georgia. But when the air-conditioning and heating mechanic was told by an attorney that he needed to pay an \$800 retainer up front, Haves balked. Instead, he turned to one of a growing number of legal document services in Arizona that helped him prepare and file his divorce and even sort through child support, child custody, and spousal maintenance problems. Haves believes that the \$175 he paid for the service was a bargain.⁸⁹

In Arizona, consumers like Haves benefit significantly from the existence of a free market in legal services. While a competitive market does not ensure that everyone can afford

legal services, it brings them within the reach of many more people.

Poorer individuals are not the only ones harmed by entry barriers that raise the cost of legal services. Any person, business, or other organization is made worse off to the extent that high legal costs divert resources from other uses. In some cases, injured parties will passively accept otherwise compensable losses because the cost of pursuing a legal claim may exceed the amount likely to be recovered. If the dispute is too large for small claims court and too complex to be resolved without retaining an attorney, the cost of pursuing justice can make justice unattainable.

Both economic theory and experience indicate that consumer welfare is optimized by a legal services market free of artificial barriers to competition. The bar's insistence on politically dictated "high" standards has this effect: a small number of harmful transactions--contracts with unlicensed practitioners who make irremediable errors--may be avoided at the expense of foreclosing a far larger number of transactions that would have been completely satisfactory and would have saved the consumer money. Regulation to bring about high standards thus leads to increased costs and decreased contracting options with little or no countervailing benefit to consumers.

The Insufficiency of UPL Prohibitions

If UPL prohibitions are not necessary to protect the public against incompetence, neither are they sufficient to do so. Mandating that legal practitioners graduate from approved law schools and pass a bar examination does not ensure their competence in handling legal matters.

A law school education trains students broadly but without great depth. They learn about legal writing and research and choose from a smorgasbord of course offerings that provide a good overview of basic doctrines and leading cases. But that does not make them competent legal practitioners. A student who has just passed a course in workers' compensation law, for example, undoubtedly understands the highlights of the law, but he would not be a good choice to represent a party in a workers' comp dispute. The ability to handle a case competently comes only after much more learning, usually under the tutelage of an experienced practitioner.

Our civil and criminal law is so vast that there are many fields a student will never encounter in law school--possibly including the very field in which he will later specialize. Law school is a useful means of acculturating a person in the law and teaching him how to learn more about it, but it does not create expertise or ensure case-handling competence. Most of what a good lawyer knows, he learns after law school.

The broad law school curriculum is often defended as enabling lawyers to spot issues--to see the full legal implications of a dispute. To some extent it does, but a law school degree affords little assurance that a lawyer will not miss an issue, especially if it relates to an area that was not part of his formal studies.

Passing the bar exam does not ensure competence in helping people with legal problems. A passing score demonstrates only that the individual was able to retain a large quantity of the bar review material for a short period of time. It does not demonstrate encyclopedic knowledge; indeed, a candidate can answer 20 to 30 percent of the questions incorrectly and still pass in most states. That fact alone belies the notion that the law school-bar exam tandem guarantees that lawyers will be competent. Rhode observes, "Law school and bar exam requirements provide no guarantee of expertise in areas where the need for low-cost service is greatest: divorce, landlord/tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions."⁹⁰

No system of training can provide society with mistake-proof professionals in any field. What minimizes instances of incompetence is that practitioners, no matter how they may be regulated or how they may have been trained, have a strong incentive to perform up to the standards of the market.

Other Justifications for UPL Prohibitions

Consumer protection against incompetence is by far the most common rationale advanced for UPL prohibitions. There are others, but they provide no better justification for prohibiting nonlawyers from offering legal services.

A variant of the consumer protection argument is the contention that consumers are better off if their legal needs are handled by members of the bar. Supposedly, the bar's enforcement of its code of ethics gives consumers an

added measure of protection against dishonesty and conflict of interest. Consider this pronouncement by the Supreme Court of Minnesota:

The law practice franchise is based on the three-fold requirements of ability, character, and responsible supervision. The public welfare is safeguarded not merely by limiting law practice to individuals who have the requisite ability and character, but also by the further requirement that such practitioners shall thenceforth be officers of the court and subject to its supervision. . . . Protection of the public is set at naught if laymen who are not subject to court supervision are permitted to practice law.⁹¹

Lawyers are officers of the court, subject ultimately to the control of the supreme court. Nonlawyers are subject only to the ordinary civil and criminal law. Does it follow from this that consumers should only be allowed to obtain legal services from lawyers?

Just as the argument that law school is necessary to ensure competence falls apart under scrutiny, so does the argument that the bar's attorney discipline system is so beneficial that consumers should be denied the chance to contract with anyone not subject to it. The system of attorney discipline has been widely criticized as a consumer protection device. Attorney Deborah Chalfie, for example, writes that "virtually all of the [bar's ethical] rules are phrased in public protection terms. However, when the content and interpretation of the rules are analyzed, 'ethical' seems to relate only to upholding the profession's public image and economic status." The code of ethics, she continues, amounts to "little more than proscriptions against crime, a form of protection that consumers already have and which yields little concrete benefit to those who have been harmed."⁹² Allegations of attorney negligence or incompetence are routinely dismissed because they do not state an infraction of the code and, therefore, lie outside the authority of the disciplinary committee. And in the rare case where an attorney is sanctioned for a code violation, the penalty is usually light; the client, moreover, seldom receives any financial redress.⁹³

Even if the bar's code of ethics deters some attorney misconduct, that is not an adequate reason to make it illegal for individuals who are not subject to its strictures to offer their services in the market. Products frequently have extra features, but that does not justify a ban on

competing products that are offered without them. Just as automobile consumers are entitled to decide whether, for example, four-wheel drive is of sufficient benefit to justify the higher price, so are consumers of legal services entitled to decide whether the bar's system of attorney discipline is sufficiently important to cause them to choose attorneys who are governed by a code of professional ethics over other practitioners who are not. The attorney discipline system should be put to the test of the market, not used as an excuse to subvert it.

UPL prohibitions are also defended on the ground that they help to guard against the waste of scarce judicial resources. Most courts have crowded dockets and a long backlog of cases. To allow untrained advocates into court proceedings would, it is argued, consume excessive amounts of court time and further delay justice.

No doubt, allowing lay representatives in court may sometimes be inefficient. Many of them, at least initially, would struggle with procedure and take up more time than would an experienced trial attorney. The same, however, is true of attorneys who seldom if ever participate in trials. It is the lack of courtroom experience rather than the absence of a license to practice law that might cause delays.

Lay advocates who intended to represent clients in court would have just as strong an incentive to master procedure as do lawyers who handle litigation. And allowing lay advocates to represent their clients in court would reduce the number of cases in which individuals represent themselves. That would substitute a trained advocate for an untrained one, thereby reducing the court time devoted to helping a litigant avoid legal pitfalls.

Furthermore, concern about judicial resources provides no justification whatever for outlawing unauthorized practice in the great majority of instances that involve no court appearance. If the waste of court time is thought to be a serious problem, the solution is to follow the practice of the Patent Office, which allows anyone to practice before it who can pass its proficiency test. That is a far less restrictive way to maintain professionalism than are blanket UPL prohibitions.

Policy Recommendation: Repeal UPL Prohibitions

UPL prohibitions, as we have seen, are neither necessary nor sufficient for the protection of consumers of legal

services. They are no more effective than the free market at deterring and filtering out incompetent practitioners, yet they raise the cost of legal services, thereby pricing many people out of the market. They also infringe upon the rights of individuals to pursue their chosen occupation and restrict the freedom of consumers to seek the best service at the lowest cost. For those reasons, states ought to repeal their UPL statutes. Where the UPL prohibition is judicially created, the legislature ought to overturn it with an anti-UPL statute, establishing that it is permissible for anyone to assist another person in any legal matter.

The ABA, aware that legal services are priced out of the reach of many people, has recommended expanding the role of nonlawyers, especially in state administrative agency proceedings.⁹⁴ The ABA suggests that, in such proceedings, states "may wish to reassess their current UPL laws, rules and enforcement activities."⁹⁵ In other areas, however, the ABA has opposed allowing people to choose nonlawyer representatives, supposedly fearing harm to consumers from ill-trained practitioners. But the ABA undercuts its own position with its analysis of the market for tax preparation services, an activity that is certainly at the periphery of the practice of law. After observing that individuals can choose tax preparers ranging from storefront operations that flourish each spring to nationally known services to accountants to tax lawyers, the ABA concludes, "This array of choices responds to a broad range of public demand for assistance. It may be a useful model of how the legal profession, together with non-lawyers, can offer the public the kinds of affordable, appropriate and reasonably safe help for law-related matters that the public seeks in many areas."⁹⁶

Exactly so. Fortunately, tax preparation has never been deemed the practice of law, so the market operates freely, giving taxpayers a wide range of service providers to choose from. People with simple tax returns can patronize low-cost services; those with difficult tax problems almost invariably go to accountants or lawyers who specialize in tax work. There are no government-imposed barriers to entry into the tax preparation market, which therefore sets its own standards for competence. Not every tax return is done perfectly--experts and nonexperts alike make mistakes--but the unlicensed, unregulated tax preparation market maximizes consumer value. It is, indeed, a useful model and argues strongly in favor of the elimination of UPL prohibitions so that consumers of legal services can simi-

larly benefit from the efficiency that comes with open competition.

The repeal of UPL prohibitions would significantly lower the barrier to entry into the legal services market. Instead of mandating a prescribed investment in human capital before an individual is permitted to practice law, we should allow the powerful discovery process of the free market to function. Entrepreneurs would then search for the most efficient ways of training people for the wide variety of work done by legal practitioners. That would mean putting the now-obligatory three years of law school to the test of the market. As Judge Richard A. Posner has pointed out, law schools now have a "captive audience, insulating them from a true market test of the value of the services they provide."⁹⁷

In a free legal marketplace, an array of law preparation institutions would compete to satisfy the educational needs of aspiring practitioners. Optimally efficient methods of legal training would evolve, as rival institutions sought to give students the best educational value for their particular needs. For some, the traditional law school education might be ideal; others might conclude that the costs of a third year outweighed the benefits. For still others, one year of study might be sufficient. Legal training institutions quite different from today's law schools might develop, dispensing with current ABA mandates such as faculty tenure and maximum teaching load. Probably first to go: the ABA requirement that law schools be nonprofit.⁹⁸

Market competition will drive down the cost of producing a criminal defense attorney, divorce lawyer, or tax specialist, just as it has reduced the cost of producing compact discs. More services will be available to people at lower cost, and resources now unnecessarily devoted to legal training will be released for more productive employment elsewhere. That dynamic free markets consistently produce more output at less cost is compelling evidence that the ABA's preferred 70-year-old model for the production of lawyers is obsolete.

Certification

To reduce their search costs and minimize the chances of contracting improvidently, consumers need guidance in locating service providers with demonstrated competence. A market device that offers such guidance is certification--a

means of notifying consumers that the provider possesses certain capabilities. The certified public accountant designation is a good example. One can sell accounting services without becoming a CPA, but by having earned that designation, an accountant informs prospective customers that he has demonstrated a high degree of proficiency. Those with relatively simple accounting needs do not usually hire a CPA because his time is too costly; on the other hand, those with high-level accounting needs do not consider a non-CPA because he probably is not capable of handling the work. Certification thus helps consumers by reducing the cost of searching for a service provider who has the appropriate level of competence. At the same time, certification does not restrict contracting options or deprive people of occupational freedom.

The legal profession itself relies on certification rather than licensure once individuals have made it into the ranks of the bar. While any lawyer can argue cases in court, for instance, those who wish to advertise their special expertise in litigation can seek certification from the National Board of Trial Advocacy, thereby highlighting their expertise. There is no reason not to establish certification programs for other legal specialties, with participation open to both members and nonmembers of the bar. If, for example, an organization wanted to set up a program to certify the competence of individuals to assist tenants in legal disputes, it ought to be free to do so. Presumably, because the objective is to help tenants, the certification process would neither restrict the number of practitioners nor mandate where and how the person seeking certification learned the law. Tenants needing legal assistance would probably seek service providers with that certification. And practitioners who were thus certified would correspondingly benefit.

At present, no such certification exists, but in the freer, more competitive environment that would prevail in the absence of UPL prohibitions, it and others would likely arise. If the bar is truly interested in helping the public find competent and affordable legal assistance, it should take the lead and begin certification programs in many common specialty fields. Those programs should focus on the candidate's demonstrated ability to perform, rather than how he achieved his proficiency. Competing certification organizations might arise, and if so, they should be welcomed.

Certification can help consumers make more intelligent decisions without depriving them of options and without

foreclosing voluntary transactions. Milton Friedman states the case for certification this way:

The usual arguments for licensure, and in particular, the paternalistic arguments, are satisfied almost entirely by certification alone. If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information. . . . I personally find it difficult to see any case for which licensure rather than certification can be justified.⁹⁹

Certification, unlike licensure, is subject to the test of the market. If a certifying organization made it very costly to obtain its endorsement, it would encourage individuals to choose other means of advertising their abilities, and perhaps spark the creation of a rival. If a certifying organization made its endorsement too cheap--that is, so easily obtained that it had little power to predict quality service--it would also suffer. As Daniel Klein of Santa Clara University has observed, "Career promisors build and protect their reputations, sensing the truth in the saying, Time wounds all heels. When not prevented by government, voluntary institutions develop to give bite to the saying, because that arrangement is preferred by all parties except the untrustworthy."¹⁰⁰ The reputation of a certifying organization would be damaged if it certified as competent practitioners who were not.

No state policy is necessary for voluntary certification programs to arise. Government should not be in the certification business, but even if it were, it should not be the exclusive certifying agency. Private certification programs must be free to compete. Otherwise, political pressure will build to make the government's certification serve the same restrictive purpose that licensure does currently.

Freedom of Contract

Freedom of contract should be the controlling principle in the market for legal services. An individual is almost always the best judge of his needs and circumstances. Sometimes people make mistakes and contract foolishly, but that is no justification for infringing upon their right to make

their own decisions. That is exactly what UPL prohibitions do, however, by preventing consumers and service providers from engaging in mutually beneficial transactions. In a counterproductive attempt to avoid the few bad transactions that inevitably happen under contractual freedom, UPL prohibitions have thrown out the baby with the bath water. It is far better to remedy the occasional instance of incompetence than to restrict everyone's liberty in futile pursuit of perfection.

Furthermore, freedom of contract and increased competition will eliminate the overinvestment in legal education that results from UPL prohibitions. Reducing the cost of entering the market will cause the price of many, although not necessarily all, legal services to decline, thus enabling some people who would not otherwise have been able to do so to obtain legal assistance and resolve disputes. It will also open up employment opportunities for individuals who cannot afford the investment now mandated to compete in the market.

Offset against those tangible benefits is the cost of a few transactions that turn out unsatisfactorily. But to insist on a market in which there are zero cases of incompetence or malfeasance is to set a standard so high that it can never be attained. Even when licensed attorneys are involved, not all transactions turn out satisfactorily. We should focus our attention on the problem of making the consumer whole after the rare cases of harm rather than attempt to prevent harm with UPL prohibitions. The Washington Supreme Court was certainly correct when it wrote, "We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the public's freedom of choice."¹⁰¹

Conclusion

Unauthorized practice of law prohibitions are neither necessary nor sufficient for their ostensible purpose: protecting the public against incompetent legal practitioners. Free markets deter most incompetents from entering an occupation and soon eliminate any who might enter. No one is able to fail repeatedly in a market; the penalties are too severe. UPL prohibitions add virtually nothing to the market's protection against incompetence. The material typically digested in law school and later mastered to pass the bar exam does little to prepare an attorney to handle a case or advise a client; competence comes from practice and

additional studies that are not mandated by law but undertaken out of self-interest.

While the benefits of UPL prohibitions are negligible, their costs are considerable. By raising the cost of entering the legal services market, UPL statutes also raise the cost of obtaining legal assistance. Some consumers cannot afford help. As a result, they must either do nothing or attempt to handle the problem themselves. When high standards are set by the political process rather than the market, prices of some legal services are inflated and contracting options of consumers are diminished.

But this is not just a dollars and cents, costs versus benefits issue. UPL prohibitions are an attack upon freedom. They threaten and sometimes impose legal sanctions against individuals merely for having rendered a legitimate service that another person desired. Legal punishments ought to be reserved for those who have harmed or threatened others, not visited upon peaceful individuals who wish to serve others. Liberty is diminished when the law compels practitioners and aspirants to comply with a competition-suppressing licensing mandate before offering services to willing buyers.

UPL prohibitions and many similar attacks on economic liberty have flourished because for decades the Supreme Court has chosen to accord economic liberty cases only minimal scrutiny, tantamount to a rubber stamp for government regulations. There is no reason to assign economic liberty to the underworld of constitutional jurisprudence. If the Court were to move to a higher level of scrutiny in economic liberty cases, insisting that the state demonstrate that it has chosen the least intrusive means of accomplishing an objective of compelling state interest, UPL prohibitions would have to be stricken. Until that happens, state legislatures can and should repeal their UPL prohibitions, thus allowing their citizens to benefit from a free market in legal services.

Notes

1. Furman's battles with the Florida Bar are reported in Florida Bar v. Furman, 376 So.2d 378 (1979); and Furman v. Florida Bar, 451 So.2d 808 (1984).

2. A few states allow prospective bar members to undertake

their education in unapproved law schools or in law offices.

See "Comprehensive Guide to Bar Admission Requirements," American Bar Association, 1996.

3. Standard 305a, "Standards for Approval of Law Schools," American Bar Association, 1994.

4. At one time, the bar also imposed "ethical canons" that restricted competition among lawyers by establishing fee schedules and forbidding advertising. The Supreme Court struck down those anti-competitive devices on antitrust grounds in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

5. See, for example, Walter Gellhorn, "The Abuse of Occupational Licensing," University of Chicago Law Review 44, no. 6 (1976): 6-27; and S. David Young, The Rule of Experts (Washington: Cato Institute, 1987).

6. See, for example, Richard A. Posner, "The Material Basis of Jurisprudence," Indiana Law Review 69, no. 1 (1993): 1-37; and W. Clark Durant, "Maximizing Access to Justice: A Challenge to the Legal Profession," 1987 address to the American Bar Association, quoted in Deborah Rhode and Mark Luban, eds., Legal Ethics (Westbury, N.Y.: Foundation Press, 1992), p. 835.

7. Slaughterhouse Cases, 83 U.S. 36 (1873).

8. Only once has the Supreme Court held a statute to be in violation of the Privileges or Immunities Clause, in Colgate v. Harvey, 296 U.S. 404 1935, and that case was overruled five years later in Madden v. Kentucky, 309 U.S. 83 (1940).

9. Slaughterhouse at 78.

10. Ibid. at 97.

11. Ibid. at 122.

12. Mugler v. Kansas, 123 U.S. 623, 661 (1887).

13. Allgeyer v. Louisiana, 155 U.S. 578, 589 (1897).

14. Thomas M. Cooley, A Treatise on the Constitutional Limitations (Boston: Little, Brown, 1868), p. 356. See also Roger Pilon, "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty," Cato Journal 4 (1985):

813-33.

15. Lochner v. New York, 198 U.S. 45 (1905).

16. Whether the statute was actually motivated by concern for the health of bakery workers is a question discussed extensively in Bernard Siegan, Economic Liberties and the Constitution (Chicago: University of Chicago Press, 1980), pp. 115-20.

17. Lochner at 56-57.

18. *Ibid.* at 57.

19. Justice Oliver Wendell Holmes's famous dissenting line, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *ibid.* at 35, is quoted far more often than anything in the majority opinion.

20. See, for example, Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Tyson & Bro. v. Banton, 273 U.S. 418 (1927); and Adams v. Tanner, 244 U.S. 590 (1917).

21. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928). Justice George Sutherland's majority opinion continued, "The claim that mere ownership of a drug store by one who is not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance" (at 114).

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

23. Muller v. Oregon, 208 U.S. 412 (1908).

24. Bunting v. Oregon, 243 U.S. 426 (1917).

25. Christopher T. Wonnell, "Economic Due Process and the Preservation of Competition," Hastings Constitutional Law Quarterly 11 (1983): 133.

26. Nebbia v. New York, 291 U.S. 502 (1934).

27. *Ibid.* at 537.

28. *Ibid.* at 539.

29. *Ibid.* at 559.

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30. N.L.R.B. v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).
31. For devastating criticism of the Court's Commerce Clause jurisprudence, see Richard A. Epstein, "The Proper Scope of the Commerce Power," Virginia Law Review 73 (1987): 1387; and Roger Pilon, "A Government of Limited Powers," in The Cato Handbook for Congress, 104th Congress (Washington: Cato Institute, 1995), pp. 17-34.
32. United States v. Carolene Products Co., 304 U.S. 144 (1938).
33. *Ibid.* at 152.
34. Railway Express Agency v. New York, 336 U.S. 106 (1949).
35. *Ibid.* at 110.
36. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
37. Richard A. Posner, Economic Analysis of Law (Boston: Little, Brown, 1972), p. 271.
38. Ferguson v. Skrupa, 372 U.S. 726 (1963).
39. Skrupa v. Sanborn, 210 F. Supp. 200 (1961).
40. Ferguson at 728.
41. *Ibid.* at 732.
42. *Ibid.*
43. *Ibid.* at 730.
44. See F.C.C. v. Beach Communications, 508 U.S. 307 (1993).
45. Griswold v. Connecticut, 381 U.S. 479 (1965).
46. *Ibid.* at 482.
47. Reynolds v. Sims, 377 U.S. 533 (1964).
48. *Ibid.* at 561-62.
49. Ronald Coase, "The Market for Goods and the Market for

-
- Ideas," American Economic Review 64 (1974): 384-85.
50. F. A. Hayek, The Constitution of Liberty (Chicago: Henry Regnery, 1972), p. 35.
51. Dukes v. City of New Orleans, 501 F.2d 706 (1974).
52. City of New Orleans v. Dukes, 427 U.S. 297, 303-4 (1976).
53. Siegan, p. 330.
54. Richard E. Levy, "Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights," North Carolina Law Review 73 (1995): 329, 415.
55. For discussions of this point, see Richard A. Epstein, "Toward a Revitalization of the Contract Clause," University of Chicago Law Review 51 (1984): 703-51. See also Levy; Wonnell; Siegan.
56. The Complete Madison, ed. Saul K. Padover (New York: Harper & Bros., 1953), p. 268.
57. Barlow F. Christensen, "The Unauthorized Practice of Law: Do Good Fences Make Good Neighbors--Or Even Good Sense?" American Bar Foundation Research Journal, no. 2 (Spring 1980): 159-216.
58. Ibid. at 173.
59. Darrow attended the University of Michigan Law School for one year but never received a degree.
60. In 1870 there were 31 law schools in the United States. Twelve had a one-year course of study, 2 had a one-and-a-half-year course of study, and 17 had a two-year course of study. Albert Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney, 1953), p. 51.
61. Ibid. at 40.
62. The American Bar Association is a voluntary organization. Most state bar associations are established by statute and operate under the control of the state supreme court. In 31 states, bar membership is mandatory for persons who desire to practice law; in 19 states, bar membership is voluntary. For a discussion of the case against a

mandatory ("unified") bar, see Allen Falk and Bradley J. Smith, "The Limits of Compulsory Professionalism: Does a Unified Bar Make Sense for Michigan?" Mackinac Center for Public Policy, Midland, Michigan, May 1994.

63. Christensen, p. 177.

64. Deborah Rhode, "Policing the Professional Monopoly," Stanford Law Review 34 (1981): 1.

65. People v. Title Guarantee & Trust Co., 125 N.E. 666, 671 (1919).

66. For example, State Bar v. Cramer, 399 Mich. 116 (1976) (sale of divorce kits declared unauthorized practice).

67. For example, State Bar v. Galloway, 422 Mich. 188 (1985). The State Bar of Michigan had sought to disallow representation by nonlawyers in cases before the Michigan Employment Security Commission. The Michigan Supreme Court held, despite the slight ambiguity in the statute, that the legislature had clearly intended to permit nonlawyer representatives to appear before the MESC without committing UPL.

68. Rhode, "Policing the Professional Monopoly," p. 4.

69. Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, September 20, 1996. Copy in author's files.

70. In re Opinion no. 26 of the Committee on Unauthorized Practice of Law, 654 A.2d 1344, 1359 (1995).

71. See Young, pp. 4-5.

72. Thomas Sowell, Knowledge and Decisions (New York: Basic Books, 1980), p. 200.

73. The large public-choice literature is summarized and its relevance in judicial review discussed in William N. Eskridge Jr., "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation," Virginia Law Review 74 (1988): 275-338.

74. Young, p. 38.

75. F. M. Apicella, J. A. Hallbauer, and R. H. Gillespy II, "Keeping Standards High Protects the Public," American Bar

Association Journal, January 1995, p. 37.

76. Arizona's UPL statute expired in 1986 and the legislature declined to reenact it. The State Bar of California announced in 1985 that it would no longer initiate UPL actions. Because UPL prosecutions are almost always brought by bar organizations rather than aggrieved clients, the bar's announcement meant a de facto freeing of entry to the market.

77. The Rules of Professional Conduct of each state bar provide that a lawyer should not take cases that are outside his competence. However, sanctions are rarely imposed upon lawyers for anything less than gross or repeated violations of the rules. The economic deterrent is much stronger than the deterrent posed by the professional rules.

78. On the importance of maintaining a good reputation, see Daniel B. Klein, "Trust for Hire: Voluntary Remedies for Quality and Safety," in Reputation: Studies in the Voluntary Elicitation of Good Conduct, ed. Daniel B. Klein (Ann Arbor: University of Michigan Press, 1997), pp. 97-133.

79. Milton and Rose Friedman, Free to Choose (New York: Harcourt, Brace, Jovanovich, 1980), p. 222.

80. "Report of the California State Bar Committee on Public Protection," State Bar of California, San Francisco, 1986.

81. "Report of the Task Force on Paralegals," Ontario Ministry of the Attorney General, Toronto, 1990, p. 27.

82. "Results of 1984 Survey of Non-Lawyer Practice before Federal Administrative Agencies," American Bar Association Standing Committee on Lawyers' Responsibility for Client Protection, 1985.

83. Sperry v. Florida Bar, 373 U.S. 379, 402 (1963).

84. Roger C. Cramton, "Delivery of Legal Services to Ordinary Americans," Case Western Reserve Law Review 44 (1994): 550. For the great majority of law students, the cost of a legal education today is undoubtedly higher than the \$100,000 figure given by the author.

85. In most states, passing the bar exam requires a score of between 70 and 80 percent correct, so it is possible to become a licensed attorney although ignorant or mistaken

about many points of law. See "Comprehensive Guide to Bar Admission Requirements 1996-97," American Bar Association, pp. 32-33. The percentage of exam takers who pass varies greatly from state to state, ranging in 1994 from a low of 56 percent in California to a high of 91 percent in Nebraska. See The Lawyer's Almanac 1996, pp. 288-89. Passing rates can vary substantially within a state from year to year. On this point, Barbara A. Reeves of the Antitrust Division of the U.S. Department of Justice commented, "It belabors the obvious to point out that practicing lawyers would benefit from restricted entry into practice in their state. The fact that some form of examination may be necessary to assure qualified lawyers does not explain the strange fluctuations in the failure rates on some state bar exams which occur from time to time." Barbara A. Reeves, "UPL: The Lawyers' Monopoly under Attack," Florida Bar Journal, November 1977, p. 609.

86. Spangenberg Group, "National Survey of the Civil Legal Needs of the Poor," in "Two Nationwide Surveys: 1989 Pilot Assessment of the Unmet Legal Needs of the Poor and of the Public Generally," American Bar Association, May 1989, p. 18.

87. Derek Bok, "A Flawed System of Law Practice and Training," Journal of Legal Education 33 (1983): 574.

88. Avrom Sherr and Simon Domberger, "The Impact of Competition on Pricing and Quality of Legal Services," International Review of Law and Economics 9 (1989): 55.

89. Jim Calle, "Bar Seeks to Protect Public with Non-Lawyer Practice Rules," Arizona Attorney, March 1994, p. 10.

90. Deborah Rhode, "The Delivery of Legal Services by Non-Lawyers," Georgetown Journal of Legal Ethics 4 (1990): 215.

91. Gardner v. Conway 48 N.W.2d 788, 795 (1951). In this case, to entrap a tax preparer in a UPL violation, a local bar association hired a private investigator to pose as a taxpayer who had difficulty interpreting tax law.

92. Deborah Chalfie, "Dumping Discipline," Loyola Consumer Law Reporter 4 (1991): 5.

93. Richard L. Abel, American Lawyers (New York: Oxford University Press, 1989), p. 147.

94. "Nonlawyer Activity in Law-Related Situations," Ameri-

can Bar Association, 1995, p. 112.

95. Ibid., p. 119.

96. Ibid., p. 134.

97. Speech at Association of American Law Schools annual meeting, January 1991, quoted in National Law Journal, January 21, 1991.

98. "Standards for Approval of Law Schools and Interpretations," American Bar Association, 1994. The three standards are, respectively, Standard 405, Standard 404, and Standard 202.

99. Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962), p. 149.

100. Klein, p. 105.

101. Cultum v. Heritage House Realtors, 694 P.2d 630, 634 (1985).

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