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THE CONSTITUTION AND OCCUPATIONAL LICENSING IN MASSACHUSETTS

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Judges have long recognized that the right to earn a living in any of the common occupations is among those fundamental interests which a democratic society should protect. Justice Bradley characterized it as an "inalienable right,"[1] and Justice Douglas asserted that it is "the most precious liberty that man possesses."[2] Indeed, Mr. Justice Field viewed protection of this right as one of the distinguishing features of our republican institutions.[3] That the right to earn a living is generally within the protective mantle of the Fourteenth Amendment is now long settled constitutional doctrine. Writing for a unanimous court in 1915, Mr. Justice Hughes declared: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[4] The Massachusetts court has been especially vigorous in asserting the constitutional standing accorded this right. Speaking in terms reminiscent of the eighteenth century natural lawyers, it said in 1924: "Manifestly no statute by attempting to outlaw a natural right can deprive one of the opportunity to earn his livelihood. The right to labor and to do ordinary business are natural, essential, and inalienable, partaking of the nature both of personal liberty and private property."[5]

Important as is the right to earn a livelihood, recent developments along a number of fronts have resulted in a marked curtailment of individual freedom of entry into various occupations. The developments

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1 Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (concurring opinion).

2 Barsky v. Board of Regents of New York, 347 U.S. 442, 472 (1954) (dissenting opinion).

3 Dent v. West Virginia, 129 U.S. 114, 121 (1888).

4 Truax v. Raich, 239 U.S. 33, 41. Accord: Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-239 (1957); Green v. McElroy, 360 U.S. 474, 492 (1959).

5 Opinion of the Justices, 247 Mass. 589, 597, 143 N.E. 808 (1924). "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." Holmes, J., Natural Law, 32 Harv. L. Rev. 40, 41 (1918).

have been multifarious. Labor unions now exert considerable control over occupational entry.[6] There has been an increasing tendency on the part of legislatures to condition an individual's choice of gainful activities upon the consent of other private persons—the most common example being the "consent" zoning ordinance.[7] Here I propose to focus upon still another significant control over free occupational entry: the requirement of a state license as a prerequisite to occupational practice. This license issues only to those who demonstrate a certain minimum proficiency, and, of course, the imposition of a licensing system upon an occupational activity automatically involves the rejection of any unlimited occupational entry notions. The Massachusetts statutes and decisions will be used as a convenient illustration of the considerations involved in this process.

I

Preliminary to any examination of the questions posed in the licensing of persons seeking to enter various occupations, is an understanding of the basic constitutional framework within which the legislature must operate when enacting laws restricting economic activities. The Fourteenth Amendment to the Constitution acts as a general limitation on the power of the state legislatures. But, except perhaps in the civil rights area, that Amendment requires only that the legislative reconciliation of the conflicting interests involved not be arbitrary or unreasonable.[8] Ordinarily, questions of policy are for the legislature, and a court will intervene only if the legislative determination can be said to lack any reasonable policy basis, given the interests at stake. A recent decision of the Supreme Court applied this standard to a municipal ordinance restricting the right to work. *Breard v. City of Alexandria*[9] involved an ordinance prohibiting peddlers or canvassers from calling on occupants of private residences without having been requested to do so. A magazine salesman was convicted under the ordinance and his appeal was based on constitutional grounds. The majority opinion laconically rejected the argument that this ordinance

[6] Weyland, Majority Rule in Collective Bargaining, 45 Col. L. Rev. 556 (1945); Cox, Labor Law, Cases and Materials, 990-1019 (Foundation Press, 1958); Jaffe, Law Making By Private Groups, 51 Harv. L. Rev. 201, 234-235 (1937).

[7] Compare, Sullivan v. Police Commissioner of Boston, 304 Mass. 113, 23 N.E.2d 106 (1939) and Note 6, U.C.L.A. Law Rev. 448 (1959) with Opinion of the Justices, 337 Mass. 796, 151 N.E.2d 631 (1958). See in general, Jaffe, op. cit. supra at Note 6; McBain, Law Making by Private Groups, 36 Pol. Sci. 617 (1921); Note 67 Harv. L. Rev. 1398 (1954); 1 Davis, Administrative Law § 2.14 (West Publishing Co. 1954).

[8] Compare Shelton v. Tucker, 81 S. Ct. 247 (1961) with Breard v. City of Alexandria, 341 U.S. 622 (1955). See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959).

[9] 341 U.S. 622 (1955). Cf. Green v. McElroy, 360 U.S. 474, 492 (1959).

was an unconstitutional interference with the right to engage in one of the common occupations of life. "We think that even a legitimate occupation may be restricted or prohibited in the public interest . . . . The problem is legislative where there are reasonable bases for legislative action."[10]

The Massachusetts court views comparable restrictions in the State Constitution[11] in the same light. The test of constitutionality is not that of the wisdom of the legislative choice. "It is not for us to inquire into the expediency or the wisdom of the legislative judgment. Unless the act of the legislature cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down . . . . "[12] And the same court has applied this standard without hesitation to legislation restricting occupational entry.[13]

The Massachusetts Constitution contains a special provision that "No man, nor corporation, or association of men have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what arises from the consideration of services rendered to the public . . . . "[14] On the doctrinal level it is clear that legislative grants of monopolies or special privileges should pose no problem calling for special constitutional formulations. As before, the sole question is whether the legislature acted reasonably in

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[10] Id. at 632-633. Cf. Mr. Justice Brandeis dissenting in New State Ice Co. v. Liebmann, 285 U.S. 262, 280 *et seq.* (1932). Justices Black and Douglas dissented urging that the application of the ordinance to convict a magazine salesman unconstitutionally abridged free speech guarantees. But Justice Black added (in a footnote) "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door selling pots." 341 U.S. at 650. Apparently, then no member of the Court is willing to accord "the right to engage in any of the common callings of life" a "preferred status" in the constitutional scheme. See Hand, The Bill of Rights 50-55 (Harvard University Press, 1958).

[11] Mass. Const. Part I, Art. 1 ("All men are born free and equal, and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety, and happiness"); Art. 10. ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property according to standing laws . . ."); Art. 12. (". . . And no subject shall be . . . deprived of his property, immunities or privileges . . . but by . . . the law of the land").

[12] Sperry & Hutchinson v. Director, Nec. of Life, 307 Mass. 408, 418, 30 N.E.2d 268 (1940). See Merit Oil Co. v. Director, Nec. of Life, 319 Mass. 301, 304-305, 65 N.E.2d 529 (1946). Cf. Commonwealth v. Ferris, 305 Mass. 233, 235, 25 N.E.2d 378 (1940).

[13] Opinion of the Justices, 322 Mass. 755, 760, 79 N.E.2d 883 (1948). "The test . . . to which resort is generally had to determine the constitutional validity of the restrictions upon the carrying on of otherwise lawful occupations . . . is whether the act has a national tendency to promote the safety, health, morals and general welfare of the public." Accord. Commonwealth v. Finnegan, 326 Mass. 378, 379, 96 N.E.2d 715 (1951).

[14] Mass. Const. Part I, Amend. VI.

choosing the questioned device as a means of promoting the common good.[15] Without exception the decisions of the Massachusetts court are in accord with this rationale. Since the beginning of the nineteenth century, judges have treated this clause as barring only awards of special privileges which are unrelated to the public welfare.[16] The result is, in effect, that the clause is treated as surplusage, adding nothing to the other constitutional inhibitions on the legislature.

While the role of courts is thus seen to be a limited one, judicial control of legislative activity—to the extent that it exists at all—is far more likely to emanate from the state courts than from the federal courts. "Economic Due Process" is not quite dead in the state courts. For example, in 1949 the Massachusetts court advised that a proposed bill which would have prohibited any cemetery association from engaging in the business of selling monuments for cemetery lots could not be sustained as a valid exercise of the police power.[17] The rationale of the opinion is quite interesting.

> We have been unable to perceive in the proposed act any rational tendency to promote the safety, health, morals or general welfare of the public. Certainly it is not a health regulation. We do not see what evil arises if any individual or religious society owning or operating a cemetery also sells monuments . . . . It is common for an individual or group of individuals to engage in more than one lawful occupation. And we see no incompatability between the two occupations here involved which might be thought to operate to the public detriment. If it is suggested that a bereaved family seeking a place to bury their dead might possibly be exposed to undesirable importunity in the matter of purchase of a monument or might be discriminated against for refusal to buy, it might equally well be argued that for similar reasons an undertaker should be forbidden to sell caskets or a lawyer to act as administrator. Equal grounds exist for the separation of many forms of activity which are commonly carried on together without objection . . . . The reason just suggested or the proposed act seems fanciful rather than real . . . .[18]

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[15] The power of the legislature to grant monopolies and special privileges where the public interest would be served has been assumed since earliest times (e.g., Bank of Augusta v. Earle, 37 U.S. 519, 595 (1839), and does not run afoul of the Fourteenth Amendment (Slaughterhouse Cases, 83 U.S. 36 (1872); Cf. Brandeis, J., dissenting in New State Ice Co. v. Liebmann, 285 U.S. 260, 280, 304-305 (1932).

[16] The leading case is an opinion by Chief Justice Shaw in Comm. v. Blackington, 41 Mass. (24 Pick.) 352 (1837). See also Hewitt v. Charier, 33 Mass. (16 Pick.) 353 (1835); Decie v. Brown, 167 Mass. 290, 291, 45 N.E. 765 (1897); Landers v. Eastern Racing Ass'n., 327 Mass. 32, 46, 97 N.E.2d 385 (1951); Cf. McNamara v. Director of Civil Service, 330 Mass. 22, 110 N.E.2d 840 (1953).

[17] Opinion of the Justices, 322 Mass. 755, 79 N.E.2d 883 (1948). See in general, Carpenter, Economic Due Process and the State Courts, 45 ABA J. 1027 (1959).

[18] Id. at 760-761.

It seems clear from the federal cases to be noted below that the Supreme Court would have found the "fanciful" reasons advanced sufficient to satisfy the requirements of the Fourteenth Amendment. While both courts purport to apply the same yardstick in adjudging constitutionality, it is difficult to escape the conclusion that the local state court judges, immediately aware of the realities behind the various pieces of legislation, occasionally slip into requiring a "higher" measure of "reasonableness" for state legislation than does the Supreme Court. That Court now assiduously rejects any role as a "super-legislature," and frankly recognizes that, by and large, recourse must be had to the normal political processes to rectify abuses by state legislatures.[19]

Daniel v. Family Life Insurance Co.,[20] also decided in 1949, graphically illustrates the general approach of the Supreme Court in this area, and stands in sharp contrast with the cemetery association case. This decision involved a state statute which prohibited undertakers from serving as agents for life insurance companies. A special three-judge federal district court invalidated the act, one judge dissenting.[21] The lower court majority[22] found that the legislation had no rational relation to the public welfare, and in fact was an anti-competitive bill aimed directly at the plaintiff which had enjoyed remarkable success in using undertakers as selling agents for small, actuarially sound burial policies. On a direct appeal, the judgment was unanimously reversed. The opinion for the court began by restating the time-honored maxim that the motives of the legislators were beyond judicial scrutiny. The constitutional question was then summarily handled. "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop."[23]

Any attack based upon the Equal Protection Clause[24] instead of the

19 Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

20 336 U.S. 220 (1949).

21 79 F. Supp. 62 (E.D.S.C. 1948).

22 Interestingly, the majority was composed of the two local federal judges, whereas the dissenter was Circuit Judge Dobie.

23 Daniel v. Family Life Insurance Co., 336 U.S. 220, 224 (1949).

24 It is open to question whether formulation of an argument in terms of the Equal Protection Clause rather than the Due Process Clause is now of any importance. Some decisions of the Supreme Court have asserted that the scope of the two clauses is not identical. Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); cf. the excellent concurring opinion of Jackson, J., in Railway Express Agency v. New York, 336 U.S. 106, 111 (1949). But it would seem that the decisions have in fact led to a coalescence of the two clauses. Substantively, the Due Process Clause bans unreasonable legislation, and an important factor in determining unreasonableness is an analysis of the discriminations which the statute sanctions. Under either clause unreasonable discrimination will vitiate the legislation. See Hand, op. cit., supra note 10 at 56; cf. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Due Process Clause, seems equally doomed to certain failure. In view of the recent decisions of the high court, it seems fair to conclude that there is no real vitality left in that clause insofar as it purports to limit state control over any type of business activity.

Railway Express Agency v. New York[25] affords a striking illustration of the general lifelessness of the Equal Protection Clause in this area. A municipal ordinance banned advertising vehicles from the public streets, except for vehicles primarily engaged in carrying on the advertiser's business. The American Express vehicles carried the advertising of others than itself and thus fell squarely within the legislative interdiction. No one had difficulty with the proposition that New York City could completely bar all advertising by vehicles. But the Express Company argued that the exception in favor of owners who advertised their own businesses amounted to a denial of the equal protection of the laws. They claimed that if the ordinance was designed to reduce traffic hazards, an Express Company vehicle carrying advertisements of a commercial house was in exactly the same position as a commercial house's vehicle carrying advertisements on its own trucks. Mr. Justice Douglas wrote the opinion for the Court. He rejected the argument of the Express Company as a "superficial way"[26] of analyzing the problem.

> 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. It would take a degree of omniscience which we lack, to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidents on traffic than those of appellants.
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> We cannot say that the judgment is not an allowable one. Yet, if it is, the classification . . . does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.[27]

The crucial point in the "Equal Protection" philosophy of *Railway Express* comes to this: the legislature need not eliminate all evils of the same kind in order to eliminate some of the evils; it may eliminate a part of traffic advertising without eliminating all of it if there is any "rational" basis for the distinctions drawn. As the Court stated in a later case, ". . . reform may take one step at a time, addressing itself to the phase of the problem which seems most acute in the legislative

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[25] 336 U.S. 106 (1949).
[26] Id. at 110.
[27] Ibid.

mind."[28] This conception of the Equal Protection Clause[29] eliminates it as a rigorous restraining influence on state action.[30]

The Supreme Court's marked reluctance to intervene here stems from a well thought out, deeply felt concern for the requirements of a viable federalism. For years Holmes and Brandeis had filed dissenting opinions urging that the states must be given great leeway in dealing with their social and economic problems.[31] The views expressed in these dissents subsequently became the accepted philosophy of the court. Writing for a unanimous bench in *Day-Brite Lighting Co. v Missouri*,[32] Mr. Justice Douglas observed:

> Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits . . . but the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standards of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.[33]

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[28] Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Cf. Morey v. Doud, 354 U.S. 457, 465 (1957); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. River Port Pilots Commissioners, 330 U.S. 552 (1947).

[29] This view of the Equal Protection Clause had been most strongly urged by Mr. Justice Holmes. "[T]he Legislature . . . may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so nonetheless that the forbidden act does not differ in kind from those that are allowed. Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912). See also the opinions of Mr. Justice Holmes in Weaver v. Palmer Bros. Co., 270 U.S. 402, 415-416 (1926), and Buck v. Bell, 274 U.S. 200, 208 (1927).

[30] Morey v. Doud, 354 U.S. 457 (1957) (three justices dissenting), does not detract from this analysis. In that case the court invalidated the Illinois Community Currency Exchanges Act, which required firms selling or issuing money orders in the state to secure a license and submit to state regulation, but excepted the American Express Company from these requirements. After repeating the principles stated in the earlier cases, the majority struck down the statute because the exception was not an open-ended class. American Express Company was excepted irrespective of whether it continued to stay financially sound, and other companies would be still subjected to the licensing requirements "even though their characteristics are, or become, substantially identical with those the American Express Company now has." Id. at 467. It seems clear to me that all that is involved is a drafting problem. Illinois can accomplish its objective by redrafting the statute but making the exception an open-ended class at least in theory.

[31] "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiment may seem futile or noxious to me and to those whose judgment I most respect." Holmes, J., dissenting in Truax v. Corrigan, 257 U.S. 312, 344 (1921). See also Mr. Justice Holmes dissenting in Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926), and Tyson & Brother v. Banton, 273 U.S. 418, 445-447 (1927).

[32] 342 U.S. 421 (1952).

[33] Id. at 423. Cf. Lincoln Federal Labor Union v. Northwestern Iron & Metal

The Supreme Court fully recognizes that to invalidate state legislation on federal constitutional grounds is to give a ring of finality not found in the constitutional decisions of the state courts, which are of course far more amenable to correction by constitutional amendment than are federal constitutional decisions.

II

The continuous growth of the occupational license as a method for restricting entry into an occupation is, in its own way, an arresting social phenomenon. Occupation after occupation is withdrawn from unrestricted access by requiring a license as a prerequisite to entrance.[34] The characteristic of this type of license is approval by a state board, upon a showing that the applicant has met certain requirements of education, experience, or examination.[35] Thus stated, the objective is to insure a minimum level of competence on the part of the members of the occupational group. But the continuous expansion of occupational licensing is now a source of increasing concern since institutionally it stands ready made to protect the economic interests of the occupational group against the competition resulting from free entry into the occupation, and perhaps even stands ready as a method for the control of competitive activity within the occupational group. Thus, a denial of a license may keep down the number of barbers, and the threat of a license revocation may serve as a sanction to enforce regulations as to the prices

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Co., 335 U.S. 525, 536-537 (1949); Daniel v. Family Life Ins. Co., 336 U.S. 220, 224 (1949).

[34] The Supreme Court long ago applied the general principles of constitutional law discussed above to the question of occupational licensing. In the leading case, Mr. Justice Field elaborated on the basic considerations at some length. "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution . . . . The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity." Dent v. West Virginia, 129 U.S. 114, 122 (1889); Cf. Graves v. Minnesota, 272 U.S. 425 (1926).

[35] "The occupations with which this survey is concerned are subject to the following conditions:

1. A license must be secured from the state authorizing the practice of a certain skill or the assumption of a particular title.
2. A person applying for such an occupational license must either
   (a) have met certain educational qualifications, or
   (b) have met certain experience requirements, or
   (c) have passed an examination, or
   (d) have attained some combination of these requirements as determined by law. (The Council of State Governments, Occupational Licensing Legislation in the States, p. 7 (1952) [hereinafter cited as Report]).

charged and the hours that the shop may be kept open. "Competency," then, may be but a euphemism for economic control of the trade group.[36]

A general survey of the history of occupational licensing statutes is illuminating. Until the end of the nineteenth century few occupations, save for law and medicine, were subject to license. But by the middle of the present century the statute books were top heavy with licensing laws. A somewhat dismayed student of the process laments that:

> One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state laws, as have sanitarians, and psychologists, assayers, and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco? What of egg graders and guide-dog trainers, pest controllers, and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the hypertrichologists who are licensed in Connecticut where they remove excessive and unsightly hairs with the solemnity appropriate to their high-sounding title.[37]

The occupational license can, of course, serve a variety of useful functions. Traditionally, it has effectuated the legitimate goals of protecting the public safety and well-being from incompetence, fraud and dishonesty.[38] Furthermore, it often provides the average citizen of limited means with a swift and inexpensive administrative avenue for redress against the licensee. The complainant frequently need not go through the costly, time-consuming, delay-ridden court processes when the licensee is concerned about an adverse report to the licensing authorities.[39] At the same time, however, occupational licensing can protect the economic position of the occupational group under the smoke screen of fostering the public welfare. It is the use of the occupational license as a method for limiting competition through control over entry into the occupation, and, where possible, use of the licensing structure to control competitive activity within the group which have led numerous writers to conjure up visions of the rebirth of the guild system—the classic example of integrated group control over its competitive status.[40] It is

[36] Gellhorn, Individual Freedom and Governmental Restraint, 105-151 (Louisiana State University Press 1956); Grant, The Guild Returns to America, 4 Journal of Politics 303, 458 (1942); Doyle, Fence-Me-In-Laws, 205 Harpers 89 (August 1952). The law reviews contain several valuable studies; Hanft & Hamrick, Haphazard Regimentation under Licensing Statutes, 17 N.C.L. Rev. (1938); Graves, Professional and Occupational Restrictions, 13 Temp. L.Q. 334 (1939); Notes, 29 Neb. L. Rev. 146 (1949), 38 Iowa L. Rev. 556 (1953). There is an extensive collection of source materials in Report op cit., supra, note 35 at 104-106.

[37] Gellhorn, op. cit., supra, note 36 at 106.

[38] Report, op. cit., supra, note 35 at 3.

[39] Ibid.

[40] Grant, op. cit., supra, note 36; Report, op. cit., supra, note 35 at 10-19. Gellhorn, op. cit., supra, note 36 at 113-115.

with little amusement that one reads the comment of a Wisconsin legislator that her six-year-old boy could no longer reasonably aspire to be a watchmaker though, fortunately, he might still hope to become President.[41]

It seems that in the final analysis no clear-cut over-all picture of the occupational licensing process emerges. As has been seen, legitimate public interests may be fostered by the process. Often, however, the interests of the occupational group alone are involved. Any given occupational licensing statute can usually be seen to involve a mixture of both ingredients. Yet there seem to be some situations where the public interests served are minimal. In this regard Professor Gellhorn concludes:

> The philosophy of free competition has dominated the economic growth of America. Of course, it has never become an obsession. Nonetheless, except in the cases of the so-called "natural" monopolies, governmental influence has traditionally been used to support and not to limit competition, to encourage and not to restrict personal, economic and social mobility . . . .
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> The thrust of occupational licensing, like that of the guilds, is toward decreasing competition by restricting access to the occupation; toward a definition of occupational prerogatives that will bar others from sharing in them; toward attaching legal consequences to essentially private determinations of what are ethically or economically permissible practices.[42]

In any evaluation of the public interest-private interest tension which has marked the extension of occupational licensing, a clear understanding of the pressures generating occupational licensing legislation is desirable.[43] Students of the process unanimously agree that the prime impetus for the creation of a state board to administer standards for entry into an occupation emanates from the occupational group itself, and not from any widespread public demand. Licensing requirements are not imposed on the group. Recent Massachusetts experiments are typically illustrative. For example, Professor Gellhorn's hypertrichologists began a campaign in 1954 to protect the public health from the

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[41] Cf. Doyle, op. cit., supra, note 36 at 114.

[42] Gellhorn, op. cit., supra note 36 at 114.

[43] E.g., Report, op. cit., supra, note 35 at 57; Gellhorn, op. cit., supra, note 36 at 110. "Did the legislators after examination of the needs of society come by themselves to the conclusion that trained and qualified chiropodists are vital to the public interest? Or that tile floor and walls, as distinguished from any other floor and walls, ought in the public interest to be laid only by carefully examined and duly licensed layers? Or that boughten photographers are so closely connected with the general welfare that only licensed persons should be allowed to take photographs for a price, whereas anyone may take them for himself? Did the man on the street put pressure on his representatives in the legislature to protect him from unlicensed chiropodists, tile layers, and photographers?" Hanft and Hamrick, op. cit., supra, note 36 at 4.

dangers of future unlicensed practitioners. In that year one Paul Wallace introduced a bill "for regulating the practice of electrolysis,"[44] as did Joan Weinrib[45] who sought, however, to extend the jurisdiction of the existing board of registration of hairdressers to cover hair removers as well. No action was taken on either proposal. One year later the Association of Electrolygists, Inc., succeeded in introducing a petition in the Senate for the creation of a state licensing board,[46] but the House received a Committee report which would have allowed the practice only if performed under the supervision of a physician.[47] Here then is an unusual occupation, thought by some to be akin to medicine and by others to hair dressing. In 1956 several hypertrichological bills were introduced but no action was taken.[48] Nineteen hundred and fifty-seven proved to be a year of unmitigated disaster for the electrolygists. Mr. Wallace and one Mabel Long had introduced separate petitions in both branches of the Legislature.[49] But the Committee on Ways and Means reported unfavorably on the proposed legislation,[50] and five days later the House delivered a crushing 49-10 vote against the bill.[51] Undaunted by this setback, Paul Wallace, *et al.*, saw to it that new petitions were filed at the opening of the 1958 legislative session.[52] For some reason or other, history did an abrupt about-face. This time the Committee Report was favorable,[53] and the final bill passed with ease.[54] Constant and increasing pressure on the legislature finally produced the desired results.

The motivation supporting the occupational group's interest in being subjected to state licensing laws is two-fold: the desire for economic security and the quest for social recognition.

Little need be said of the desire for economic protection. Numerous writers have pointed out that the typical American's attitude toward competition is that it is a wonderful idea for everyone—except himself.[55] Controlling occupational entry through rigorous entrance prerequisites and group control over the competitive activities of the occupational group are obvious means of protecting group economic in-

[44] 1954 Journal of the Senate 171; 1954 Journal of the House 151.
[45] 1954 Journal of the Senate 45; 1954 Journal of the House 234.
[46] 1955 Journal of the Senate 178.
[47] 1955 Journal of the House 1106.
[48] 1956 Journal of the Senate 988; 1956 Journal of the House 1387, 1398.
[49] 1957 Journal of the Senate 195; 1957 Journal of the House 182.
[50] 1957 Journal of the House 1412.
[51] Id. at 1447.
[52] 1958 Journal of the Senate 44, 182; 1958 Journal of the House 162.
[53] 1958 Journal of the House 1470, 1894 (amended version).
[54] 1958 Journal of the Senate 1436; 1958 Journal of the House 1909.
[55] See e.g., Stocking, The Rule of Reason, Workable Competition, and The Legality of Trade Association Activities, 21 U. of Chi. L. Rev. 527, 539-540 (1954); Galbraith, The Affluent Society, 100-110.

terests. An equally common example of the drive for economic security is the traditional fight of the licensed occupation against "new" occupational groups which are sufficiently related to the older occupational activity so as to be viewed as competitors.[56] A less obvious manifestation of the desire for economic protection is seen in the movement from optional certification to compulsory licensing. (Unlike compulsory licensing, optional certification does not preclude the practice of the activity but merely prevents anyone from holding himself out as possessing certain qualifications unless he obtains a certificate.)[57] A recent experience in Massachusetts illustrates this latter trend nicely. Prior to 1958 the statutes did not condition the practice of engineering upon obtaining a license, but if the registration requirements were satisfied the licensee would possess the title of registered professional engineer.[58] In 1958 a bill was pushed through the legislature which (save for exceptions dictated by necessity) made a license a prerequisite to any practice of the occupation.[59]

Of considerable interest are the psychological factors which are at the root of most recent attempts by groups to obtain occupational licensing. Indeed, while it may be hazardous to make the generalization here, my impression is that at least originally the prime group motivation in seeking the occupational license is not grounded in thoughts of economic discrimination (this is a later development), but rather reflects a deeply rooted group quest for status. As the group becomes conscious of its own identity, it feels impelled to proclaim its uniqueness and self-importance. The occupational license is viewed by the group as a method for obtaining social status. The drive to be recognized as not merely a member of the polloi is quite pervasive. For example, a representative of the barbers cautions us that barbers cannot be classified as within the ranks of ordinary humanity:

> We are not laboring people. Our work requires a certain learned knowledge, and is requiring more all the time. We must be skillful in certain movements and manipulations of the hands and fingers. It requires a certain skillful technique in the use of delicate tools, instruments and appliances. It requires adaptation and coordination of eye and brain, nerve and muscle. We are not laboring people. We are building a profession.[60]

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[56] Witness for example the unsuccessful attempts of the chiropractor in Massachusetts. Commonwealth v. Anthony, 333 Mass. 175, 129 N.E.2d 914 (1955), appeal dismissed 351 U.S. 916. See also the successful attempts at tightening up the definition of what constitutes the practice of dentistry. Commonwealth v. Finnegan, 326 Mass. 378, 96 N.E.2d 715 (1950).

[57] Report, op. cit., supra, note 35 at 24.

[58] St. 1941, c. 643, § 2; c. 722 § 9c.

[59] St. 1958, c. 584, § 10, amending Mass. G.L., c. 112, § 81 T.

[60] 19 Master Barber Mag. 7 (April 1959).

Not to be outdone, the policeman demands his proper place in the sun. "We aren't watchmen, that's for sure. The Army officer has professional recognition so why not the police officer?"[61] Professor Fellman observes that occupational groups:

> . . . seek the social and psychological satisfaction which they think will come from elevating a humble and honorable trade into a profession, replete with examinations, standards, boards, and a terminology smacking of the scientific. Regulation is not merely a matter of external restraint, it is also a product of the group quest for status and security. The assertion of integrated group interests is a characteristic feature of our times.[62]

Professor Gellhorn sums up the phenomena with his usual incisive humor: "Be he chiropodist or chiropractor, tile layer or horseshoer, photographer or watchmaker, dry cleaner or embalmer, the sound man may yearn for professional status and social advancement."[63] In Massachusetts the recent addition of a board of registration for sanitarians[64] seems to be a good example of a group quest for status. The statutory setup at present seems to do little more than to provide a scheme allowing the members to call themselves registered sanitarians, and to write "R.S." after their names.[65]

An awareness of the real source of occupational licensing legislation and the causes for its extension must not be viewed as providing us with any automatic answer to the policy considerations involved. To begin with, it would often be the grossest oversimplification to limit motivation to one or a few factors. Unquestionably in a great many cases members of the occupational group seeking licensing legislation have a genuine concern for protecting the public welfare, whether or not this concern is intertwined with desires for economic security and status. And furthermore, the crucial question for the legislature and the courts is not the motivation of the proponents of legislation, but the objective relationship between the legislation sought and the public welfare.[66]

III

Turning more specifically to an examination of the occupational licensing structure in Massachusetts, one is immediately struck by the ever-widening circle of occupations subjected to licensing requirements. Massachusetts provides for a Division of Registration as a part of the

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[61] New York Times, June 22, 1956, p. 20, Col. 1.
[62] Fellman, op. cit., supra, note 36 at 124.
[63] Gellhorn, op. cit., supra, note 36 at 109.
[64] Mass. G.L., c. 112, §§ 8711 to 8700. This is now an "optional certification" statute but it is safe to predict that in the future, once the occupational group "matures," this will develop into a compulsory licensing system.
[65] Mass. G.L., c. 112, § 8700.
[66] See, e.g., Robert, op. cit., supra, note 35 at 57.

Department of Civil Service. Within the division are the boards of registration and examination for: medicine (and physical therapy), chiropody, nursing, optometry, dentistry, pharmacy, veterinary medicine, embalming and funeral directing, electricians, certified public accountants, plumbers, barbers, hairdressers, architects, and professional engineers and land surveyors.[67] Recent legislative activity has further expanded this list. In 1955 the dispensing opticians came under a board of registration,[68] and in 1957 boards of registration for sanitation experts, and real estate brokers and agents were added.[69]

By and large the various boards are composed entirely of members of the regulated group.[70] Interestingly, one member of the Board of Registration in chiropody must be a physician,[71] and one member of the Real Estate Board must be a lawyer.[72] One would not need to be a cynic to conclude that at least a partial explanation for their presence is to protect the interests of their own professions. An exception to occupational group dominance in the state boards is the Board of Registration and examination of electricians. Here a majority of the five members could be classified as representatives of the public.[73]

The mechanics of operation of the various boards afford interesting contrasts in public administration. The principal source of information we have as to the actual operations of the boards is the annual report each files. At one time the boards submitted reports which were available for public distribution, but this is no longer the practice. The only available reports are typewritten copies at the State House Library. Some boards apparently no longer regularly submit annual reports. The reports themselves exhibit no consistent pattern and vary widely in helpfulness, some being quite elaborate, others being of a most perfunctory nature.[74] As expected, the reports indicate that some boards meet often, others but a few days a year. The figures of the various boards on their

[67] Mass. G.L., c. 13, §§ 10-11 (medicine and physical therapy), §§ 12A and B (chiropody), §§ 13-15A (nursing), §§ 16-18 (optometry), §§ 19-21 (dentistry), §§ 22-25 (pharmacy), §§ 26-28 (veterinary medicine), §§ 29-31 (embalming and funeral directing), § 32 (electricians), §§ 33-35 (certified public accountants), §§ 36-38 (plumbers), §§ 39-41 (barbers), §§ 42-44 (hairdressers), §§ 44A-44D (architects), §§ 45-47 (professional engineers and land surveyors), MGLA c. 112, § 1 *et seq.*, contains the substantive provisions governing occupational licensing in Massachusetts.

[68] Mass. G.L., c. 13, §§ 48-50.

[69] Mass. G.L., c. 13, §§ 51-53 (sanitation experts), §§ 54-57 (real estate brokers and agents).

[70] E.g., Mass. G.L. c. 13, § 32 (hairdressers). There are a few exceptions. For example, the board of registration in nursing has one physician as a member. Mass. G.L., c. 13, § 13.

[71] Mass. G.L., c. 13, § 12A.

[72] Mass. G.L., c. 13, § 54.

[73] Mass. G.L., c. 13, § 32.

[74] E.g., compare 1957 Public Document No. 91 (Nursing) with 1958 Public Document No. 158 (Podiatry).

economic status are interesting. For example, the licensing board for electricians accumulated receipts of over $73,000 for fiscal 1957, $14,000 more than its total expenditures.[75] On the other hand, the licensing board for veterinarians expended only $3,100 for fiscal 1958, but this was still $500 more than its receipts.[76]

As we have seen, any expectation of a wholesale judicial assault upon the extension of occupational licensing statutes is unrealistic, especially on the federal constitutional level. But to say that the courts have but a limited role is not to say that they have no role at all. We may still hope that at least the uncommitted state courts would invalidate in toto occupational licensing statutes for such groups as dry cleaners, professional photographers, tile layers, and grocery store operators. It is indeed difficult to see any sufficient interest for legislative imposition of minimum levels of "competence" on these occupations when this is viewed against the traditional right of the free man to engage in any of the common callings.[77] The public interest is adequately protected here by the forces of competition. Furthermore, both the federal and state courts can fulfill a vital function by striking down discriminatory and indefensible provisions in an otherwise constitutional statute. And it is with this last consideration in mind that we now examine some of the particular qualifications for entry into an occupation prevalent in the Massachusetts statutes.

IV

A common provision in the licensing laws bars aliens from the permanent practice of the occupation.[78] It is of course difficult to ascertain just how widespread are the consequences of such a ban, but the 1957 report submitted by the Board of Registration in nursing showed that the licenses of 14 registered nurses and 2 practical nurses were revoked for failure to satisfy citizenship requirements—despite the fact that the report exhibited great concern over the nursing shortage.[79]

The Attorney General of Massachusetts seems firmly committed to the view that such citizenship requirements are valid.[80] So does the state court. In 1907 the Supreme Judicial Court upheld the validity of a

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75 1957 Public Document No. 157, p. 3.

76 1957 Public Document No. 72, p. 2. The number of persons passing the various examinations showed equally wide variations. For example, of 153 prospective dentists examined in 1957 only 2 failed (1958 Public Document No. 38, p. 3), whereas the board of registration and examination for electricians passed only 679 out of 1126 applicants in 1957 (1958 Annual Report of the Board of Registration for Electricians for the year ending June 30, 1957, p. 2).

77 But cf. Gellhorn, op. cit., supra, note 36 at 122-123 who would remove the courts entirely from these considerations.

78 E.g., Mass. G.L., c. 112, §§ 2 (physicians and surgeons), 23 c. (physical therapists), 87 GGG (electrologists).

79 1957 Public Document No. 91, pp. 3, 14.

80 1942 Op. Atty. Gen. 103, cf. 1956 Op. Atty. Gen. 29; 1939 Op. Atty. Gen. 76.

statute which restricted hawker's and peddler's licenses to citizens and would-be-citizens.[81] Nine years later the same court sustained provisions in a labor law requiring state departments, agencies, cities and towns, as well as their private contractors doing construction work, to give preference in employment to citizens of the Commonwealth.[82]

Whatever support previous rulings of the United States Supreme Court gave to the federal constitutionality of acts restricting the right of an alien to work,[83] *Takahashi v. Fish & Game Commission,*[84] seems to indicate that, at least insofar as most occupations are concerned, the right to work cannot be tied to the right to vote. In voiding a California statute which prohibited the issuance of a fishing license to any person ineligible for citizenship, the rationale of the majority opinion leaves little doubt that few, if any, discriminations against an alien's right to work will be upheld. The Court, after reiterating the ancient dogma that the alien's right to work is protected by the Fourteenth Amendment,[85] clearly stated that the test of classifications discriminating against aliens is the orthodox test applied in all cases of discrimination through classification—does the discrimination reflect actual differences reasonably related to the objectives of the legislation. The Court assumed that California had the power to restrict free access to fishing waters as a reasonable conservation measure, but held that discrimination against aliens bore no reasonable relationship to the statutory objectives.[86]

Perhaps a state may still constitutionally bar an alien from the practice of the "more learned" profession of medicine and dentistry, but this seems to be doubtful at best.[87] Since "law" has governmental connotations, a slightly stronger case could be made out for making citizenship

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[81] Commonwealth v. Hanna, 195 Mass. 261, 265-266, 81 N.E. 149 (1907).

[82] Lee v. City of Lynn, 223 Mass. 109, 111 N.E. 700 (1916). This was the expressed view of the United States Supreme Court. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915).

[83] Fellman, "The Alien's Right to Work," 22 Minn. L. Rev. 137 (1938).

[84] 334 U.S. 410 (1948), cf. Oyami v. California, 332 U.S. 663 (1948).

[85] This was so held in the landmark case of Yick Wo v. Hopkins, 118 U.S. 356 (1886) and was specifically applied to the right of an alien to engage in the common occupations of life in Truax v. Raich, 239 U.S. 33, 41 (1915). But subsequent decisions of the Supreme Court and the state courts sanctioned ever increasing discrimination against the alien's claim to equal opportunities. See Fellman, op. cit., supra note, 83; Comment, Restrictions on Alien's Right to Work, 57 Col. L. Rev. 1013 (1957).

[86] The decision, in its narrowest terms, would seem to invalidate Mass. G.L., c. 130, § 38 insofar as it discriminates against aliens in the granting of licenses for lobster fishing.

[87] McIntyre, in Citizenship and Medical Licensure, 112 A.M.A.J. 1075 (1939) justifies banning aliens from the practice of medicine on the theory that the alien is not likely to be able to fulfill his social obligation to the community. There is little doubt that this rationale is insufficient to justify the present discrimination against alien physicians. Restrictions on Aliens' Rights to Work, 57 Col. L. Rev. 1013, 1026 (1957); Gellhorn, op. cit., supra, note 36 at 126.

a prerequisite to its practice. In any event, it now seems perfectly clear that few discriminations against the alien's right to work on the same basis as the citizen will survive a constitutional attack.[88] Professor Gellhorn puts this view forcibly: "Not even a semblance of plausibility supports an argument that chiropodists, tree surgeons, and embalmers (among many others), must be eligible to vote before they may become eligible to seek a license."[89] Perhaps the heart of the present attitude of the Supreme Court was expressed in moving terms by Mr. Justice Field sitting with the Circuit Court back in 1879.[90] Decrying such legislation as "unworthy of a brave and manly people,"[91] he wrote:

> It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is "caught upon the broad shield of our blessed constitution and our equal laws."[92]

Prospective physical therapists, embalmers, and electrolygists must now possess a high school education.[93] While this has an arguable enough relationship to the public welfare so as to pass muster constitutionally, realistically it seems that the requirements serve as status features designed to enhance the prestige of the occupation, and perhaps to a lesser extent to protect the economic security of the group.

The usual pattern in occupational licensing requires the prospective entrant to satisfy certain apprenticeship and/or trade school training requirements.[94] The Massachusetts statutes afford typical illustrations of both. In order to be certified as a licensed barber, a two-year apprenticeship is necessary.[95] A prospective embalmer must serve a two-year apprenticeship under a registered embalmer after the completion of a nine month trade-school course.[96] The future dispensing optician has the choice of one year in school or a three-year apprenticeship.[97]

Both the trade school and apprenticeship requirements have been the

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88 The comment in the Columbia Law Review, supra, note 87 suggests (at 1020-1021), that at least a certain amount of discrimination based on non-citizenship may still be permissible in government employment—at least in "sensitive" positions.

89 Gellhorn, op. cit., supra, note 38 at 126.

90 Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (C.C.D. Cal. 1879).

91 Id. at 256-257.

92 Id. at 256.

93 Mass. G.L., c. 112, §§ 23 (physical therapists), 83 (embalmers), 87 GGG (electrolygists).

94 Report, op. cit., supra, note 35 at 49-50.

95 Mass. G.L., c. 112, § 87.

96 Mass. G.L., c. 112, § 83.

97 Mass. G.L., c. 112, § 73.

subject of considerable controversy. Insofar as trade school requirements are concerned, the Council of State Governments reports that: "There is considerable disagreement within and without these occupations about the value of this type of training and about the amount of time which students need to spend in such schools."[98] The feeling is that the increasing use of trade school requirements often reflects no more than the occupational group's monopolistic desires to prevent easy access to the occupation. This seems especially true of the "barber college." Professor Gellhorn writes:

> Of eighteen representative states included in a study of barbering regulations in 1929, not one then commanded an aspirant to be a graduate of a "barber college." Today the states typically insist upon graduation from a barbering school that provides not less (and often much more) than 1000 hours of instruction in "theoretical subjects" such as sterilization of instruments, and this must still be followed by apprenticeship. Opinions may differ about the motives that underlie this striking shift from in-service to in-school training; but at least one man whose memory runs as far back as 1929 doubts that barbering has risen to new heights because of it.[99]

Perhaps of even more acute concern nationally are the often onerous apprenticeships which must be served before a license will be issued. The result may be to place a severe restraint on social mobility. Professor Gellhorn's observations here are well worth considering:

> Parochialism is also antithetical to the American tradition. Movement from place to place in pursuit of advancement or congeniality has always been an American prerogative. Observers from more static societies, noting our mobility, think of us as almost rootless. But licensing laws may soon anchor Americans to a degree not hitherto experienced. Despite occasional judicial remonstrance, many states require antecedent local residence as a condition of license eligibility. . . . The ultimate consequences are at once apparent. No longer can the advice be given "Go west, young man"—or east or north or south. If a young man is hopeful of engaging in a licensed occupation, he must remain where he is in order to satisfy residence requirements. Especially is this true when the apprenticeship is a necessary preliminary to achieving licensed status, for the apprenticeship must be served under one who already possesses the coveted local license.[100]

Undesirable and indefensible though some of the trade school requirements may be, it is particularly difficult to envisage the courts as an

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98 Report, op. cit., supra, note 35 at 49.

99 Gellhorn, op. cit., supra, note 36 at 146.

100 Gellhorn, op. cit., supra, note 36 at 126-127. This is not identical with the problem of licensing practitioners from other states, although there is some overlap in the problems involved. See Report, op. cit., supra, note 35 at 54-56.

effective check here. Once it is conceded that some trade school and/or apprenticeship qualifications can be imposed upon a particular occupation, it is hard to see how the courts can separate reasonable periods from unreasonable ones, except perhaps in the clearest cases. The result is that these methods for discouraging occupational entry seem particularly invulnerable to judicial scrutiny. The Supreme Court early recognized this fact. "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity . . . . It is only when they have no relation to such calling or profession, or are unascertainable by . . . reasonable study and application, that they can operate to deprive one of his right to pursue a lawful calling."[101]

Finally we might observe that good moral character is required of physicians, physical therapists, architects, embalmers, nurses, veterinarians, chiropodists, and real estate brokers,[102] but of no others, if we take the statutes literally. And features common to most Massachusetts occupational licensing schemes provide for revocation of the license for specified violations of the criminal laws, or for crimes involving moral turpitude.[103]

V

The primary concern of this paper has thus far focused on control of entry into the occupational group. However, the inevitable trend of any firmly entrenched occupational group seems to be to seek control over the competitive activities of the occupational group itself.[104] The most salient example of control over competitive activity may be found in the numerous provisions barring advertising among members of the occupational group.[105]

The constitutionality of prohibiting advertising among professional men is not open to doubt. In 1939 the question was examined at

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101 Dent v. West Virginia, 129 U.S. 114, 122 (1888). Cf. Graves v. Minnesota, 272 U.S. 425 (1926).

102 Mass. G.L., c. 112, § 2 (physicians), § 16 (chiropodists), § 23c (physical therapists), § 55 (veterinarians), § 60B (architects), § 74 (nurses), § 83 (embalmers), § 87 TTT (real estate brokers).

103 E.g., Mass. G.L., c. 112, § 18 (chiropodists), § 23H(d) (physical therapists), § 73H (dispensing opticians), § 84 (embalmers). For a collection of the statutes see Delegation of Discretion in Massachusetts Licensing Statutes, 43 Harv. L. Rev. 302, 305 (1929). For the constitutional and social policy questions involved in automatic occupational door closing for the commission of certain crimes, see Gellhorn, op. cit., supra, note 36 at 128-129, and Barsky v. Board of Regents, 347 U.S. 442 (1954).

104 In a sense current occupational licensing effects a three-fold development. Licensing is first used to enhance the social status of the occupational group. At a later stage, it is used to control entry into the occupation. Finally it emerges as a method for controlling competitive activity within the group itself.

105 E.g., Mass. G.L., c. 112, § 19(d) (chiropody), § 23K (physical therapy).

length in *Commonwealth v. Brown*,[106] where the Massachusetts court unanimously concluded that the ban was a reasonable measure designed to protect the public against the claims of charlatans and defrauders. The United States Supreme Court dismissed the appeal "for want of a substantial federal question."[107] While the older cases talk in terms of prohibiting advertising among "professional" groups, it seems perfectly clear that "professional" in this context means any group that the state can constitutionally subject to licensing requirements.[108]

It is common for advertising limitations to be extended to non-licensed occupational groups who perform any services which are related to the licensed activities. *Perlow v. Board of Dental Examiners*[109] affords an excellent illustration of the process. That case upheld the validity of a statute which prohibited dental laboratories engaged in the construction or repair of dentures from advertising to the public, as distinguished from advertising to dentists. This had the obvious economic effect of assuring dentists that repair work on dentures would be channeled through, not past, their profession.[110] *Commonwealth v. Weiner*[111] is yet another illustration. Dispensing opticians complained against statutory prohibitions of advertising at a single price lenses or complete eyeglasses, including lenses, and of advertising a claim to a policy of underselling competitors.[112] Apparently, the optometrists did not feel strong enough at that time[113] to completely bar the sale of eyeglasses without a prescription, but they sought to achieve much the same goal by the back door. The statute was upheld, the Court reasoning that the legislature could have completely prohibited selling eyeglasses without a prescription, and therefore could take the lesser step of just "discouraging the business."[114] While there can be little doubt that the measures in both cases bear a recognizable relationship to the public welfare, they do provide rather clear examples of an effective method used by licensees to protect their economic security. There is not, of

[106] 302 Mass. 523, 20 N.E.2d 478 (1939).
[107] 308 U.S. 504 (1939).
[108] Williamson v. Lee Optical Co., 348 U.S. 483, 489-490 (1955).
[109] 332 Mass. 682, 127 N.E.2d 306 (1955).
[110] See, Comment, Dentists, Dental Laboratories, and the Public Interest, 51 N.W. U. L. Rev. 123 (1956).
[111] 305 Mass. 233, 25 N.E.2d 378 (1940).
[112] Mass. G.L., c. 112, § 73A.
[113] Under the present law eyeglasses may be sold only by prescription. Mass. G.L., c. 112, § 73C, added by St. 1955, c. 688, § 2. This is clearly constitutional. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
[114] "The legislature evidently was not prepared to prohibit the sale of eyeglasses and lenses as merchandise, to be selected by the buyer. But it was prepared to discourage it, by eliminating the temptation to and pressure upon customers that results from the assurance that no more than a named price will be charged, or that the price is less than competitors ask . . . . [T]hat shorter step is consistent with the Constitution." 305 Mass. at 237. Cf. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

course, anything *a priori* wrong with such a development since, quite often, fostering the public welfare coincides with a particular private interest.[115] But there are situations where there is little more than a "National" (i.e., "constitutional") connection between the privately sponsored legislation and the public welfare, and it is in this area, insulated as it is from judicial scrutiny, that the legislature should tread most warily.

Other attempts by occupational groups to control competitive activity have met with a good deal more judicial opposition. The barbers have been particularly active—and unsuccessful—in this area. In 1938 the state court held, with the great weight of authority, that a proposed bill which would have regulated the hours of opening and closing for barber shops in any city or town would be unconstitutional, if enacted.[116] The state court said:

> There are many barber shops in the Commonwealth run by the proprietor without help. It might well be a great hardship for such a barber not to conform to the needs of his customers as to the hours of keeping his shop open . . . . It might interfere to a great extent with his business . . . to comply . . . . The hours of labor may also be such as to render it unreasonable to require the barber to adhere to the stated hours. It is difficult to see how the reasons suggested in support of the bill, such as protection from tuberculosis and other communicable diseases, and the promotion of public morals, are compatible with § 2 of the proposed act allowing cities and towns which accept the act to vary the hours without any limitation other than the total number of hours.[117]

Some twenty years later another proposed bill was before the Massachusetts court, and it reaffirmed its prior ruling.[118] The 1958 version contained an additional wrinkle. It allowed the board of registration to approve "reasonable" agreements by 70% of the licensed barbers

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[115] "If the proper inquiry were limited solely to the private economic interests of the parties, the statute would appear to be unreasonable since it discriminates against retail laboratories for the benefit of dentists and wholesale laboratories. However, whereas in this area important questions of public health are involved, the validity of a statute must be measured primarily by the reasonable necessity of the regulation in safeguarding the public rather than the effect of the statute upon private economic interest." Comment, Dentists, Dental Laboratories and the Public Interest, 51 N.W. U.L. Rev. 123, 126 (1956).

[116] Opinion of the Justices, 300 Mass. 615, 14 N.E.2d 953 (1938).

[117] 300 Mass. at 618-619. The Massachusetts court also adverted to a possible "Equal Protection Clause" infirmity in the proposed legislation. "The proposed bill does not apply to hairdressers . . . nor . . . to beauty parlors. . . . It has been held, since the acts performed on customers of barber shops and beauty shops are very similar in their nature, that such an omission renders unconstitutional a statute because of discrimination between persons belonging to the same class." Id. at 617. But it is clear that the Supreme Court would not find that the discrimination ran afoul of the Equal Protection Clause of the Fourteenth Amendment. See notes 24-33 and text supra.

[118] Opinion of the Justices, 337 Mass. 796, 151 N.E.2d 631 (1958).

in any city or town setting the days and hours that barber shops could be kept open. The court viewed this provision as an added ground for condemnation. "There is no discernible connection with public health or safety in a provision which makes a trade agreement a condition precedent to board action. The result could be economic tyranny."[119]

An attempt by the hairdressers to totally eliminate competitive activity from one segment of the occupational group met with a similar fate. In *Mansfield Beauty Academy v. Board of Registration,*[120] the court, noting the obvious economics behind the legislation, struck down a statute which prohibited training schools for hairdressers from making any charge for materials or services in connection with the practice of hairdressing or manicuring performed by students.

Occupational groups have, however, successfully managed to expel "corporate competition." *McMurdo v. Getter,*[121] decided in 1937, involved a statute which prohibited the practice of optometry by a corporation, and apparently was aimed at the optometry departments of large department stores. Mr. Justice Lummus' opinion began by demonstrating the power of the legislature to regulate the learned professions, which may be held to higher ethical standards than ordinarily prevail in the market place. Furthermore, it states that the weight of authority supports the general rule banning corporate practice of the learned professions because:

> . . . [a] corporation . . . cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professionally trained and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer. The rule stated recognizes the necessity of an immediate and unbroken relationship of a professional man and those who engage his services.[122]

The opinion conceded that the state courts were divided on the issue of applying such criteria to optometry, but concluded that:

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[119] Id. at 799. It is interesting to note that the courts have shown a marked sympathy towards legislative authorization of trade agreements in certain areas, particularly agriculture. Cf. United States Rock Royal Co. Operative, 308 U.S. 553 (1939); Schwegmann Brothers Giant Super Mkts. v. McCrory, 237 La. 768, 112 So. 2d 606 (1959). See notes 6 and 7 supra.

[120] 326 Mass. 624, 96 N.E.2d 145 (1951). The act, St. 1941, c. 626, § 3 also prohibits any student from practicing on paying customers. This part of the statute was not contested, 326 Mass. at 625. The statute was amended after the decision, St. 1958, c. 85, § 1 *et. seq.*, apparently to avoid the remainder of the statute from being held invalid solely because of inseparability.

[121] 298 Mass. 363, 10 N.E.2d 139 (1937). Accord. Kay Jewelry Co. v. Board of Registration, 300 Mass. 581, 27 N.E.2d (1940). Many of the cases present problems of classification. Rather than view the corporation cases as simply banning entry into an occupation, I think they should be viewed as expulsion of competition from already existing sources somewhat distinct from the self conscious occupational group.

[122] 298 Mass. at 368.

> The considerations to the contrary seem to us more weighty. In recent times abnormalities of the eye, like those of the teeth, have been found sometimes to indicate and often to result in serious impairment of the general health. . . . The learning and the ethical standards required for that work, and the trust and confidence reposed in optometrists by those who employ them, cannot be dismissed as negligible or as not transcending the requirements of an ordinary trade. We cannot pronounce as arbitrary or irrational the placing of optometry on a professional basis.[123]

Despite the carefully worked out reasoning of the opinion, it seems that a stronger argument could have been based on a theory of denial of equal protection of the laws. The essence of the holding is that the legislature could reasonably conclude that the practice of optometry now requires the undivided loyalty of the optometrist to the patient. Yet another section of the act[124] allows the unregistered spouse of a deceased or incapacitated optometrist to continue the business through a licensed practitioner. One could argue with plausibility that while the law often should, but does not distinguish between the corporation and the widow, such a distinction here cannot be supported in terms of the reasoning sustaining the restriction against corporate practice. Had such an argument been pressed it might have prevailed on the state constitutional level. But I think it is perfectly clear that the Supreme Court of the United States would find no transgression of the Equal Protection Clause of the Fourteenth Amendment.[125]

In light of the rationale of the *Getter* opinion, the subsequent decision in *Attorney General v. Union Plumbing Co.*[126] seems questionable. Once again the state court upheld expulsion of corporate competition. The statute prohibited corporations from carrying on the plumbing business, since in order to carry on the plumbing business a master's license was needed and there was no provision for its issuance to a corporation, or to an employee of the corporation on the corporation's behalf.[127] Clearly the rationale of the *Getter* case affords no basis for the exclusion of a corporation from this line of business, and the opinion does not address itself to any discussion of the constitutional problems involved.[128] It assumed[129] that the constitutional issue had been fore-

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123 Id. at 369.

124 Mass. G.L., c. 112, § 73.

125 See notes 20-33 supra. Note that, unlike spouses, corporations enjoy an indefinite existence.

126 301 Mass. 86, 16 N.E.2d 89 (1938).

127 The statute still contains the ban on corporate practice. Mass. G.L., c. 142, § 4.

128 Corporations are, of course, within the protective ambit of the Due Process Clause of the Fourteenth Amendment. The cases are reviewed by Circuit Judge Soper in NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958), vacated and

closed by the decision in *Commonwealth v. McCarthy*,[130] but that case concerned itself only with an individual conducting a plumbing business without a master's license, and not at all the question of whether a corporation could be barred from securing a license.[131]

VI

An examination of the occupational licensing statutes may well be concluded by contrasting them with the more traditional type of license often required as a prerequisite to occupational entry. These latter licenses may be characterized as "good character or public health" licenses, and have existed for many years.[132] The license issues after some official, almost invariably a municipal official, concludes that the applicant is of "good moral character," or that the grant of a license will not be contrary to the "public interest or welfare."[133] In the "good character—public health"[134] license, the central problem is to prevent the delegate from abusing his power to license. The fear is basically not one of group economic discrimination,[135] but of arbitrary action. Therefore, the problem now tends to be viewed, perhaps somewhat erroneously, as one of laying down standards to control the delegate's exercise of discretion.[136]

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remanded sub. nom.; Harrison v. NAACP, 360 U.S. 167 (1957). But there are still many unsettled features as to the nature of the protection afforded, especially in respect to civil rights. The Massachusetts court seems to assume that ordinarily a corporation may not be barred from carrying on an otherwise permissible occupation. Cf. Opinion of Justices, 322 Mass. 755, 19 N.E.2d 883 (1948); discussed supra notes 17-18 and text. The issue of excluding a corporation simply because it is a corporation does not usually reach the courts, except in the "learned profession" cases.

129 301 Mass. at 89.

130 225 Mass. 192, 114 N.E. 287 (1916).

131 In view of the recent trend of decisions, one would not expect the Supreme Court to intervene here.

132 The Massachusetts statute books are top heavy with licensing laws, but it would serve no useful function to list them here. For an excellent early survey of the chaotic state of these statutes, see Comment, The Delegation of Discretion In Massachusetts Licensing Legislation, 43 Harv. L. Rev. 302 (1929).

133 E.g., Mass. G.L., c. 101, § 22 (hawkers and peddlers); c. 100, § 2 (auctioneers).

134 E.g., Mass. G.L., c. 140, § 49 (lunch carts); c. 140, § 2 (innholders and common victuallers). Cf. Liggett Drug Co. v. North Adams, 296 Mass. 41, 4 N.E.2d 628 (1936).

135 In the "good character" license it is generally held to be impermissible for the delegate to consider economic questions. Picone v. Commissioner of Licenses, 241 N.Y. 157, 149 N.E. 336 (1925). Cf. Commonwealth v. McCarthy, 225 Mass. 192, 114 N.E. 287 (1916).

136 "The matter of standards in statutes and ordinances dealing with licensing of the common occupations has been in great confusion. These statutes long antedate the modern demand for limits on official power. Characteristically they contained no standard; their validity was taken for granted . . . . In certain occupations deviously linked to criminal or disreputable activity, the determination of the applicant's fitness must rest on suspicion or on evidence not capable of formal presentation. It is convenient in such areas to justify broad discretion by dubbing the license a 'privilege.' Thus within a single jurisdiction can be found cases which

The characteristics of the occupational licensing system are of course markedly dissimilar from those of the "good character—public welfare" license. Here a license issues from a state board composed of members of a clearly defined, self-conscious occupational group. Ostensibly at least, competence is the criterion for issuance (hence the elaborate determination of competence based upon education, experience and examinations), whereas, as we have seen, the traditional license does not concern itself with assuring a minimum level of competence. Furthermore, the modern occupational licensing laws are not at all defective for want of adequate standards; rather, the problem is to prevent clearly spelled out standards from becoming tools for exclusionary practices.

The gradual expansion of occupational licensing with its built-in, guild-like propensities results in the steady erosion of traditional freedoms, often without the usual offsetting compensations to the public welfare which are expected when freedom is curbed. Of course, in a country beset by the problems of nuclear war and civil rights legislation. I do not suggest that this is one of the major problems of the day. The restrictions imposed by these statutes must be considerably more widespread and severe before there will be anything approaching public concern over the matter. In the meantime, however, we see here, as in other areas, a slow, barely perceptible inroad on a traditional freedom. It is in vain to look to the judges to act as an effective check against such legislation. At best, the courts can do little but slow down the process—to attempt more would be beyond the judicial power in a democratic society. "For protection against abuses by the legislatures the people must resort to the polls, not the courts."[137] Thus the ultimate responsibility for the preservation of freedom is in the people themselves. And as Brandeis aptly put it, "The greatest menace to freedom is an inert people."[138]

In the final analysis, then, the primary responsibility for any extension of occupational licensing must rest with the people through their elected representatives. Obviously, a good many licensing statutes are

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uphold grants of licensing power without a stated standard on the ground that there is no 'right' to engage in the occupation and others which denounce grants of 'unlimited' power to license a 'lawful' business," Jaffe, Administrative Law, Cases and Materials 52 (Prentice-Hall, Inc., 1953). The Massachusetts statutes are analyzed in Comment, The Delegation of Discretion in Massachusetts Licensing Statutes, 43 Harv. L. Rev. 302 (1929). For the view that the problem of controlling the delegate's exercise of discretion is not reducible to a quest for standards see 1 Davis, Administrative Law, §§ 2.01-2.13 (West Publishing Co., 1958).

[137] Chief Justice Waite in Munn v. Illinois, 94 U.S. 113, 134 (1876), cited with approval in Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Cf. Tenney v. Brandenhowe, 341 U.S. 367, 368 (1951).

[138] Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion).

rammed through a busy legislature with very little awareness by anyone (except the sponsors) of what is going on. Ideally, however, we expect the legislature to take stock of what is happening and to address itself to the conflicting policy issues involved. The question the legislature should ask itself when called upon to consider the licensing of an occupation is essentially a pragmatic one. Is the activity so directly related to the public welfare that the existing laws (both criminal and civil) are inadequate to protect the public interest?[139] This question ought to be considered in the light of the high value which our democratic society has traditionally ascribed to an individual's freedom to choose freely any of the common occupations of life.

In evaluating the necessity for an extension of licensing, the legislature may fairly consider whether optional certification rather than compulsory licensing would be more appropriate in effectuating legislative ends.[140] Compulsory licensing is a door closing device, whereas optional certification merely prohibits the noncertificate holder from holding himself out as having been officially adjudged as possessing a certain level of competence. This solution works admirably in certain areas at least. Consider, for example, that in most states certified public accountants and professional engineers are certificate holders, not compulsory licensees.

In some instances, at least, we ask of the legislature only that it exercise a little common sense. After all, "we can struggle along with much less licensing than we have—and certainly without the additional licensing of caterers, canopy and awning installers, cider makers, coal merchants, dancing masters, egg breakers, frog dealers, music teachers, and beer coil cleaners who have recently sought to be regulated."[141]

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139 Report, op. cit., supra, note 35 at 147-148.
140 See Gellhorn, op. cit., supra, note 36 at 147-148.
141 Id. at 145.