February 1983

Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed Professionals

Toni M. Massaro

Thomas L. O'Brien

Follow this and additional works at: https://scholarship.law.wm.edu/wmlr

Part of the Constitutional Law Commons

Repository Citation

Copyright c 1983 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/wmlr
CONSTITUTIONAL LIMITATIONS ON STATE-IMPOSED CONTINUING COMPETENCY REQUIREMENTS FOR LICENSED PROFESSIONALS

Toni M. Massaro*
Thomas L. O'Brien**

TABLE OF CONTENTS

I. Introduction .................................................. 255
II. The Current Approach to Continuing Competence
    and the Critical Response .............................. 258
    A. Regulation Advocates .............................. 258
    B. Regulation Opponents ............................... 261
III. State Authority to Regulate the Professions .... 266
    A. Substantive Due Process and Equal Protection
       in Occupational Licensing ........................... 267
       1. Recent Developments ............................ 277
       2. Implications for Continuing Competence
          and Suggested Changes ....................... 281
    B. Procedural Due Process in Occupational Licens-
       ing .................................................. 292
       1. Fair Hearing ..................................... 295
       2. Notice .......................................... 296
       3. Fair Tribunal .................................. 297
       4. Right of Review .................................. 299
       5. Right to Retake Examinations .................. 300
       6. Grading of Examinations ........................ 301

---

* Assistant Professor of Law, Washington & Lee University; B.S. 1977, Northwestern University; J.D. 1980, College of William and Mary.

The authors wish to thank Professors James Phemister, Lash LaRue and Martha Morgan for their insight and suggestions that improved our work. Any errors in the product, of course, are ours. We also thank Terry McKenney, J.D. 1983, Washington & Lee, for her research assistance.
C. Application of Eldridge to Continuing Comptency Requirements .......................... 302
   1. Peer Review ........................................ 304
   2. Examinations ...................................... 306
   3. Continuing Education ............................ 309

IV. Conclusion .......................................... 311
CONSTITUTIONAL LIMITATIONS ON STATE-IMPOSED CONTINUING COMPETENCY REQUIREMENTS FOR LICENSED PROFESSIONALS

I. INTRODUCTION

Consumers of professional services need assurances that capable people manage their physical and mental health, and their financial and legal affairs. Ostensibly in response to this need, states condition the right to practice a profession on the completion of specific requirements, such as graduation from an accredited school and satisfactory performance on written examinations. Despite these conditions, writers recently have charged that many professionals are incompetent. The criticism has prompted a plethora of commentary addressing solutions to the problem of incompetent professionals.¹

Many writers have asserted that compulsory continuing competency requirements for professionals could reduce or eliminate incompetence. The suggested forms of competency evaluation often include increased self-policing by professional societies, private certification, private peer review, state specialty certification, self-imposed continuing education, state-imposed peer review, state-


The problem of professional incompetence is not new, as the following seventeenth century Virginia statute illustrates:

Whereas many troublesome suits are multiplied by the unskillfulness and covetousness of attorneys, who have more intended their own profit and their inordinate lucre then the good and benefit of their clients: Be it therefore enacted, That all mercenary attorneys be wholly expelled from such office, except such suits as they have already undertaken, and are now depending, and in case any person or persons shall offend contrary to this act to be fined at the discretion of the court.

1645 Va. Acts VII.
imposed continuing education, and periodic reexamination. Other writers have doubted the validity, efficacy, and economic value of increased regulation of professionals. These writers believe that existing policing methods are adequate, and that proposed additional safeguards would be costly and result in minimal benefit.

Some states already have adopted continuing competency requirements for professionals. If the trend continues, public regulatory bodies will compel increasing numbers of professionals to demonstrate continuing competence. The standards for demonstrating competence and the sanctions imposed for failing to meet those standards are likely to vary among the states and the professions. Regardless of form, increased regulation certainly will foster legal challenges to the enacted regulatory schemes.

Thus far, commentators on continuing competence have discussed only the policy issue of whether the suggested measures will produce better professionals. No commentator has analyzed whether a particular mechanism is a reasonable exercise of state power under the United States Constitution, or whether states must incorporate procedural protections into continuing competency mechanisms. This Article, therefore, will examine the equal protection and due process issues raised by state-imposed competency requirements, and describe the procedural rights that professionals deserve or are likely to enjoy.

The Article first discusses the arguments for and against continuing competency regulation. The conflicting views raise doubts whether proposed continuing competency measures are meaningful, cost-effective, or in the public's best interest. The state boards that implement occupational licensing statutes consist almost entirely of professionals. Consequently, members of a profession have considerable opportunity to control competition. Also, occupational licensing historically has had a disparate, negative impact on minorities. Any additional licensing requirements may aggravate the inequities. Finally, the proposed forms of continuing compe-

2. See Gilbreath, supra note 1; Krivosha, supra note 1; Parker, supra note 1; Comment, supra note 1.

3. See, e.g., Frankel, Curing Lawyers' Incompetence: Primum Non Nocere, 10 CREIGHTON L. REV. 613 (1977); Gellhorn, supra note 1; Shephard, Licensing Restrictions and the Cost of Dental Care, 21 J. L. & ECON. 187 (1978); see also M. Friedman, CAPITALISM AND FREEDOM 137-60 (1962); D. Lees, ECONOMIC CONSEQUENCES OF THE PROFESSIONS (1966).
tency evaluation may not test skills that are job-related or necessary for competent professional performance; moreover, their cost may outweigh their benefits. Yet, if judicial review of continuing competency requirements for professionals parallels the review of other occupational licensing measures, the requirements will be virtually unassailable despite the probable disparate impact and certain economic burden.

The Article then examines due process and equal protection decisions in the occupational licensing area. These decisions show that the constitutional rights of professionals faced with increased regulation are very limited. Substantive due process and equal protection rights provide almost no protection against ill-conceived or economically inefficient regulations. Although procedural due process rights provide greater protection, significant procedural safeguards are triggered only when the continuing competency measure is subjective and focuses on an individual professional. Otherwise, procedural rights provide meager protection against unreasonable regulations.

These observations lead to several conclusions. First, professionals, state legislators, and the public should be skeptical of proposals for increased regulation. Second, courts should uphold new continuing competency requirements only if the requirements demonstrably measure occupational skills, as determined by validity and reliability standards resembling those developed under Title VII. In addition, courts should ensure that licensing procedures provide adequate safeguards against bias, error, and arbitrary decisions. Strict judicial scrutiny of occupational licensing measures would depart significantly from the current practice of upholding state regulation unless the regulation is patently unreasonable. Nevertheless, the unique character of occupational licensing and its profound effect on a professional's ability to work warrant strict judicial scrutiny of continuing competency requirements.

4. See 42 U.S.C. § 2000e (Supp. V 1981). Title VII regulations are codified at 29 C.F.R. § 1607 (1982). The United States Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), noted that employers subject to Title VII must use professionally accepted methods that are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Id. at 431.
II. The Current Approach to Continuing Competence and the Critical Response

Most states evaluate licensed professionals' competence in only two situations: initial licensure and disciplinary proceedings. People seeking initial licensure must satisfy educational and knowledge requirements and undergo a cursory character inquiry. States assess the knowledge requirement through an examination administered by the state's licensing body. For most professionals, this examination is the only demonstration of competence that the licensing body requires.

States also evaluate professional competence when someone files a complaint with state officials about a licensee's capabilities. If an investigation and hearing confirm the allegations of the complaint, the state may suspend or revoke the professional's license. In most jurisdictions, this complaint-triggered system is the sole monitor of practicing professionals' competence.

A. Regulation Advocates

Many critics perceive the after-the-fact disciplinary approach as an inadequate response to professional incompetence, and favor regulation that would require all practicing professionals to demonstrate continuing competence. These critics view the current system as deficient in several respects. First, the system operates after the damage is done. Second, discipline will occur only when a complaint is filed with state officials, or when professional incompetence otherwise comes to the officials' attention. This disciplinary method is invoked infrequently and rarely results in license revocation. Third, the system may identify the wrong profession-

5. See Frankel, supra note 3; Marks & Catheart, supra note 1; Comment, supra note 1.
6. Frankel reported that his review of West's Decennial Digest for 1966-76 revealed that no more than ten percent of the reported attorney malpractice complaints resulting in litigation could be read as alleging a lack of technical proficiency. The balance consisted of cases of attorney neglect or betrayal. Frankel, supra note 3, at 619. One explanation for this statistic is that a client may be less likely to discern an attorney's technical incompetence than to uncover an attorney's neglect or disregard of duties. Thus, dependence upon client, patient, or consumer complaints may be an unsatisfactory means of ferreting out technically incompetent professionals because laypersons are unable to evaluate technical skills.

Another writer relied upon the following figures to support his view that licensing standards are not enforced. "Consider the example of New York City. According to a 1968 re-
CONTINUING COMPETENCY REQUIREMENTS

als. The physician, lawyer, nurse, or dentist who commits an egregious and patent error on one occasion may constitute a far less serious threat to public health and safety than a professional who consistently performs at a substandard level. Discovery and discipline of this borderline professional, however, are unlikely to occur under existing procedures. The present system thus provides little incentive for minimally competent professionals to increase or maintain their level of competence.

According to some critics, failure to monitor the continued competence of all licensed professionals seriously undermines the value of the licensing system. Entry level licensure ensures only a minimal level of competence measured crudely by the completion of educational requirements and a general written examination. The evaluation occurs at the most unilluminating point in a professional's career—before he or she has begun to practice. Moreover, constant technological advances threaten the useful life of a professional's training and knowledge. Thus, some writers conclude, entry level licensing does not adequately protect the public health, safety, and welfare. The licensing system fails to protect the public from professionals who can read but cannot do, who fail to supplement their training on a continual basis, or who consistently ignore their professional responsibilities.

Regulation advocates also reject implicitly the argument that competence cannot be defined accurately and that the states,
therefore, should not compel competence. The states already pur-
port to evaluate competence by granting initial licensure on the
basis of an examination. Also, the current disciplinary approach
already vests the states with authority to define ongoing compe-
tence insofar as incompetence is a basis for license suspension or
revocation under most statutes.\textsuperscript{11} Competence presumably is no

\textsuperscript{11} See, e.g., ARiz. REv. STAT. ANN. § 32-1451 (1976 & Supp. 1977-82) (medical doctor
may lose license if guilty of unprofessional conduct); ARiz. Sup. Ct. R. 29(b) (1982) (lawyer
may lose license for willful violation of disciplinary rules, including rule 6-101(A)(2) (codi-
fied at ARiz. Sup. Ct. R. 29(a), which describes inadequate preparation of a legal matter);
ARiz. REv. STAT. ANN. § 32-1663 (1976 & Supp. 1977-82) (nurse may lose license if guilty of
unprofessional conduct or if unfit or incompetent by reason of negligent habits); ARiz. REv.
STAT. ANN. § 32-1263 (1976 & Supp. 1977-82) (dentist may lose license for unprofessional
conduct, including gross malpractice, repeated acts constituting malpractice, or any conduct
contrary to recognized ethical standards of the dental profession that constitutes a danger to
the health, welfare, or safety of the patient); CAL. BUS. & PROF. CODE § 2234 (West Supp.
1983) (definition of unprofessional conduct by a physician includes gross incompetence);
CAL. BUS. & PROF. CODE § 2761 (West 1974 & Supp. 1983) (nurse may lose license for in-
competence or gross negligence in carrying out usual nursing functions); FLA. STAT. ANN.
§ 458.331(t) (West 1981 & Supp. 1983) (physician may lose license for gross or repeated
malpractice or for failing to practice medicine with the level of care, skill, and treatment of
a similarly situated reasonable, prudent physician); FLA. STAT. ANN. § 464.018(f), (h) (West
1981 & Supp. 1983) (nurse may lose license for lack of minimal skills or for inability to
practice nursing with reasonable skill and safety to patients); ILL. ANN. STAT. ch. 111, § 4433
(Smith-Hurd 1978 & Supp. 1983) (physician may lose license for professional incompetence
as manifested by poor standards of care or for mental incompetency as declared by a court
of competent jurisdiction); ILL. ANN. STAT. ch. 110A, § 771 (Smith-Hurd Supp. 1983) (attor-
ney may be disbarred, suspended, or censured for failure to act competently, either by han-
dling a legal matter without adequate preparation or by neglecting a legal matter); ILL. ANN.
STAT. ch. 111, § 3420 (Smith-Hurd 1978 & Supp. 1983) (nurse may lose license if unfit or
incompetent by reason of gross negligence); ILL. ANN. STAT. ch. 111, § 2222 (Smith-Hurd
Supp. 1983) (dentist may lose license for professional incompetence manifested by poor
standards of care or for mental incompetency as declared by a court of competent jurisdic-
tion); MASS. GEN. LAWS ANN. ch. 112, § 5 (West 1980) (physician may lose license for prac-
ticing with gross incompetence or gross negligence on a particular occasion, or negligence on
repeated occasions); MASS. GEN. LAWS ANN. ch. 221, § 40 (West 1958 & Supp. 1983) (attor-
ney may lose license for deceit, malpractice, or other gross misconduct); N.Y. EDUC. LAW
§ 6509-11 (McKinney Supp. 1982) (professionals may lose their licenses for practicing their
profession fraudulently, beyond its authorized scope, with gross incompetence, with gross
negligence on a particular occasion, or negligence or gross negligence on more than one occa-
sion); VA. CODE § 54-316 (1982) (physician may lose license if grossly ignorant or careless in
his practice, or if guilty of gross malpractice); VA. CODE 54-73 (1982) (attorney may lose
license if convicted of any malpractice); VA. CODE § 54-367.32 (1982) (nurse may lose license
for practices contrary to the standards of ethics, or practices that endanger the health and
welfare of patients or the public); VA. CODE § 54-187 (1982) (dentist may lose license for
negligent conduct likely to cause injury).

The professions also have incorporated definitions of competence into their ethical and
more difficult to define accurately in a continuing competency evaluation system than for initial licensure or disciplinary purposes. Consequently, competency evaluation is possible.

B. Regulation Opponents

Opponents of increased state regulation of continuing competency requirements make several arguments against proposed changes. Many opponents maintain that voluntary private associations, specialty accrediting bodies, and consumer selection adequately supplement the state licensing system and enable laypersons to distinguish skilled practitioners from less proficient practitioners.12

One commentator has observed that the impetus for occupational licensing laws often comes from the occupational groups, not the public.13 Questioning the need for many licensing measures,14 he argues that

occupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer; it has reduced competition; it has narrowed opportunity for aspiring youth by increasing the costs of entry into a desired occu-

disciplinary codes. For example, the American Bar Association recently adopted new model rules of professional conduct that include the following unhelpful definition of competence: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Professional Conduct Rule 1.1 (Final Draft 1982), reprinted in 68 A.B.A. J. 1411 supp. 5 (1982). Thus, private and public bodies continue to attempt to evaluate competence, or at least purport to regard competence as a goal for all professionals.

12. See generally supra note 3 and authorities cited therein. Gellhorn favors abolition of state licensing in some contexts:

One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state laws, as have sanitarians and psychologists, assay- ers and architects, veterinarians and librarians. But with what joy 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 unsightly hair with the solemnity appropriate to their high-sounding title?

W. GELLOHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 106 (1956).


14. See id. at 111-18.
pational career; it has artificially segmented skills so that needed services, like health care, are increasingly difficult to supply economically; it has fostered the cynical view that unethical practices will prevail unless those entrenched in a profession are assured of high incomes; and it has caused a proliferation of official administrative bodies, most of them staffed by persons drawn from and devoted to furthering the interests of the licensed occupations themselves.\(^{15}\)

Another common criticism is that professional competence is not susceptible to accurate, objective measurement because relevant practice skills do not lend themselves to pencil and paper evaluation.\(^{16}\) In addition, many professions have become so specialized

\(^{15}\) Gellhorn, supra note 1, at 16-18. Gellhorn might not oppose the reformation of licensing laws in a manner that promoted the public interest. He observed that “those already in practice remain entrenched without a demonstration of fitness or probity. The self-interested proponents of a new licensing law generally constitute a more effective political force than the citizens.” Id. at 12. Although Gellhorn objects to the stranglehold that professionals maintain on the licensing system, which undermines reform inimical to the professionals’ self-interest, he might favor consumer-initiated reform that did not impede competition.

Any of the continuing competency requirements that a state is likely to adopt, however, would impede competition. For example, compulsory continuing education programs often entail large hidden social costs that outweigh potential benefits. Id. at 24-25 (quoting Wolkin, On Improving the Quality of Lawyering, 50 St. John’s L. Rev. 523, 542 (1976)). Mandatory certification of specialists also decreases competition and discourages qualified, uncertified professionals from performing functions within the zone of a specialization, increasing the cost of services. Id. at 23. Gellhorn proposes that instead of licensing or compulsory competency requirements, states should adopt permissive, voluntary certification and mandatory registration to control professions. Id. at 26.

Other commentators echo the view that occupational groups, not the electorate, commonly initiate new licensing legislation. The inferred motive is to enhance the prestige and status of the occupational group and to afford the group greater control over competition. Wallace, Occupational Licensing and Certification: Remedies for Denial, 14 Wm. & Mary L. Rev. 46, 47-50 (1972); Silverman, Equal Protection, Economic Legislation, and Racial Discrimination 25 Vand. L. Rev. 1183, 1197 (1972); see also Shepard, supra note 3 (concluding that licensing examinations for dentists operate in the manner of a cartel, limiting the entry of nonresident practitioners and constraining the number of new dentists trained in the state); M. Friedman, supra note 3, at 137-60 (concluding that the social costs of licensure outweigh the benefits). See generally Pashigian, Occupational Licensing and the Interstate Mobility of Professionals, 22 J. L. & Econ. 1 (1979) (statistically demonstrating that licensing requirements restrict the interstate flow of professionals).

\(^{16}\) One commentator has cautioned that neither a profession nor a state should redefine the goal of competence on the basis of the ability to measure competence. Otherwise, competence definitions may overemphasize academic and analytical skills because these skills lend themselves to objective measurement; other professional skills of equal or greater importance to overall competence that are not susceptible of accurate measurement may be
that practitioners in the same field share almost no skills or knowledge essential to competence for all members of the profession. 17 Development of a meaningful measure of competence thus poses the formidable and expensive obstacle of developing competency measures for every specialty and subspecialty within the licensed profession.

Peer review, the commonly suggested alternative to objective evaluation tools, is unacceptable to some critics because the review is subjective, time-consuming, and subject to abuses. 18 The abuses range from the unfair elimination of competition to meaningless rubber-stamp approval of favored fellow professionals.

Few regulation opponents advocate the elimination of licensure, or reject the consideration of incompetence as a basis for license revocation. Presumably, they feel some limitation on access to the

---

17. This does not mean that these critics oppose specialty certification. Rather, the critics object to an overall competency test that fails to consider the specialized nature of most professionals' practices.

A survey of attorneys conducted by the American Bar Association in May 1982 indicated that most survey respondents supported the certification of law specialists and affording qualified attorneys the right to announce their specialties publicly, but opposed periodic relicensure. 68 A.B.A. J. 800 (1982). The poll did not ask the respondents to indicate whether they favored state or private control of specialty certification.

The respondents' preferences probably stem in part from familiarity with the prevalence of specialty certification in the medical profession. Unlike the legal profession, the medical profession is regulated heavily through various mechanisms other than initial state licensure. Both governmental and private mechanisms compel physicians to specialize and demonstrate their continued competence. See, e.g., 42 U.S.C. § 1320c (Supp. V 1981) (establishing professional standards review organizations to review the quality of medical services rendered). The constraints on the medical profession may encourage imitation by other professions. See Parker, supra note 1, at 467-73.

18. Peer review can take several forms. One proposal includes three forms of attorney peer review: "referral peer review," triggered by complaints, submission to which is voluntary; "disciplinary peer review," triggered by complaints of a more serious nature, submission to which is not voluntary; and "law practice peer review," which is a self-referral submission to review that allows an attorney to announce to the public that he has been reviewed and approved. AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM 1 (1982). These suggestions could be adapted to other professions and enforced through public or private means or through a combination thereof.
professions is valuable, and that the tools currently used to separate the wheat from the chaff are reasonable. The critics do not agree, however, that a similar limitation on the continued right of professionals to practice is reasonable, except in the extreme cases that now reach licensing boards for disciplinary action under the after-the-fact disciplinary approach.\textsuperscript{19} This position may have several explanations.

One explanation might be that the differences between a disciplinary approach and a preventive approach may justify evaluating competence in one context, but not the other. Under the disciplinary approach, state authorities review conduct on an ad hoc basis and decide whether the conduct constitutes incompetence. Under the preventive approach, however, state authorities must determine the minimum skills and knowledge necessary for all competent practitioners. For some writers, this distinction apparently justifies a difference in treatment. The distinction, however, does not explain how states can make determinations of competence when granting initial licensure. Accordingly, the argument against a preventive approach to evaluating continued competence is flawed unless the argument also posits the abolition of any preventive approach to competency regulation.

A second explanation applies only to practicing professionals who oppose continuing competency regulation, but do not advocate abolition of all licensing. They may have anticompetitive motives. Entry level barriers to a profession elevate the status and income of practicing professionals. Barriers to the continued right to practice, however, threaten a professional’s income in two ways. First, the professionals must sacrifice income by expending working time to meet the requirements. Second, professionals who failed to satisfy the requirements would lose their licenses to practice, and thus their professional income. In contrast, the income at stake at the initial licensing stage is merely an economic potentiality belonging to all people without regard to professional status or

\textsuperscript{19} No satisfactory objective support for such a conclusion has been suggested. Instead, detractors typically enumerate the infirmities of proposed means of evaluating continued competence without conducting a rigorous analysis of the validity of the examinations now used for initial licensing. The growing sophistication of test validity research, prompted in part by developments in employment discrimination law, may make the continued use of these unvalidated licensing tests indefensible.
power. Of course, economic self-interest also favors the arguments of professionals who advocate continuing competency regulation. Increased restrictions on the right to practice make the right more financially attractive for professionals who maintain their license because restrictions decrease competition and elevate the cost of professional services.

Pragmatism offers a third explanation why some people might accept initial licensing though they oppose continued competency regulation. Initial licensing gives consumers a sense of security when selecting a professional. People are familiar with the system and probably rely on it. Elimination of the initial licensing system thus could cause consumers to hire only those professionals licensed under the old system. Also, any hope that states will abolish initial licensing of some professions, especially medicine, is highly unrealistic. Prevention of new, additional regulation, however, is still possible and worth pursuing by those who doubt the value of licensing.

Perhaps the strongest argument against increased state regulation of the professions is that the state licensing boards that would enforce the regulations might not act in the public interest. Seventy-five percent of all occupational licensing boards are composed exclusively of practitioners licensed in the respective professions.

20. See Gellhorn, supra note 1.

21. See generally id. Another explanation for reform agitation by professionals may be a desire to deflect efforts by the general public or public interest groups who propose legislative changes that do not protect the profession's interests. Legislation prompted by the professions is likely to be more temperate and solicitous of professional interests than legislation proposed by public interest groups.

22. W. GELLHORN, supra note 12. Marks and Cathcart, in addressing the legal profession, conclude that the composition of the licensing board does not render the tribunal unfair, at least when the competence issue is professional performance, not general conduct. Marks & Cathcart, supra note 1, at 234. This view is reasonable because a member of a profession can evaluate performance better than a nonmember. Laypersons, however, are as capable as professionals in identifying incompetence with respect to moral turpitude, commingling of funds, and neglect of client matters. Id. Cf. Board of Curators v. Horowitz, 435 U.S. 78, 86 (1978) (distinguishing procedures accorded students for disciplinary dismissals from procedures accorded students for “academic dismissals”).

In an interesting aside to Verner v. Colorado, 533 F. Supp. 1109 (D. Colo. 1982), discussed in text accompanying infra notes 126-32, the plaintiff's attorney moved to disqualify the presiding judge for bias because the judge had taught courses for the National Center for Continuing Legal Education. The plaintiff's attorney requested a judge uninvolved in continuing legal education. The judge responded to this allegation of bias by citing Canon 4 of
The suggestion that state board members can disregard their professional interests while private bodies cannot seems naive. Despite these criticisms of continuing competency regulation, state legislatures are likely to adopt expanded continuing competency requirements in the future. When they do, litigation concerning the substantive and procedural aspects of those requirements is certain to follow, especially if the requirements apply to the legal profession. A review of occupational licensing cases, and an analysis of the practical differences between initial licensing and continuing competency regulation, may adumbrate the outcome of substantive and procedural challenges to the continuing competency requirements.

III. STATE AUTHORITY TO REGULATE THE PROFESSIONS

A state's authority to regulate the professions within its borders is broad, but not unfettered. The fourteenth amendment requires that state-imposed restrictions bear a rational relation to an indi-

the Code of Judicial Conduct, which exhorts judges to contribute to the improvement of the law. Id. at 1108-10.

23. To assure continuing competence, many states require continuing professional education. For example, California, Massachusetts, and Minnesota have adopted continuing education requirements for the nursing profession. The regulations of these states show that states will vary in their approach to continuing competence, even if the method selected and the profession affected are the same.

California requires 30 hours of continuing education approved by the state Board of Nursing for license renewal, which occurs every two years. Alternatively, the licensee may take an examination that tests current knowledge in the registered nursing field. A nurse who selects this alternative and fails the exam must complete 30 hours of continuing education before the nurse's license can be returned to "active status." See CAL. ADMIN. CODE tit. 16, R. 1450-15, 1456 (1983). The Code also attempts to define the types of courses that satisfy the 30 hour requirement.

Massachusetts also requires nurses to complete continuing education requirements to maintain their licenses. Massachusetts' requirement is not as explicit as California's, however, and does not provide an examination alternative. See MASS. GEN. LAWS ANN. ch. 112, §§ 74, 74A, 74C (West 1983).

Minnesota requires 30 hours of continuing education for license renewal each year. Minnesota also provides for random audits to ensure that licensees who submit assurances of completion of the educational requirements actually have completed the requirements. See 7 MINN. CODE AGENCY R. § 5.1030 (1982) (Rules of the Board of Nursing).

individual’s fitness or capacity to practice the profession. In addition, a person denied the right to practice by state restrictions is entitled to certain procedural rights, including notice and the opportunity for a hearing to contest the validity of the denial. A state’s discretion is broadest when making substantive assessments about what constitutes a fair standard of professional competence. As the United States Supreme Court said in *Williamson v. Lee Optical Co.*:

“The . . . law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”

A. Substantive Due Process and Equal Protection in Occupational Licensing

The leading substantive due process case dealing specifically with occupational licensing is *Schware v. Board of Bar Examiners*. In *Schware*, the New Mexico State Board of Bar Examiners refused to allow Schware to take the state bar examination. The board’s refusal was based on Schware’s “bad moral character,” as

---


Specificity focuses on the standards and guidelines that a licensing board uses in granting, denying, suspending, renewing, or revoking a license and demands that they be intelligible. Rationality requires that the standards bear a reasonable relation to effective practice of the regulated occupation. Fairness concerns the make-up of the licensing board, the procedures it follows, and the necessity and timing of judicial review.


26. See, e.g., Greene v. McElroy, 360 U.S. 474, 492, 496-97 (1959); Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 123 (1926). A more precise delineation of the due process rights depends on the facts and circumstances of each case. The Supreme Court has observed: Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.


evidenced by his admitted membership in the Communist Party during his youth, his prior use of aliases, and his history of arrests.\textsuperscript{29} The United States Supreme Court held that the state board deprived Schware of due process by precluding him from taking the licensing examination.\textsuperscript{30} The Court noted that during the fifteen years preceding his bar application, Schware had engaged in no conduct that reflected adversely on his character,\textsuperscript{31} and that Schware's past activities did not imply that he presently lacked the good moral character necessary to practice law.\textsuperscript{32}

The Court's description of the nature and limits of state authority to regulate professions is significant:

A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.\textsuperscript{33}

29. 353 U.S. at 234-35.
30. Id. at 247.
31. Id. at 239.
32. Id. at 246-47. Schware assumed aliases to obtain employment in businesses that discriminated against Jews so that he could organize more effectively non-Jewish workers in those businesses. Id. at 240-41. Schware belonged to the Communist Party from 1932 to 1940, but never advocated the overthrow of the United States government by force or violence, and did not participate in any illegal activities as a party member. Id. at 243-46. His prior arrests related to his union activities and to his alleged support of the Spanish Loyalist government. Id. at 241-43. The arrests did not lead to conviction and, in the Supreme Court's view, were "wholly insufficient to support a finding that Schware had bad moral character at the time he applied to take the bar examination." Id. at 242-43.
33. Id. at 239 (citations omitted). The Court in \textit{Schware} relied on Dent v. West Virginia, 129 U.S. 114 (1889). \textit{Dent} involved a challenge to a state statute that required medical practitioners to obtain a diploma from an appropriate medical college, to have practiced ten years in the state, or to have passed an examination before practicing medicine in West Virginia. Id. at 115. The Court in \textit{Dent} acknowledged that a state may regulate the practice of professions within its borders under its power to provide for the general welfare of its people. Qualifications required by a state are valid, despite their stringency or difficulty, if the qualifications are related to the profession and are attainable by reasonable study and application. Id. at 122.

The Court acknowledged the state's power not only to control entry into an occupation,
The rational connection standard set forth in *Schware* is easily satisfied. Thus, nearly all post-*Schware* challenges of occupational regulations based on substantive due process grounds have failed.\(^3\)

Equal protection challenges of licensing measures also have been unsuccessful, even when the challenged regulation has had a consistent and significant adverse impact on a suspect class. The primary obstacle to these equal protection challenges is *Washington v. Davis*,\(^8\) decided by the United States Supreme Court in 1976. *Davis* established an intent requirement that insulates state occupational licensing laws from meaningful constitutional scrutiny, despite the adverse impact of the licensing laws on minorities.

The plaintiffs in *Davis*, two black police officers, challenged the District of Columbia's police department recruiting procedures on

---

34. The few exceptions in which courts have held otherwise either involve the application of a legitimate requirement, such as good moral character, to discriminate against a specific group of individuals, or implicate other constitutional rights, such as free speech, freedom of association, or privacy. See, e.g., Baird v. State Bar, 401 U.S. 1, 4-8 (1971) (exclusion from practice of a bar applicant for failure to state whether she ever belonged to an organization that “advocates overthrow of the United States Government by force or violence” was unconstitutional); Florida Bd. of Bar Examiners v. N.R.S., 403 So. 2d 1315, 1317 (Fla. 1981) (per curiam) (private, noncommercial sexual acts between consenting adults were not relevant to prove fitness to practice law).


due process and equal protection grounds.\textsuperscript{37} The recruiting procedures included a written test that had a disparate impact on blacks. Although scores on the written test correlated directly with performance in the department training program, no evidence was presented that the test measured job-related skills.\textsuperscript{38} Citing the disparate impact of the examination,\textsuperscript{39} the officers alleged that the use of the test violated the equal protection clause by invidiously discriminating against blacks.\textsuperscript{40}

The Court acknowledged the disparate impact of the test, but stated that disparate impact alone did not constitute unlawful discrimination under the equal protection clause of the fourteenth amendment;\textsuperscript{41} the officers also had to prove a discriminatory purpose.\textsuperscript{42} The Court admitted, however, that the disproportionate impact of a law may be relevant to a showing of intent to discriminate, because a prima facie case of discrimination can be established through evidence that the selection procedure results in the systematic exclusion of protected class members.\textsuperscript{43} After establishing a prima facie case of discrimination, the burden of proof shifts to the state to rebut the presumption of unconstitutionality.\textsuperscript{44} The state must show that “‘permissible racially neutral selection criteria and procedures have produced the monochromatic result.’”\textsuperscript{45} If the criteria and procedures are neutral, the criteria need only be rationally related to a legitimate state purpose. Disparate impact alone does not trigger the strict scrutiny equal protection test, under which the state measure must further a compelling state purpose.\textsuperscript{46}

\textsuperscript{37} 426 U.S. at 233. The officers based their constitutional challenge on the fifth amendment due process clause. The Court ruled in Bolling v. Sharpe, 347 U.S. 497 (1954), that the due process clause of the fifth amendment also contains an equal protection component.

\textsuperscript{38} 426 U.S. at 232-33, 235-36, 250-51.

\textsuperscript{39} \textit{Id.} at 234-35.

\textsuperscript{40} \textit{Id.} at 236.

\textsuperscript{41} \textit{Id.} at 245-48.

\textsuperscript{42} \textit{Id.} at 239-41.

\textsuperscript{43} \textit{Id.} at 241.

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.} (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

\textsuperscript{46} 426 U.S. at 242. \textit{See also} Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (upholding a zoning board decision that tended to perpetuate racially segregated housing patterns). Although Title VII did not apply to the facts in \textit{Davis}, the Court concluded that the test would satisfy standards “similar to those obtaining under
The Court in *Davis* also refused to apply Title VII discrimination standards to the Constitution. Title VII provides that if an employee demonstrates that a neutral selection method has a disparate impact on a protected class, then the employer must demonstrate that the method is a valid and reliable measure of job-related skills. The employee does not need to prove an intent to discriminate. The Court in *Davis* feared that application of Title VII disparate impact analysis to facially neutral statutes would "raise serious questions about, and perhaps invalidate, . . . licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."

These apprehensions, however, are overdrawn. A state could satisfy the compelling justification requirement by showing that a licensing measure assesses skills necessary for the performance of professional duties—the same evidence required of private employers under Title VII. To define private discrimination as the use of unvalidated selection methods with a disparate impact on a protected class, while limiting governmental discrimination to intentional discrimination is hypocritical and unnecessarily deferential. This broad deference to government is especially

---

47. *See* 29 C.F.R. § 1607 (1982).
49. 426 U.S. at 248.

Silverman asked whether licensing advances a compelling state interest that outweighs the racially discriminatory impact of licensing. Silverman would shift the burden and have the government prove a direct relationship between the licensing standards and the state regulatory purpose. *Id.* Silverman also favored a system of certification instead of licensure, in part because certification would serve better the needs of poor and minority consumers of professional services. Silverman, *supra*, at 1201-02.

Silverman's approach is narrower than the approach advocated in this Article because his approach is limited to cases in which a plaintiff has established a disparate impact. Even absent a disparate impact, however, courts should compel states to demonstrate a direct relationship between occupational licensing and state goals. The argument becomes more compelling, of course, when a disparate impact is present.

Other commentators have criticized the Court's approach to discrimination in *Davis*. One
unreasonable in the occupational licensing area, where the selection measures that are protected from meaningful scrutiny are essential prerequisites to professional employment.

The critical question after *Davis* is the nature and scope of evidence required to establish discriminatory intent. The United States Supreme Court provided some guidance in *Personnel Administrator v. Feeney*:51 "‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group." *Feeney* involved a veteran’s preference policy that had the definite and foreseeable effect of discriminating against women. The Court nevertheless held that the policy did not violate the fourteenth amendment.52 Intent to discriminate, said the Court, implies more than the continued use of a procedure with known adverse effects on a particular class of people.53 Rather, the ad-

thoughtful analysis underscores the shortsightedness of the *Davis* requirement of intent:

When the context is race . . . the problem of the stigma of caste cannot be confined to purposeful stigmatizing action. It is a global problem, this inheritance from slavery and the system of racial subordination that took slavery’s place. . . . Racism, 1970’s-style, is a living system, just as Jim Crow was a system. The main difference between the two systems is that today’s racism inflicts a greater proportion of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks.

*Karst, The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 50-51 (1977) (citations omitted).* In a footnote, the Court further explained:

>This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

*Id.* at 279 n.25.

51. *Id.* at 281.

52. *Id.* at 279.
verse effect must have been one reason for selecting the procedure.\textsuperscript{54}

The troubling question raised by \textit{Davis} and \textit{Feeney} is how a plaintiff ever can produce evidence of discriminatory intent, other than by demonstrating an adverse impact of which the state was aware. A statute represents the collective effort of a body of politicians, whose legislative intent can only be inferred. Even extensive legislative history, which is almost never available for state statutes, may not reveal a clear purpose or intent. Moreover, few legislators would disclose any discriminatory purpose behind a measure that had a disparate impact. Discrimination can be a subtle current that is difficult to isolate and prove by direct means. Often, the only evidence of intent to discriminate is the exclusionary effects from which the intent might be inferred. This indirect proof, however, will not satisfy the Supreme Court's test in \textit{Feeney}.

\textit{Davis} and \textit{Feeney} pose significant obstacles to the development of a constitutional theory that accommodates post-civil rights movement social developments. After \textit{Davis} and \textit{Feeney}, only blatant forms of discrimination violate the Constitution; insidious and subtle discrimination must be addressed legislatively. Although this result may appeal to those who oppose meaningful judicial review of state substantive decisions, the result offends those who believe that equal protection should include freedom from "neutral" barriers that perpetuate the effects of past intentional discrimination.

In \textit{Davis}, the Court also rejected the plaintiffs' substantive due process arguments. The District of Columbia Circuit had evaluated the constitutionality of the police recruitment measures by Title VII standards, and found that the test was not sufficiently job-related to satisfy the reasonableness requirement of due process.\textsuperscript{55} The Supreme Court disagreed and held that the test was directly related to the requirements of the police training program.\textsuperscript{56} The Court cited the defendant's validation study and other evidence, including the opinions of experts.\textsuperscript{57}

\textsuperscript{54} \textit{Id.}
\textsuperscript{57} 426 U.S. at 251 & n.17.
Schware and Davis indicate that states must support their licensing measures with only some evidence that the measures are valid. Regrettably, the quality and amount of evidence offered to demonstrate validity can fall far short of that required under Title VII without violating the Constitution, even though the licensing measure has a disparate impact on minorities. Three appellate court decisions that upheld the constitutionality of state bar examinations as a valid exercise of state power to regulate the profession demonstrate this point.58

In Chaney v. State Bar,59 a California bar applicant challenged the use of an essay bar examination as fundamentally unfair and improper because the grading was subjective.60 He also made a "general insinuative charge" that the state used the examination to control competition.61 The United States Court of Appeals for the Ninth Circuit rejected both arguments.62 Although the court in Chaney cited no evidence to support its conclusion, the court found that California's right to use an essay examination to test bar applicants' ability to analyze general legal situations and apply general knowledge was "patent on its face."63 The court rejected the possibility that the grading of the examination was dishonest or that the examination questions were unreasonably difficult.64 Because fifty percent of the examinees passed the examination, the court stated that the content was not "unarguably . . . outside the bounds of the educational prescriptions which had been made the basis for the right to take the examination."65 The court noted that California reasonably and con-

58. State regulation of the legal profession is somewhat unique. Unlike other professions, the power to admit and discipline lawyers usually is vested in the state supreme court. See District of Columbia Court of Appeals v. Feldman, 103 S. Ct. 1303 (1983). Thus, lawyers are self-regulated. See generally Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 Geo. L.J. 705 (1981).
59. 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968).
60. 386 F.2d at 964.
61. Id. at 965.
62. Id. at 967.
63. Id. at 964. Other circuits have relied on Chaney in holding that an essay examination is a valid means of assessing the competence of bar applicants. See Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974); Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971).
64. 386 F.2d at 965.
65. Id.
stitutionally could impose high standards on its professionals and limit professional status to individuals who possessed the requisite qualifications.66

*Tyler v. Vickery*67 involved due process and equal protection challenges to the Georgia bar examination. The plaintiffs made three constitutional arguments: the state used the examination to discriminate purposefully against blacks; the examination denied equal protection to blacks, as evidenced by their much higher rate of failure; and the examination procedure violated due process because the procedure included no right to review failing grades.68

The United States Court of Appeals for the Fifth Circuit summarily disposed of the purposeful discrimination allegation because the examination was graded anonymously, precluding the graders from intentionally discriminating.69 Although the plaintiffs offered expert testimony that “black English” would produce a unique and recognizable writing style on the examination,70 the same expert stated that black English was not unique to blacks.71 This expert doubted that someone not trained in linguistics would recognize black English as anything other than “incorrect standard English.”72 The multiple choice format used on half of the Georgia bar exam also refuted the allegation of purposeful discrimination. Only one black who passed this portion failed to pass the exam.73

The plaintiffs in *Tyler* also made a disparate impact argument similar to the one used in *Davis.*74 Specifically, they urged that the state could not use testing procedures that excluded a disproportionate number of protected class members unless the test was a valid measure of job performance as defined by Title VII.75 As the plaintiffs pointed out, the stakes are far higher in the occupational

---

66. Id. at 964.
67. 517 F.2d 1089, 1092 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976).
68. 517 F.2d at 1093.
69. Id.
70. Id. at 1093-94. The petitioners in *Tyler* presented evidence that “many black persons tend to speak an English variant, . . . which has been coined Black English.” Id. at 1094. See J. DILLARD, BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES (1972).
71. 517 F.2d at 1094.
72. Id.
73. Id. at 1095.
74. See supra text accompanying notes 37-40.
75. 517 F.2d at 1095-96.
licensing setting than in ordinary employment testing: denying a license precludes an individual from working in his chosen field; failing an employment test only prevents an applicant from working for the employer who required the test.76

The Fifth Circuit rejected this argument and declared that the less stringent disparate impact standard urged by the plaintiffs should be confined to Title VII cases.77 The court reasoned that the job relatedness of the bar examination was not irrelevant to the exam's constitutionality because “[t]he hallmark of a rational classification is not merely that it differentiates, but that it does so on a basis having a fair and substantial relationship to the purposes of the classification.”78 The court stated, however, that constitutional standards—not statutory ones—defined the relationship.79 Applying the rational basis standard of equal protection analysis, the court concluded that the examination was reasonable because the examination tested relevant skills, and the minimum passing score was related to the quality of performance that the exam attempted to measure.80

Finally, in Richardson v. McFadden,81 the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the South Carolina bar examination. The court, applying the principles enunciated in Davis,82 concluded that South Carolina's bar examination satisfied the Supreme Court's fourteenth amendment rationality test.83 The examination questions were adequately related to the skills required to practice law, and the minimum passing score selected by the state board of bar examiners was reasonably related to minimal competency.84

---

76. Id. at 1096.
77. Id.
78. Id. at 1099.
79. Id.
80. Id. at 1102. The court also accepted as reasonable the practice of the board of bar examiners of regrading borderline exams and comparing exam results with law school performance. Id. at 1103.
81. 540 F.2d 744 (4th Cir. 1976).
82. See supra text accompanying notes 41-46.
83. 540 F.2d at 749.
84. The court cited United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975), for the proposition that to satisfy the equal protection clause, the cut-off score must be "reasonably related to minimal competency." 540 F.2d at 749. The court described the cut-off score used by the South Carolina bar examiners as "very subjective and general in nature"
1. Recent Developments

Little has changed since Chaney, Tyler, and Richardson. Disappointed examinees continue to challenge the validity and rationality of licensing examinations.85 Some have argued unsuccessfully that state rules limiting the number of times an applicant can re-take an examination violate due process.86 Other challenges, sometimes fruitful, have alleged that state residency requirements violate the privileges and immunities clause.87 On the whole, however, substantive due process and equal protection rights remain inconsequential in the occupational licensing area.

Although it confirms this unhopeful view, one recent lower court decision merits special attention. The decisions suffer from the same problems of conclusory analysis and meaningless review as Davis, Schware, and their progeny. In Delgado v. McTighe,88 three black and two hispanic plaintiffs alleged that the Pennsylvania bar examination procedure discriminated against minorities and that the examination was not rationally related to its purported

and hardly acclaimed by the educational testing experts who testified." Id.

One examiner testified that he determined scores by reading a whole exam and then assigning one numerical grade to the entire exam, with 70 as a passing mark. The examiner assigned no particular point value to any of the questions, although he mentally assessed their relative importance in arriving at a final score. Id. at 749-50. Another examiner did ascribe specific points to parts of questions. He then took the “top paper” and raised its score to a perfect score. He then adjusted other examinees’ scores accordingly by adding the same number of points thereto. Id. at 750. Although the court opined that this approach was unprofessional and provided little confidence in the precise numerical results obtained, the court concluded that the scoring procedure was not so unrelated to the state’s objectives as to violate the equal protection clause. Id.

85. See, e.g., Tofano v. Supreme Court, No. 83-1773, slip op. (9th Cir. Oct. 12, 1983); Lowrie v. Goldenherz, 716 F.2d 401 (7th Cir. 1983) (revised opinion); Davidson v. Georgia, 622 F.2d 895 (5th Cir. 1980) (per curiam).

86. See, e.g., Poats v. Givan, 651 F.2d 495 (7th Cir. 1981) (per curiam) (upholding Indiana Supreme Court rule limiting to four the number of times an applicant can take the bar examination); Younger v. Colorado State Bd. of Law Examiners, 625 F.2d 372 (10th Cir. 1980) (holding that although the determination of attorney competence is an “imperfect process,” the court could not interfere with a state policy that rationally furthered a legitimate, articulated state purpose; statistics tended to support Colorado’s conclusion that three failures on the bar exam indicated a lack of ability to practice law).


The United States District Court for the Eastern District of Pennsylvania rejected the discrimination allegation under an analysis similar to that applied in *Tyler* and in *Richardson*. The court in *Delgado* found that the plaintiffs had failed to show the requisite discriminatory intent. Thus, despite an undeniable and persistent disparate impact on minority applicants, the court held that the Pennsylvania bar examination did not violate the fourteenth amendment's equal protection clause.

The court in *Delgado* also rejected the allegation that the test was not rationally related to its purported objectives. The court reached this conclusion despite expert testimony that the essay and multiple choice portions of the test bore little relation to a determination of minimal competence to practice law. The expert testified that the multiple choice portion failed to simulate the practice of law because clients rely on practitioners to uncover answers to legal problems, not to choose among four possible responses. In addition, few of the "wrong" answers to the multiple choice questions were patently wrong; many were arguably correct. The essay portion of the test was also unreliable because it was not a comprehensive test of legal subjects and because of the potential for inconsistent grading. The court observed that the bar examination "could not measure minimal competence to practice law unless some determination was made as to what constitutes incompetent performance by an attorney."

The court offered several reasons for holding that the examination was rationally related to the goal of measuring competence. The court found that a properly administered essay examination

---

89. The plaintiffs in *Delgado* had failed the bar exam. *Id.*
90. *Id.* at 895-96. See also supra text accompanying notes 67-84.
91. 522 F. Supp. at 897.
92. *Id.* at 898.
93. *Id.* at 896-97.
94. *Id.* at 897.
95. *Id.*
96. *Id.* at 896.
97. *Id.* Another expert testified that the model answers for two essay questions were incorrect. *Id.* The court, nonetheless, upheld the validity of both portions of the test. *Id.* at 898.
98. *Id.* at 897-98.
was a fair means of testing competence because essays test the ability to analyze facts, determine the legal issues involved, and apply the pertinent law.\textsuperscript{99} In response to the challenge to the multiple choice portion of the examination, the court cited the testimony of the director of testing at the Educational Testing Service in Princeton, New Jersey, who asserted that the multiple choice examination used by Pennsylvania tested the ability to analyze facts and apply a rule of law.\textsuperscript{100} The court further noted that a committee of law school professors and bar admission officials had drafted the multiple choice questions and had submitted the questions to attorneys knowledgeable in each subject area for their review and comments.\textsuperscript{101}

These contentions are unconvincing responses to the plaintiffs' expert testimony that the examination was unreliable and invalid. For example, the Ninth Circuit's approval in \textit{Chaney} of the use of essay exams is not conclusive evidence that the essay exam at issue in \textit{Delgado} was valid, especially in light of the expert testimony to the contrary. The conclusion that the multiple choice portion tested the ability to analyze facts also does not support fully a finding that the test was a meaningful assessment of competence to practice law. To demonstrate the reasonableness of the test, the state should introduce evidence that the analysis of facts is a skill required of an entry level lawyer. Moreover, the facts analyzed must be relevant to entry level practice, and the method chosen to evaluate the ability to analyze these facts must test that skill. The state failed to introduce any evidence on these issues.

The state likewise offered no proof that the subjects covered by the multiple choice examination—contracts, criminal law, evidence, real property, torts, constitutional law, and negotiable instruments—were "those that a newly admitted attorney should reasonably be expected to know."\textsuperscript{102} The list of subjects tested may

\begin{itemize}
\item \textsuperscript{99} Id. at 894. The court cited no evidence, case law, or other authority to support this conclusion. The judge may have believed that precedent provided adequate authority because the licensing regulation decisions are replete with similarly bald, unsupported statements of "patently true" conclusions. See, e.g., \textit{Petitt v. Gingerich}, 427 F. Supp. 282 (D. Md. 1977), aff'd, 582 F.2d 869 (4th Cir. 1978) (per curiam).
\item \textsuperscript{100} 522 F. Supp. at 897.
\item \textsuperscript{101} Id. at 898.
\item \textsuperscript{102} Id. at 894. Civil procedure, notably absent from the list, is a subject most attorneys
have been overinclusive. For example, applicants who intend to practice labor law may have little need for competence in real property and negotiable instruments. The list also may have been underinclusive. The same aspiring labor lawyer should reasonably be expected to know administrative law, labor law and discrimination law, but these subjects were not tested. The underinclusive or overinclusive nature of the exam may be unavoidable, of course, because states license people to practice law generally; they do not limit licensees to any particular area of law. Thus, entry level licensing examinations that test general legal knowledge may be reasonable. Nevertheless, the subjects selected should reflect a reasonable cross-section of the problem areas that entry level lawyers confront in practice, and the state should present empirical evidence to justify the subjects selected. Without this evidence, a court cannot possibly assess whether the test is a reasonable measure or merely an arbitrary limit on access to the profession.

Indeed, the court in Delgado cited no facts that demonstrate the reliability and validity of bar examinations. The validity of the examination depends on whether it is an evaluation tool that adequately measures the critical aspects of the entry level practice of law that are susceptible to assessment. Absent identification of these aspects and proof that the examination measures them, a state may be applying a permissible standard of qualification—proficiency in the state's law—with no basis for finding that unsuccessful applicants fail to meet that standard.

If the judge in Delgado had invalidated the bar examination results, however, he would have faced the difficult problem of fashioning appropriate relief. One option would have been to admit a group of bar applicants without the usual screening. This result is troublesome if one believes some screening is necessary to weed out threats to consumers of professional services. Another, perhaps concurrent, option would have been to compel the state to develop a valid test. This process, however, would require time and money. Thus the court also would have had to decide how the state should handle the bar applications received during the period in which the state was developing a valid test.

Alternatively, the court could have prohibited the state from ad-
ministering any bar examination during the interim period, requiring the state to admit all applicants who met the educational and character requirements. Popular sentiment, however, probably favors limitations on access to the professions as necessary for the protection of public safety, even though the definition of competence is hazy and the exclusionary measures may be invalid. Indeed, if the state had admitted several groups of applicants to the bar without a test, future applicants could argue that a licensing test is not necessary to protect public safety, and thus is not a reasonable requirement.

The court in Delgado was in a precarious position. If the court had decided that the licensing examination was unreasonable, the court may have had to order the state to stop using the test. Without an examination or other means of limiting access to the profession, however, public safety arguably would have been jeopardized. Confronted with the difficulty of fashioning a remedy, the court opted to uphold the exam and to disregard the evidence of the test's invalidity.

2. Implications for Continuing Competence and Suggested Changes

The court's hands-off approach in Delgado has several weaknesses. First, under Title VII, no private employer can use an unvalidated testing method that has a disparate impact on members of a protected class. Although the Supreme Court in Davis emphasized that Title VII imposes more stringent standards than the fourteenth amendment, the Court admitted that the disproportionate impact of a state measure is not irrelevant to the measure's constitutionality. Thus, if a state persists in using a test that has a disparate impact on minorities, and empirical evidence does not demonstrate that the test evaluates measurable critical tasks performed by entry level members of the profession, then an intent to discriminate becomes harder to rebut. Even if a test does not have a disparate impact, the absence of empirical evidence to support its job relatedness bolsters a claim of unreasonableness. Courts

103. 426 U.S. at 246-47.
104. Id. at 246-48.
105. Id. at 242. See also Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979).
should not allow state licensing boards to ignore correctable imperfections in their licensing procedures that deny capable persons the opportunity to practice a profession.

The second reason that courts should avoid cursory review of occupational regulations is that the licensing board members who make the exclusionary decisions are not state legislators, or even disinterested bureaucrats; rather, they are members of the regulated professions. State licensing statutes delegate general authority to licensing boards to assess the competence of applicants for initial licensure and to discipline incompetent professionals. The statutes seldom specify standards or procedures to govern these determinations. Thus, self-interest may influence the selection and enforcement of competency standards, pass rates, scoring methods, and all other aspects of competency assessment.

The regulations that result from this delegation of authority merit treatment distinct from that accorded state statutes implemented by disinterested state officials. Support for this argument lies in the United States Supreme Court's decision in *Hampton v. Mow Sun Wong*. In *Hampton*, the Court reviewed a Civil Service Commission rule that excluded aliens from federal service. The Court suggested that although Congress or the President could have adopted the citizenship rule, the Commission could not because the alien exclusion rule exceeded the Commission's limited function of ensuring an efficient federal service. The Court acknowledged that citizenship was a valid requirement for some federal jobs and that the rule was not unrelated to a valid Commission concern. But, the Court noted, no evidence indicated that this concern prompted the Commission to adopt the alien exclusion

106. See supra note 11.
108. 426 U.S. at 90.
109. Id. at 114. The court rejected the government's argument that administrative convenience and the sensitive nature of certain federal jobs justified the alien exclusion rule. Id. at 115.
110. Id. at 101.
rule, or that the Commission explored less restrictive means.\textsuperscript{111}

The Court's analysis in \textit{Hampton} represents a more rigorous standard of review than the rational basis test. The Court acknowledged that judicial review of agency regulations differs from the review of express actions by the legislature.\textsuperscript{112} \textit{Hampton} suggests that courts should scrutinize licensing board regulations closely to ensure that the regulations comport with the board's legislative directive to promote public health and safety. Although competent professionals are necessary to protect public health and safety, the measures used to assess competence may not achieve this goal. If the evaluation tools do not measure job-related skills, then the primary effect of the measures, and perhaps their true purpose, is to control entry into the professions.

Such a role for licensing boards finds no express support in legislative delegations of authority. Moreover, if the state has not authorized controlling competition expressly, the regulation violates the policy of free competition expressed in the Sherman Act,\textsuperscript{113} if not the Act itself.\textsuperscript{114} At a minimum, the methods of developing oc-

\textsuperscript{111} Id. at 115. \textit{See also} Kent v. Dulles, 357 U.S. 116 (1958); \textit{Note, A Madisonian Interpretation of the Equal Protection Doctrine}, \textit{91 Yale L.J.} 1403, 1412-15 (1982).

The quality of the interest at stake was an important reason for the result in \textit{Hampton}, as the following language indicates: "Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case." 426 U.S. at 115-16.

Justice Rehnquist's dissent reveals the implications of the majority position. In his view, "[t]he fact that Congress has delegated a power does not provide a back door through which to attack a policy which would otherwise have been immune from attack." \textit{Id.} at 124 (Rehnquist, J., dissenting).

Litigants who oppose occupational licensing regulations should use this "back door." An occupational licensing board, like the Civil Service Commission, has a limited and specific function. Courts should examine licensing board regulations closely to ensure that the regulations serve only to protect the public health and welfare, not to decrease competition by limiting the number and type of professionals. The public interest in avoiding the wholesale deprivation of employment opportunities caused by continuing competency measures, weighed against the hypothetical justification for the methods used, requires the invalidation of those methods unless empirical evidence exists that the methods are reasonably predictive of job-related skills and performance.


\textsuperscript{114} The issue whether bar grading procedures not actively supervised by the state itself are immune from the antitrust laws may be resolved shortly. The Supreme Court has ac-
ocupational regulations and the interests of their drafters provide
good reasons why courts should not apply the cursory review stan-
dard used to review other economic legislation. In addition to these
reasons for stricter scrutiny are the facts that occupational regula-
tions have a disparate impact on historically disadvantaged classes
and that licensing regulation excludes individuals from both pri-
ivate and public employment in the licensed profession. In sum,
strong policy reasons favor stricter scrutiny of licensing board ac-
tions than the cursory scrutiny afforded state action in other areas.

Courts will have difficulty ignoring these concerns when con-
fronted with substantive challenges to continued competency mea-
sures. First, the economic interest at stake will be greater than in
initial licensing cases. Second, the competence purportedly evalu-
ated may be more elusive due to variables such as specialization
and differences in the duration and nature of professional experi-
ence. Third, the litigants often will be more sophisticated, power-
ful, and wealthy.

cepted certiorari in Ronwin v. State Bar, 686 F.2d 692 (9th Cir. 1982) (amended opinion),
cert. granted sub nom. Hoover v. Ronwin, 103 S. Ct. 2084 (1983), in which the United States
Court of Appeals for the Ninth Circuit concluded that the bar examiners were not immune.
The decision hinges on the scope of the state action exception to the antitrust laws. See
Browning, Fail the Bar, Sue the Examiners, 69 A.B.A. J. 1656 (1983) (discussing Ronwin
and its implications for the legal profession). If the Supreme Court accepts the Ninth Cir-
circuit's view of state action, constitutional limits on licensing officials may be less significant
to disappointed applicants or licensees who want to challenge licensing measures; antitrust
laws will provide applicants with greater protection. The Ninth Circuit, however, limited its
holding to cases in which the licensing authorities act without "active supervision" by the
state. A possible result of the case thus may be that states will redraft licensing statutes to
provide this active supervision and insulate licensing authorities from antitrust laws. When it
considers Ronwin, the Court doubtless will analyze the following line of cases: Community
Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers
Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co.,
439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978);

A lower court decision is also relevant to the Ronwin controversy. In United States v.
Texas State Bd. of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), modified and
aff'd mem., 592 F.2d 919 (5th Cir. 1979), the district court held that a rule of the state
licensing board that prohibited competitive bidding by licensed public accountants enjoyed
no antitrust immunity under the Parker doctrine. The decision rested on the conclusion
that the rule "is not mandated by any state regulation or action." 464 F. Supp. at 404. Thus,
for purposes of the antitrust laws, the court found that the acts of a licensing board com-
prised of members of the regulated profession were not acts of the state as sovereign in the
declaration of the state's policy.
The following example clarifies this point. Assume that a successful Filipino physician who has practiced medicine for fifteen years fails a relicensing examination, and may no longer practice medicine. He then discovers that the number of minority professionals who fail the examination is vastly disproportionate to the number of whites. The physician institutes a lawsuit on substantive due process or equal protection grounds challenging the reasonableness of the continuing competency regulations. The plaintiff produces his patient records for his fifteen years of practice and several expert witness physicians who testify that their review of the plaintiff's patient records shows that he is a competent physician. The court probably would review the reasoning in Schware, Chaney, Tyler, and their progeny, but would find little scientific or other evidentiary support for their results.  

The court could react in one of three ways: it could extend the cursory review approach to continuing competency cases; it could adopt a more stringent approach for reviewing occupational licensing cases; or it could distinguish continuing competency cases from initial licensure and after-the-fact disciplinary cases and adopt a stricter standard of review only in continuing competency cases.  

The cursory review approach furthers the policy of judicial economy because courts would not need to evaluate the substance of a competency measure. Instead, the measure would be valid if the measure tested such general skills as the ability to analyze facts and apply the law. Absent evidence of intentional discrimination, courts could dispose of challenges to continuing competency measures on motions for summary judgment. Even if a plaintiff could establish a prima facie case of intentional discrimination, however, proof of intentional discrimination by a preponderance of the evidence would be impossible if the continuing competency measure were an objective, anonymously graded examination that tested concepts arguably related to professional practice.  

The problems with extension of the cursory review approach to continuing competency measures, however, are significant. First, although a general test that covers the entire scope of a professional practice may be reasonable at the entry level stage, the

115. See supra notes 28-84 and accompanying text.  
116. See supra note 102 and accompanying text.
reasonableness fades as the professional's career progresses and he or she develops a speciality. Accordingly, revocation of a professional's license on the basis of an examination unrelated to the professional's speciality seems unfair.

Under present licensing systems, of course, states allow professionals to practice outside their specialties. For example, a licensed physician may practice neurosurgery although his postdoctorate training and experience is in dermatology. The state controls such practices only through disciplinary proceedings. Rather than support additional examination requirements, however, the possibility of practicing two distinct professional specialties under one broad license reinforces the view that current licensing examinations are an illusory means of protecting the public from incompetent professionals.

The economic interests at stake in continuing competency challenges also weigh against cursory review. Licensed professionals already have licenses to earn a living by practicing their profession. Revocation of their licenses affects an established economic interest, not an economic potentiality. Thus, courts may find that the interests at stake warrant distinct treatment.¹¹⁷

The third argument against cursory review of continuing competency measures is that regulatory restraints on the continued right to practice, other than discipline for reported misconduct, are not part of society's experience and expectations. Rather, the states historically have deferred to the professions and relied principally on private associations and certification boards to monitor continuing competence. Thus, the psychological and practical impediments that may prevent a stricter review of substantive due process challenges to initial licensing laws are absent in the context of continuing competency regulation.

The final argument against cursory review of continuing competency measures is the evidence available to practicing professionals. Unlike license applicants, practicing professionals may be able to prove their competence through acceptable measures. In the

¹¹⁷. The courts have avoided the issue of whether license revocation involves a right or a privilege. As Justice Brennan observed in Barry v. Barchi, "wooden distinctions [no longer] govern the applicability of procedural due process rights." 443 U.S. 55, 70-71 (1979) (Brennan, J., concurring) (citation omitted).
previous example, the Filipino physician had expert witnesses who could testify that he was competent, based on the experts' evaluation of the physician's patient files. Confronted with this practical and relevant evidence of competence, a court would have difficulty upholding a license revocation based on the results of an unvalidated examination. For the above reasons, therefore, cursory review of continuing competency regulation is inadvisable.

The second approach that a court could take in reviewing continuing competency regulations would be to adopt a more searching analysis of all occupational licensing measures. Specifically, courts would have to interpret the rational basis requirement of *Schware* to mean that all competency evaluation measures must be reasonably and demonstrably job-related. This stricter scrutiny would provide a necessary check on the broad power delegated to licensing boards composed of professionals.

Courts are unlikely to adopt this sweeping approach, however, because of the problems inherent in fashioning a remedy, and because of the Supreme Court's consistent refusal to review licensing measures in a meaningful fashion. Nevertheless, such a course is not inconceivable. A committee representing the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education currently is preparing revised testing standards that will define appropriate testing methods for employment, educational admissions and achievement, licensing, and clinical evaluations. New standards might prompt drafters of licensing examinations to modify tests accordingly. If the drafters do not modify licensing examinations, litigants challenging the validity of an examination could rely on the new standards as evidence of the examination's unreasonableness.

The availability of new standards, of course, may not persuade litigants to use them or courts to strike down invalid licensing examinations. The Equal Employment Opportunity Commission's

---

118. See supra text accompanying note 115.
119. See supra text accompanying note 33.
120. See supra text accompanying notes 102-03.
121. See 113 LAB. REL. REP. (BNA) 75 (May 23, 1983). The committee should complete its recommendations by August, 1984.
Uniform Guidelines on Employee Selection Procedures\textsuperscript{122} have been available for years. Litigants, however, have not relied on the guidelines when challenging licensing examinations, although the preambles to the guidelines state that the guidelines should assist licensing and certification boards in complying with laws prohibiting discrimination on the basis of race, color, religion, sex, and national origin.\textsuperscript{123} Unfamiliarity may have prevented attorneys from using the standards. More likely, however, attorneys have concluded that \textit{Davis} makes the use of Title VII standards inappropriate and unpersuasive in constitutional challenges.\textsuperscript{124}

The third approach that a court could take in reviewing challenges to continuing competency requirements would be to distinguish between such requirements and other licensing requirements. Specifically, the court could apply a stricter standard of reasonableness in continuing competency cases, based on the stronger individual interest at stake and the greater difficulty in developing meaningful measures of competency. Professionals who fail continuing competency examinations, and thereby lose their licenses, incur a greater loss of income and reputation than entry level applicants. These professionals are unlikely to be satisfied with the remedy of eventual reexamination. Rather, they will have the means and the incentive to sue. In litigation, the practicing professional could expect support from fellow professionals, and could receive financial backing from professional organizations. Testimony of fellow professionals, and the favorable testimony of clients, customers, or patients make problems of proving the practicing professional’s competence less burdensome. In addition, a practicing professional may be able to hire testing experts to challenge the validity and reliability of the competency measure. Unvalidated continuing competency measures, therefore, may produce a greater risk of litigation to the states than entry level licensing examinations.

This third approach would not disrupt existing licensing procedures, but would avoid creation of new procedures with the same infirmities. Although the present approach to initial licensing is an

\textsuperscript{122} See 29 C.F.R. § 1607 (1982).  
\textsuperscript{123} Id. § 1607.1(B).  
\textsuperscript{124} See supra text accompanying notes 47-50.
imperfect selection system that excludes some deserving people from practice, it is a familiar system that we have come to accept. We need not accept uncritically the same percentage of error in new procedures that can disrupt or destroy established careers. Instead, courts should scrutinize continued competency procedures more closely and reject regulations unsubstantiated by empirical evidence that the regulations further the goal of competence in a direct, measureable way. Courts should require the type of evidence that plaintiffs adduce to challenge the validity and reliability of selection procedures under Title VII.\textsuperscript{128}

Unfortunately, decisions such as \textit{Verner v. Colorado}\textsuperscript{128} dampen the hope that courts might apply a meaningful standard of judicial review to continuing competency cases. In \textit{Verner}, the United States District Court for the District of Colorado analyzed a challenge to continuing competency requirements under the cursory review approach used in initial licensure cases.

Colorado required that practicing attorneys and judges engage in "organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties."\textsuperscript{127} Attorneys or judges could satisfy the requirement through formal classroom instruction, educational seminars, or other means. Verner failed to comply with the continuing legal education requirement and the Colorado Supreme Court suspended his license to practice law.\textsuperscript{128} Verner brought suit alleging that the rule was arbitrary and had little relation to legal practice.\textsuperscript{128}

In a case of first impression, the court rejected Verner's challenge. The court relied principally on \textit{Schware} and \textit{Chaney} and concluded:

If states can set strict legal proficiency related requirements for

\begin{itemize}
\item \textsuperscript{126} 533 F. Supp. 1109 (D. Colo. 1982), \textit{aff'd}, 716 F.2d 1352 (10th Cir. 1983).
\item \textsuperscript{127} \textit{Id. at} 1117 (citing \textit{COLO. REV. STAT.} \S\ 7A, R. 260.4 (Supp. 1982)).
\item \textsuperscript{128} 533 F. Supp. at 1112.
\item \textsuperscript{129} \textit{Id. at} 1116. Verner based his challenge on the first, sixth, eighth, thirteenth, and fourteenth amendments, seeking injunctive and monetary relief. \textit{Id. at} 1112.
\end{itemize}
admission to the bar, it follows that they may also set strict proficiency related requirements for continuing legal practice. There is no doubt that the state has a substantial interest in also regulating the continuing practice of law within its borders and may establish rules and regulations for the practice of law within its jurisdiction. . . . Further, attorneys failing to comply with such requirements may validly be suspended or disbarred, so long as these rules and regulations are rational.130

The court noted that the continuing competency requirement was reasonable because the rule's purpose was to increase competence, the rule attempted to achieve this purpose by requiring attorneys to engage in an organized activity dealing with subject matter directly related to the practice of law, and because attorneys could satisfy the requirements through classroom instruction, educational seminars, video and audio presentations, preparation of articles, papers and books, self-administered courses and testing, or other "meritorious learning experiences."131 The court viewed these requirements as rational under any interpretation of that term.132

The problem with this analysis is that it attempts to demonstrate the rule's rationality by restating the rule's requirements. The court failed to indicate the manner in which the requirements furthered the purported purpose of increasing professional competence. On the contrary, the long list of alternative means of satisfying the continued competency requirement demonstrates the rule's unreasonableness because almost anything satisfies the requirement. Colorado placed no qualification on the nature of the meritorious learning experiences that would ensure that attorneys selected a method or subject area directly related to their actual practice. Instead, the experience only needed to be directly related to the practice of law. Attorneys could select the organized activity that was the least expensive, the least rigorous, or offered in the most pleasant location. The availability of general continuing edu-

130. Id. at 1117 (citation omitted).
131. Id.
132. Id. Pease v. Clayton, 556 F. Supp. 699 (N.D. Ill. 1983), also involved a challenge to continuing competency requirements. The court in Pease upheld an Illinois requirement of 20 hours of continuing education for licensed physicians because the requirement was rationally related to the state's interest in ensuring competent health care. Id. at 702.
Education requirements do not mean that lawyers will take courses unrelated to their practice or approach the courses with a cavalier attitude. The requirement may encourage responsible professionals to improve their skills or to increase their knowledge in relevant subjects. But the rule as drafted did not compel this result, and the state adduced no evidence that continuing legal education actually improved professional competence. Nevertheless, if meaningful measures could be devised, then the state's interest in enforcing them should be significant.

Given the absence of evidence that the education requirement improved professional competence, the troubling question becomes, who benefits from this rule? One group which clearly benefits includes the people paid to sponsor and teach the programs, and the hotels and resorts that host the programs. The lawyers also may benefit, or at least not be injured, if the time and cost expended in attending these programs can be passed on to their clients or deducted from their taxes. This assumes that they comply with the requirement and not flaunt it as Verner did. No benefit, however, flows to the clients; rather, they must absorb any resulting increase in the cost of legal services.

The substantive due process and equal protection decisions may discourage individuals from challenging state competency requirements at either the initial licensure stage or in the continued competency setting. The case law indicates that courts will not disturb state licensing procedures unless the plaintiff proves discriminatory intent or the absence of a rational relationship between the requirement at issue and a legitimate state purpose. Under either criterion, the plaintiff's burden will be difficult to meet.

Nevertheless, this obstacle is not insurmountable. Plaintiffs can satisfy the strict standards of the fourteenth amendment by presenting evidence that the competency measure is not rationally related to actual practice skills and thus is unreasonable. Litigants also should argue that the actions of occupational licensing boards deserve close scrutiny to ensure that board members do not exceed or abuse their delegated authority.

Courts may be more receptive to challenges of continuing competency requirements than they have been to challenges of initial licensing laws. Because few continuing competency requirements now exist, the courts would not be invalidating an historically ac-
cepted exercise of state power. Rather, the courts would be protecting individuals from unwarranted extensions of state power that could deprive individuals of their established careers and income. Also, even unsuccessful challenges might produce the desirable effect of encouraging states to adopt reliable and valid competency requirements. Of course, the best course for advocates of reliable and valid testing measures is to prevent the state legislature or the state agency responsible for drafting occupational regulations from adopting unreasonable continuing competency measures, thereby avoiding the uncertain remedy of litigation.

B. Procedural Due Process in Occupational Licensing

A more promising basis for challenging continuing competency requirements is the procedural due process requirement of the fourteenth amendment. The essence of procedural due process is reasonable notice and an opportunity to be heard. Procedural due process may include the right to a neutral and fair tribunal, the right to counsel, the right to cross-examine and confront witnesses, and the right to present evidence. Procedural due process also determines the burden of proof a state must satisfy when making decisions that affect protected rights. The scope of the due process requirement depends on the facts of the particular dispute.

Current procedural due process analysis is based on Mathews v. Eldridge. In Eldridge, the Supreme Court considered whether procedural due process required an evidentiary hearing before social security disability benefits could be terminated. The Court decided that a post-termination hearing was adequate and distinguished Goldberg v. Kelly, in which the Court held that an

134. Id. at 271.
135. Id. at 270.
136. Id. at 269.
137. Id. at 268.
138. See infra note 200.
139. See supra note 26.
141. Id. at 323.
142. Id. at 339.
evidentiary hearing must precede the termination of welfare benefits. The Court in Eldridge recognized that people receiving disability benefits, unlike welfare recipients, have other sources of income. Thus, the Court found no reason to depart from the principle that no evidentiary hearing is required before adverse administrative action. Moreover, the decision to terminate disability benefits depended on a medical assessment of the worker’s physical or mental condition, which eliminated the “spectre of questionable credibility” that a prerevocation hearing might dispel.

The Court in Eldridge reasoned that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement will entail.

Commentators have criticized this utilitarian approach for failing to consider certain interests relevant to due process and for emphasizing constitutionally irrelevant considerations. The test

144. Id. at 266. An evidentiary hearing, as defined by the Court in Goldberg involves: timely and adequate notice detailing reasons for the proposed termination; an effective opportunity to defend by confronting adverse witnesses and presenting arguments and evidence; retained counsel, if desired; an impartial decisionmaker; a decision resting solely on the legal rules and evidence adduced at the hearing; and a statement of reasons for the decision and the evidence on which the decisionmaker relied. Id. at 266-71.

145. 424 U.S. at 342. The important factor in Goldberg was the Court’s assessment of the impact that the termination of benefits would have on welfare recipients who depend on the benefits for food, clothing, shelter, and medical care. 397 U.S. at 265.


147. 424 U.S. at 344 (quoting Richardson v. Perales, 402 U.S. 389, 407 (1971)). See also Arnett v. Kennedy, 416 U.S. 134 (1974) (no evidentiary hearing required before removal of a federal nonprobationary employee when procedural protection included 30 days notice of charge and right to respond to charge, as well as full evidentiary hearing after removal).

148. 424 U.S. at 335.

enunciated in *Eldridge* employs procedural due process rights primarily as safeguards against error. The test does not account for other procedural due process values, such as protecting the dignity of an individual deprived of a significant interest by state action. Nevertheless, the Court continues to apply the *Eldridge* test to resolve procedural due process problems.150 *Eldridge*, therefore, is

the Due Process Clauses Nonjusticiable, 60 Tex. L. Rev. 875, 882-90 (1982). Mashaw criticized the utilitarian approach as "unresponsive to the full range of concerns embodied in the due process clause." Mashaw, supra, at 30. Specifically, this due process calculus fails to consider other "process values," including individual dignity, equality, and responsiveness to a "democratic morality's demand for participation in decisions affecting individual and group interests." Id. at 49-50.

Perhaps Mashaw's most insightful criticism of *Eldridge* is that the due process test of *Eldridge* may ask not only unanswerable questions, but questions that may be constitutionally irrelevant. The Bill of Rights focuses on the relationship between the individual and the government and does not resolve all competing social values. The *Eldridge* approach to procedural due process, however, conditions individual rights on an assessment of the result that will maximize the social welfare. Under a separation of powers analysis, the legislature should make these assessments.

In other contexts, such as personal jurisdiction cases, the Court has refused to construe due process in such a utilitarian manner. Instead, the Court has held that the relevant relationship under the fourteenth amendment is the relationship between the state and the individual defendant. Other social welfare factors, such as the effective employment of interstate judicial resources, the plaintiff's interest in choosing a forum, or the state's interest in adjudicating certain classes of controversies, are secondary. A court can consider these factors only after determining that the defendant's relationship with the forum state is such that the state may constitutionally assert jurisdiction over him. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958).

Justice Stevens recently expressed his view of the limitations of *Eldridge* in cases involving liberty interests:

The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.


150. See, e.g., Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (a state did not have to provide an indigent mother with court-appointed counsel in a parental termination hearing where no allegation was made of neglect or abuse, no expert witnesses testified, and no difficult legal issues arose); Little v. Streater, 452 U.S. 1 (1981) (a state could not deny blood grouping tests to a putative father because of his lack of financial resources); Mackey v. Montrym, 443 U.S. 1 (1969) (a motorist is not entitled to a hearing before the Registrar of Motor Vehicles prior to suspension of his driver's license for refusal to submit to a breath-analysis test); Parham v. J.R., 442 U.S. 584 (1979) (formalized fact-finding hearing was not
the standard by which the Court would determine the constitutionality of the procedural aspects of any continuing competency mechanism. Proper application of Eldridge to proposed continuing competency measures, however, requires an understanding of the pre-Eldridge decisions addressing specific aspects of the procedural rights of licensees.

1. Fair Hearing

In Willner v. Committee on Character & Fitness, the petitioner challenged the denial of his application for admission to the New York Bar. The bar had rejected Willner's application because he lacked the character and fitness requisite for an attorney. Willner argued that the bar had afforded him no opportunity to discover the reason for the rejection, to confront his accusers, to have them sworn and cross-examined, or to refute their accusations.

To determine the merits of Willner's claim, the Court relied on Goldsmith v. United States Board of Tax Appeals. In Goldsmith, the Court had held that the board of tax appeals could not suspend a person from the practice of accounting upon charges of unfitness without giving him an opportunity for a hearing and an answer. Goldsmith indicated that the board could admit, suspend, or disbar an accountant only after a "fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process." Applying Goldsmith, therefore, the Court in Willner concluded that due process entitled Willner to confront his accusers and to ascertain and contest the bases of the bar committee's negative report.

In a concurring opinion, Justice Goldberg read the majority

---

required before institutionalizing a minor child whose parents sought to commit the child; diagnostic medical inquiry conducted by an admitting physician sufficed); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (upholding constitutionality of prison discretionary parole release procedures).

152. Id. at 100.
153. Id. at 101.
154. 270 U.S. 117 (1926).
155. Id. at 123.
156. 373 U.S. at 106.
opinion narrowly as not requiring confrontation and cross-examination in every case.\textsuperscript{157} Rather, the circumstances of each case would determine whether the plaintiff received a fair hearing.\textsuperscript{158} Justice Goldberg concluded that if the decisionmaking body based its decision on information supplied by the applicant or on undisputed documentary evidence, and the applicant had an opportunity to reply, no due process problem would arise.\textsuperscript{159} If the denial involved testimony by a witness of questionable veracity, however, confrontation and cross-examination should be allowed.\textsuperscript{160}

The holding in \textit{Willner} and Justice Goldberg’s analysis are consistent with the due process theory of \textit{Eldridge}. \textit{Willner} faced charges of character unfitness lodged by unnamed persons. Such allegations are subjective and may be erroneous or biased. When the risk of error or unfairness is great and the assessment is not primarily objective, due process mandates a pretermination hearing. A fair hearing under these circumstances should include notice, an opportunity to be heard, and the right to confront the accusers.

\textbf{2. Notice}

Five years after \textit{Willner}, the Supreme Court explored the procedural due process requirement of adequate notice in \textit{In re Ruffalo}.\textsuperscript{161} The Court concluded that an attorney who received notice of only one of two charges against him did not receive adequate notice because the two charges involved unrelated incidents.\textsuperscript{162} The Court reasoned that the notice of only one charge did not apprise the attorney of the full reach of the grievance procedure or of the focus of the committee’s inquiry.\textsuperscript{163} Due process requires that notice of a proceeding must be specific enough to enable an individual to prepare a defense.

The United States Court of Appeals for the Tenth Circuit recently distinguished \textit{Ruffalo} in \textit{Phelps v. Kansas Supreme
Phelps, an attorney, argued that the Kansas Supreme Court violated his due process rights by applying an ethical standard to his conduct that the Court's disciplinary review panel had not cited or considered. Unlike the charges in Ruffalo, the charges in Phelps stemmed from "one continued and integrated pattern of misconduct." The Court of Appeals, therefore, found that Phelps had full knowledge that this pattern of misconduct was the basis for the disciplinary proceeding, and held that he had a full opportunity to present a defense even though the Kansas Supreme Court determined that his conduct violated an ethical standard not mentioned in the notice. Thus, the court concluded that the notice given Phelps was constitutionally adequate.

3. Fair Tribunal

The Supreme Court addressed the elements of a fair tribunal in Withrow v. Larkin. In Withrow, the Court considered whether a state medical licensing board constitutionally could suspend the license of a physician at a hearing conducted on charges evolving from the board's own investigation. The Court concluded that although the licensing board functioned in both an investigative and an adjudicative role, the dual roles did not constitute a per se violation of due process.

The hearing officers in Withrow had participated in the determination that probable cause existed to believe the physician had violated the licensing act. Following this determination, the physi-

165. 662 F.2d at 650-51.
166. Id. at 651.
168. 662 F.2d at 652.
170. Id. at 46.
171. Id. at 54-55. The Court placed the burden on the plaintiffs to show that an administrative tribunal is unfair because of combined functions. The plaintiffs must show a risk of actual bias strong enough to overcome the "presumption of honesty and integrity in those serving as adjudicators." Id. at 47. But cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950) (complete separation should exist between the investigative and adjudicative functions during proceedings governed by Administrative Procedure Act). See Gray & Harrison, Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems, 11 CAP. U.L. REV. 529, 539-43 (1982).
cian received proper notice and hired an attorney who attended the hearing. Because the physician was aware of the facts presented to the board, the physician's due process rights were not violated.\footnote{172} A key factor in \textit{Withrow} was the long-honored judicial presumption that administrative boards exercise their powers with honesty and integrity.\footnote{173}

\footnote{172. 421 U.S. at 58.}

When an adjudicator has a direct, substantial pecuniary interest in the proceedings, due process requires that the adjudicator be disqualified. \textit{See} Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927); K. DAVIS, \textit{ADMINISTRATIVE LAW} 349-59 (6th ed. 1977). Applying this principle, the Supreme Court in \textit{Gibson v. Berryhill}, 411 U.S. 564 (1973), held that a state optometry board constitutionally could not conduct license revocation hearings involving licensees charged with unprofessional conduct. The board, in the Court's view, had a personal interest in the legal proceedings that sufficed to disqualify board members. \textit{Id.} at 578.

In \textit{Gibson}, Alabama had proscribed the practice of optometry by individuals working for corporations. \textit{Id.} at 567. The Alabama Optometric Association had filed a complaint with the state licensing board, and the board then charged optometrists working for Lee Optical Co. with unprofessional conduct. The optometrists instituted an action under 42 U.S.C. § 1983, alleging that the board should not hear the charges against the licensees because of the board's bias and interest in the proceedings. \textit{Id.} The Supreme Court agreed that the board members had an interest in the proceedings sufficient to disqualify them because the board was composed solely of optometrists in private practice. \textit{Id.} at 578-79. Business corporations such as Lee Optical employed nearly half of the optometrists practicing in Alabama, and the board intended to revoke the licenses of the optometrists employed by the corporations. Thus, the potential financial benefit to the board members of a decision to revoke the licenses was substantial enough to require their disqualification from the board. \textit{Id.} at 578.

Although the facts of \textit{Gibson} were extreme, the holding suggests that anticompetitive or unreasonable continuing competency regulations may provide a basis for attack if the regulations apply to only a portion of the profession. Board members not affected by the regulation arguably would have a personal financial stake in applying the regulation to revoke the licenses of their competitors and thus should not preside at revocation hearings. The argument would be most persuasive when a board applied rules that excluded identifiable segments of a profession, such as a regulation adopted by a medical licensing board that compelled all osteopaths, but not medical physicians, to undergo peer review as a condition of
4. **Right of Review**

When the basis for the denial of a license is failure on an examination, most courts hold that the sole right of review, absent an allegation of fraud or coercion, is reexamination. The leading appellate decision is *Tyler v. Vickery*.\(^{174}\) Relying on *Whitfield v. Illinois Board of Law Examiners*,\(^{175}\) the court in *Tyler* concluded that hearings were not a demonstrably better means of safeguarding an applicant's interest in pursuing a profession than the unqualified right to reexamination provided by Georgia.\(^{176}\) Bar examinations were held every six months, and numerous applicants typically failed.\(^{177}\) The court, therefore, viewed reexamination as a more efficient method of uncovering an erroneous evaluation than affording all unsuccessful candidates the right to a hearing.\(^{178}\) The court presumed that errors caused by arbitrary or capricious grading would be infrequent,\(^{179}\) and doubted that a hearing would be more effective in uncovering the grading errors that did occur.\(^{180}\)

The court admitted that a hearing would remove any stigma associated with bar examination failure more effectively than a reexamination, but gave the concern little weight.\(^{181}\) The court disregarded the adverse effect because failure did not stigmatize an individual as incompetent, but "merely indicated that he did not demonstrate minimal competence on a particular examination."\(^{182}\) The court reasoned that the interests that the state sought to advance by allowing reexamination instead of hearings outweighed relicensing.

\(^{174}\) 517 F.2d 1089 (5th Cir. 1975).
\(^{175}\) 504 F.2d 474 (7th Cir. 1974).
\(^{176}\) 517 F.2d at 1102-05. See also *Sutton v. Lionel*, 585 F.2d 400 (9th Cir. 1978).
\(^{177}\) 517 F.2d at 1104.
\(^{178}\) *Id.*
\(^{179}\) *Id.*
\(^{181}\) 517 F.2d at 1104.
\(^{182}\) *Id.* The distinction appears meaningless. The court disregarded the psychological and economic impact on an individual who fails the bar examination. The court could have reached the same result, however, by acknowledging the stigma and concluding that the state interest outweighed that individual concern.
any potential injury.\textsuperscript{183}

At least one federal circuit court has rejected the administrative burden rationale adopted in \textit{Tyler}. Without directly addressing the specious suggestion that failure on the bar examination did not signify incompetence, the United States Court of Appeals for the Fourth Circuit in \textit{Richardson v. McFadden}\textsuperscript{184} rejected such reasoning by stating:

To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.\textsuperscript{185}

In distinguishing \textit{Tyler} and \textit{Whitfield}, the court in \textit{Richardson} noted that the bar applicants in \textit{Tyler} and \textit{Whitfield} had an unlimited right to retake the examination, whereas in \textit{Richardson}, bar applicants could take the bar examination only three times.\textsuperscript{186} These decisions imply, therefore, that the court’s willingness to review an adverse determination expands as the right to retake a licensing examination becomes more restricted. Reexamination restrictions may limit the number of times an applicant can retake an examination and the frequency with which the state administers the exam. As the restrictions become more severe, however, the decisions indicate that reexamination alone may fail to satisfy procedural due process.

5. Right to Retake Examinations

Another frequently litigated issue involving licensing examinations is whether states can limit the number of times a candidate can take an examination. In \textit{Poats v. Givan},\textsuperscript{187} the United States

\textsuperscript{183}. \textit{Id.} at 1105.
\textsuperscript{184}. 540 F.2d 744 (4th Cir. 1976).
\textsuperscript{185}. \textit{Id.} at 752. The court noted that after \textit{Richardson} was filed, the state voluntarily established a procedure for reviewing failing papers. Unlike the defendants in \textit{Tyler} and \textit{Whitfield}, the state in \textit{Richardson} made no argument of an undue administrative burden. \textit{Id.} at 752 n.19.
\textsuperscript{186}. \textit{Id.} at 752 n.20.
\textsuperscript{187}. 851 F.2d 495 (7th Cir. 1981) (per curiam).
Court of Appeals for the Seventh Circuit upheld an Indiana Supreme Court rule that allowed bar applicants only four opportunities to pass the Indiana bar exam.\textsuperscript{188} A significant aspect of the rule, in the court's view, was the provision that an applicant who failed the exam twice could petition the Indiana Supreme Court for review.\textsuperscript{189} Upon review, the state supreme court would examine the applicant's file and render a decision.\textsuperscript{190} The applicant in Poats had taken the test four times and the state court had afforded the applicant an opportunity for review on each of the last three failures.\textsuperscript{191} The Seventh Circuit reasoned that this procedure satisfied the due process requirement.\textsuperscript{192} Poats demonstrates again that as the right to retake an exam becomes more restricted, the applicant's right to review must expand to satisfy due process.

6. Grading of Examinations

Courts have rejected numerous due process challenges to examination grading methods. For example, in Bailey v. Board of Law Examiners,\textsuperscript{193} the United States District Court for the Western District of Texas disagreed with an examinee's contention that he should be given credit on his reexamination for the sections on which he received a passing grade when he first took the examination.\textsuperscript{194}

Thompson v. Schmidt\textsuperscript{195} represents an egregious example of deference to state authority in the selection of grading methods. In Thompson, the Seventh Circuit upheld Indiana's method for grading real estate brokers' examinations. The examination consisted of two parts. Part two of the exam consisted of four sections each worth thirty to forty points and containing twenty to twenty-four questions. If the examinee answered a single question in a section incorrectly, he received no points for the entire section. This "all or nothing" approach meant that an examinee who missed one

\begin{enumerate}
\item Id. at 499.
\item Id. at 496.
\item Id. at 496-97.
\item Id. at 497.
\item Id. at 499-500.
\item 508 F. Supp. 106 (W.D. Tex. 1980).
\item Id. at 108. \textit{See also} Davidson v. Georgia, 622 F.2d 895, 896 (5th Cir. 1980).
\item 601 F.2d 305 (7th Cir. 1979).
\end{enumerate}
question in each of the four sections received no points for part two of the examination, which was worth over half of the possible points for the examination. Although the court doubted that the all or nothing approach was the fairest or most effective grading method, the court held that the technique was not so arbitrary as to violate due process. The court stated that “[t]he Commission must be recognized as having some expertise in this field and in its choice of the type of grading method to utilize.” No evidence was presented, however, that the real estate commission had any expertise in testing techniques. Rather, the commission’s expertise was in real estate.

C. Application of Eldridge to Continuing Competency Requirements

Application of the Eldridge three-part test to continuing competency requirements indicates that due process does not always mandate a hearing before license revocation. The hearing requirement hinges on the nature of the tool employed to measure competence, and some tools do not raise issues that must be resolved by a hearing.

The first consideration under the Eldridge three-part test is the private interest affected by the official action. The private interest at stake in the continuing competency setting is the individual’s property interest in his professional license. A state licensing law engenders an expectation of continued enjoyment of a license absent proof of improper conduct as defined by the licensing statutes and regulations. The nature and weight of the private interest involved depends on the potential sanctions. For example, if the sanction for failing to satisfy a continuing competency requirement is suspension, the private interest is the continued possession and use of the license during the suspension period. However, if the sanction is revocation, the private interest is more substantial be-

196. Id. at 307.
197. Id. at 310.
198. Id. See also In re Reardon, 378 A.2d 614, 617 (Del. 1977) (upholding grading of essay portion of 1976 Delaware examination because “[t]ests, like taxes, can never be perfect and completely fair to all”).
cause revocation permanently deprives the individual of his license. If the sanction is public censure or another penalty short of license suspension, the private interest is the continued possession and use of the license free of any taint or other limitations on its value.

Any restriction on the use of a professional license affects a critical private interest. Without a license, a professional cannot practice because state laws typically make practicing without a license unlawful. Even a tainted license is reduced in value. Clients or patients who know that the state is investigating their lawyer or doctor for charges of incompetence obviously will be reluctant to entrust their legal or health problems to the professional. Moreover, a favorable resolution of the charges may not restore the trust that is crucial to the professional relationship. At risk then is more than mere personal inconvenience; rather, investigation of professional competency may affect the professional’s reputation and his ability to earn a living. Reversal of an incorrect determination on review may not compensate fully for the damage to the professional’s reputation, the economic hardship incurred, or the psychological and emotional distress entailed in defending against an erroneous allegation of professional incompetence. Thus, the private interest at stake is significant.

The third factor in Eldridge, the state’s interest in administrative ease, directly conflicts with the professional’s interest. Eldridge requires the court to evaluate the state function involved and the fiscal and administrative burdens that additional or alternative procedural requirements would entail. Few people would disagree that states have a strong interest in protecting their citizens from incompetent licensed professionals. The state’s interest derives from its traditional authority and responsibility to protect the health, safety, and welfare of its citizens.

When the potential danger may be immediate and grave, as with an incompetent physician or nurse, the state interest justifies swift action with few impediments to the exercise of power. Summary state action rarely will be warranted in the context of actuarial, legal, or accounting services because only economic interests, not human life, are customarily at stake.

The state interest factor of Eldridge as applied to continuing competency regulation may be easily overstated. States previously
have not compelled continuing competence except in the after-the-fact disciplinary sense. Accordingly, to invoke the state’s interest in protecting the public health, safety, and welfare may be superficially persuasive, but factually unwarranted, especially absent proof that the regulation actually improves professional competence.

Thus, we are at a stalemate under the first and third Eldridge factors: the private interest and the state interest at stake in the continuing competency setting are both significant, perhaps equally so. Given this equipoise, the second Eldridge factor assumes primary importance: what is the risk of an erroneous deprivation of a private interest through the procedure used, and the probable value of additional or substitute procedural safeguards? The degree of risk of an erroneous decision depends on the procedure that a state adopts to impose continuing competency requirements. Evaluating the risk, therefore, involves speculation regarding the kind of continuing competency requirements that states are likely to adopt.

1. Peer Review

If a state adopts peer review to ensure continuing competency, the state must provide significant procedural rights to the professional licensee. The scope of these rights depends on the type of peer review adopted. Generally, however, the competency standards applied should be specific and clear, and the state should announce the standards publicly to apprise professionals of the state’s expectations. If a peer review committee finds that a professional is or may be incompetent, the state should give the professional timely and specific notice of this assessment and the evidentiary basis for the committee’s finding. Before the state suspends or revokes the license, an administrative hearing should be held, preferably before individuals who did not participate in the peer review. The procedural protections should include the right to legal counsel, the right to present evidence, and the right to confront and cross-examine opposing witnesses. Only the evidence presented, subject to a clear and convincing standard of proof,
CONTINUING COMPETENCY REQUIREMENTS

should form the basis of any adverse decision by the factfinders. Providing safeguards against biased peer review committees is also critical to the fairness of a peer review system. The state should select committee members on a basis that reduces the likelihood that a reviewer might act out of exclusionary, discriminatory, or self-interested motives.

If a state suspends or revokes the license of a professional, he or she should be entitled to judicial review of the action. The scope of judicial review depends on the nature of the administrative decision. If a tribunal of professionals decides to revoke a license and bases its decision on its assessment of skills that a layperson could not evaluate, judicial review should be narrow because the tribunal's decision constitutes an expert finding, for which a court should not substitute its opinion. The only inquiry on review would be whether the administrative decision was procedurally correct.

If nonprofessionals make the administrative decision to suspend or revoke a professional license, or base their decision on an assessment of skills that a layperson could evaluate, a judge or jury would be equally capable of deciding whether the licensee violated the standard of conduct or care. For example, a decision that an attorney had commingled funds is not a determination that only

200. See Santosky v. Kramer, 455 U.S. 745 (1982). The Court in Santosky applied the Eldridge three-part test to burden of proof issues and held that the intermediate standard of proof—clear and convincing evidence—applied when the private interests at stake were "particularly important" and went beyond the mere loss of money. Id. at 769-70. The loss of a professional license satisfies this test. Accord Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982). But see In re Polk License Revocation, 90 N.J. 550, 449 A.2d 7 (1982).

201. See Board of Curators v. Horowitz, 435 U.S. 79 (1978). In Franz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 642 P.2d 792, 181 Cal. Rptr. 732 (1982), the court discussed whether a board composed of professionals can rely on its expertise in resolving "legislative fact" issues in disciplinary proceedings. By legislative fact issues, the court meant facts regarding the community standards of professional practice and whether the licensee's conduct departed grossly from this standard. The court concluded that a professional board may take "judicial notice" of legislative facts if the board gives advance notice of this intention, and affords the licensee an opportunity to rebut the facts. If the board fails to give notice, due process requires that expert testimony be adduced concerning the applicable standard of care, and the board should not rely on its professional experience to resolve the legislative fact issues. The court added that the notice requirement applied only to determinations that the board made in an expert capacity. Id. at 139-41, 642 P.2d at 799-800, 181 Cal. Rptr. at 739-40.
attorneys could make. In these cases, a reviewing court need not defer to agency findings. Instead, the court can review the decision as the court would any other nonexpert administrative decision.

Stringent procedural safeguards must accompany peer review for three reasons: competence is an elusive variable; the assessments of peer review committees are subjective; and unlike licensing exams, peer review is not anonymous. These factors create a risk of error and bias in the decisionmaking process. Thus, procedural protections are necessary to help reveal errors and reduce the risk of unfair or arbitrary applications of amorphous standards.

After Eldridge, the most efficient and effective way to ensure accurate, fair factfinding in the peer review context is to provide a prerevocation administrative hearing with the features described above. Unfortunately, the procedures are costly. In fact, peer review is costly even without the procedural price tag because peer review involves the observation of individuals by other professionals, not the grading of a mass-produced and administered examination. In addition, the licensee presumably would receive feedback from the peer review committee, even if the committee concluded that the licensee was competent, to make the evaluation as worthwhile as possible. This procedure also takes time and money. Nevertheless, anything less than a prerevocation evidentiary hearing with all the procedural safeguards would violate the fundamental principles of fairness underlying Eldridge and Willner.

Under exceptional circumstances involving a clear and present danger to the public, summary prehearing license suspension should be permissible. The state should reserve this sanction, however, for extreme circumstances resembling those that warrant a temporary restraining order, and similar procedural limitations should accompany the sanction. Moreover, a full evidentiary hearing should be held as soon as possible after the suspension.

2. Examinations

If a state uses an examination to measure continuing competence, the licensee's right to review usually should not include an evidentiary hearing. Although courts may perceive the private in-
terest in retaining a license as more substantial than the interest in entry level licensing, the risk of an erroneous determination under the examination form of competency assessment is not one that a hearing is substantially likely to reduce. The critical issue in examination cases usually is whether the examination actually tests competence, not whether the procedures used to administer the examination are fair.

If an exam is substantively fair, a licensee's only possible procedural grounds for complaint would be that the examination grading was either unfair or erroneous. An evidentiary hearing may determine whether the grading was unfair, but erroneous grading could be corrected simply by regrading the examination. Thus, a state should provide a hearing only if the examinee alleges fraud, discrimination, or coercion in the examination process. If the state administers and grades the examination anonymously, however, no opportunity for fraud, discrimination, or coercion exists. Thus the hearing alternative is of limited application when the state's competency measure is an examination.

A caveat to the foregoing analysis is that if an examination consists of essay questions, grading is subjective and may produce a greater risk of error. Though difficult to compare, the risk of error or unfairness in grading anonymous essay examinations does not appear to be dramatically greater than the risk of an erroneous medical determination of disability at issue in Eldridge. Medical diagnoses consist of professional interpretations of tests, physical observations, the patient's recitation of symptoms, and the patient's medical history. Grading of an essay answer likewise would be a professional interpretation by a qualified expert in the profession. Though physicians may disagree about a diagnosis, or professionals may disagree about the correct response to a set of facts on an examination, these disagreements would not be resolved best at a hearing.

Moreover, in the initial licensing context, most courts have been unsympathetic to pleas for review rights beyond the right of reexamination. Whether a court would rule that a hearing is necessary thus would depend on whether the court decided that the private interest of a practicing professional was sufficiently greater than the private interest of a license applicant to warrant additional procedural protection. A court arguably might view a professional
who lost his or her license without a hearing more sympathetically than a license applicant who was denied licensure without a hearing and, therefore, might accord the professional greater due process rights. This result, however, is unlikely to occur: Supreme Court cases since *Eldridge* have evidenced no trend toward expanding procedural due process rights.

Although *Eldridge* may not require an evidentiary hearing, a practicing professional should have some right of review. Reexamination should not be the sole recourse because, as one court correctly observed, retaking an examination requires time and money. In addition, the delay involved in retaking an exam will be more costly to a practicing professional than to an aspiring one.

To ensure greater fairness, therefore, the state should advise an unsuccessful examinee of the subject areas in which he failed to demonstrate minimal competence so that the professional would know in which areas he or she needed to improve. The state could regrade failing papers to ensure that no computational errors occurred. Examinees who did not pass essay examinations could request regrading by another member of the licensing board or, in cases involving allegations of fraud, bias, or discrimination, regrading by an independent professional.

The state would not have to release to the examinee test items that the state wished to reuse in future examinations. If an examinee instituted a lawsuit challenging the validity of the exam on substantive grounds, however, these materials should be made available to the examinee’s experts and his or her attorney, subject to stringent protective orders that would preserve the security of the test items.

The conclusion that licensees ordinarily should not have access to their exam questions and answers derives in part from a practical concern falling under the rubric of administrative burden. Many states use licensing examinations that include multiple-choice or other objective questions prepared by professional testing services. The cost of item preparation and expert studies is substantial; a single test item can cost as much as $1,000.\(^{263}\) Accordingly, the security of test items is a major financial and practical

\(^{203}\) Telephone interview with Dr. Eileen McQuaide Dvorak, Executive Director of the National Council of State Boards of Nursing, Inc. (July 6, 1983).
If compelled to release test items to all unsuccessful examinees, states would have to prepare a new or revised test for each administration of an examination. This cost, in addition to the cost of reviewing the test results with each candidate, could be prohibitive. To encourage the use of reliable and valid testing measures, therefore, courts should not require a state to disclose routinely questions and answers that the state intends to reuse.

Denying an unsuccessful licensee access to the examination, the licensee’s answers, and samples of the correct answers, may seem unfair because these materials would enable the licensee to prepare better for the next administration of the test, as well as to uncover invalid test items. Nevertheless, if a test is substantively fair and the risk of erroneous or arbitrary examination grading is controlled by other means, no federal constitutional principle compels the states to provide these materials. Indeed, such access could give those who retake the examinations an unfair advantage over first-time examinees. The suggested procedure substantially reduces the risk of error and unfairness without seriously jeopardizing the state’s interest in maintaining test item security.

3. Continuing Education

If a state selects participation in continuing education as its continuing competency requirement, a hearing would do little to reduce the risk of error. If the continuing education requirement is substantively reasonable, few errors are conceivable other than clerical errors in computing the number of hours or courses necessary to satisfy the requirement.

A sensible approach would involve notification to the licensee that he or she failed to submit adequate evidence of compliance with the continuing education requirements in a form and manner stated in published regulations. The licensee then would have a reasonable period within which to submit evidence of compliance or to offer written reasons for noncompliance. Failure to do so within the stated period would result in license revocation. If the licensee submitted reasons for noncompliance that raised a factual issue, he or she would be entitled to appear before an appropriate state official to discuss the reasons and produce evidence in support of these assertions. The only factual issues that a licensee might raise are erroneous calculations of the licensee’s hours of ed-
ucation, or an excuse for noncompliance such as illness or disability. The state could issue regulations outlining exceptions to the continuing education requirements so that the only issue would be whether the individual fell within an exception. Disagreements concerning the reach or wisdom of the exceptions would be substantive, not procedural, problems.

In *Pease v. Clayton*, the United States District Court for the Northern District of Illinois adopted such an approach. Pease claimed that the director of the Illinois Department of Registration and Education and members of the Medical Examining Committee violated his equal protection and due process rights by placing his license to practice medicine on a nonrenewed status. Pease had requested a waiver from the state continuing education requirements on the basis of a physical disability.

The department denied Pease's request and instructed him to complete 100 hours of continuing education to renew his license. Pease then wrote to the director of the department and attached an affidavit setting forth the nature of his disabilities and requesting a waiver or indefinite extension of time to fulfill the educational requirement. The director scheduled Pease for an interview before the Medical Examining Committee, but Pease responded that he was unable to attend the interview and requested a home interview instead. The director informed Pease that the committee had denied his request and placed his license on nonrenewed status.

Pease argued that the state violated his procedural due process rights because the department failed to give him the notice and hearing rights required by section 17.01 of the State Medical Practice Act. The court rejected Pease's arguments, stating that section 17.01 applied only to disciplinary actions, not to actions taken

205. *Id.* at 700.
206. *Id.* at 701.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 702-03.
212. *Id.* at 702. See *ILL. ANN. STAT.* ch. 111, § 4440 (Smith-Hurd Supp. 1983).
for a failure to meet basic licensing requirements. Moreover, the procedures afforded Pease were constitutionally sufficient.\textsuperscript{213} In concluding that the procedures satisfied due process, the court noted that because Pease had initiated the waiver request, he knew that the status of his license could be affected.\textsuperscript{214} The court considered the committee’s offer of an interview as a hearing, and observed that the committee had interviewed Pease at his home after Pease had moved for a preliminary injunction.\textsuperscript{215} The due process requirements of notice and an opportunity to be heard were satisfied, “[e]specially in light of the fact that the Department’s decision did not finally terminate plaintiff’s license but placed it on non-renewed status pending Pease’s fulfillment of the State’s licensing requirements.”\textsuperscript{216}

\textit{Pease} is consistent with the approach to procedural due process suggested in this Article. Pease’s disagreement was with the substance of the Illinois requirement, not its procedural protections. Pease had an opportunity to be heard on his waiver request before the state denied the request. Additional procedure would have cost the state additional money without any apparent benefit. Absent evidence that the state treated Pease arbitrarily or erroneously, the procedure he received was sufficient.

\textbf{IV. Conclusion}

The movement toward increased regulation of the professions continues. As states impose new requirements, legal challenges will follow. This Article advocates that states use caution and restraint in evaluating the need for additional regulation. Further, the Article recommends that the courts assume a more active role in reviewing constitutional challenges to occupational regulation.

Title VII jurisprudence has revised our concept of reasonableness by requiring job-related rationales for barriers to employment that have an adverse impact on minorities. These standards provide a workable and apt means of reducing the opportunity for discrimination or errors in state competency measures. As prerequi-

\begin{footnotesize}
\begin{enumerate}
\item[213.] 556 F. Supp. at 702-03.
\item[214.] \textit{Id.} at 703.
\item[215.] \textit{Id.}
\item[216.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
sites to professional employment, licensing measures should not be exempt from this enlightened, equitable approach.

Professional incompetence is a serious social problem. The solution, however, is not to impose unreasonable or anticompetitive requirements that produce no demonstrable benefits. Courts should scrutinize closely the substance of new continuing competency measures, and ensure that the measures incorporate adequate procedural safeguards.