



STATE “COMPETITOR VETO” LAWS AND THE RIGHT TO EARN A LIVING Some Paths to Federal Reform

Imagine what would have happened if, in 1992, the owners of then-little-known Starbucks had been required to prove that the United States “needed” a new chain of coffee shops. At that time the nation had millions of coffee shops serving tens of millions of customers daily, and these coffee shops would have argued that they could cover any foreseeable increase in demand. Yet the nation did need a new chain of coffee shops, as Starbucks’ dramatic success proves. Only through the experiment could the company’s owners prove that America needed a new coffee chain.

Silly as this example might seem, many states and cities actually do enforce laws that prevent new businesses from entering the market unless they can prove—without running the experiment—that there is a “public need” for new competition. These laws, called “certificate of public convenience and necessity” (CPCN) laws, govern a wide variety of businesses, from taxicab and limousine services to car dealerships, ambulance companies, hospitals, moving companies, and so on.

In [an article](#) to be published in the *Harvard Journal of Law & Public Policy* in conjunction with the Mercatus Center at George Mason University, legal scholar Timothy Sandefur explores the history, theory, and operation of CPCN laws, also known as “Competitor Veto” laws, focusing on evidence uncovered as part of litigation challenging such laws in Missouri and Kentucky. The article concludes that because these laws are designed to protect incumbent businesses, there must be reforms on the federal level to abolish them. Several possible reforms are considered, along with objections.

SUMMARY

CPCN laws are on the books in most states and major cities, regulating everything from taxicabs to hospitals. These state and local laws enable existing businesses to block new companies from starting simply because the existing firms do not want economic competition: a “competitor’s

For more information, contact
Kate De Lanoy, 703-993-9677, kdelanoy@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

veto.” Because these laws block people from entering trades simply because the government does not believe more competition is necessary, they have been termed “Competitor Veto” laws. While the Supreme Court has declared that licensing requirements that lack a connection to a person’s skills or qualifications violate the Constitution, courts have been reluctant to strike down Competitor Veto laws as unconstitutionally infringing on economic liberty.

Such laws stifle the American dream and drive up prices for taxicab services, moving services, and other services that ordinary Americans need. Unfortunately, because federal courts typically ignore the fact that states regularly infringe on the constitutional right of economic liberty, federal reforms are necessary to protect the constitutional right of economic freedom against violation by states.

CASE STUDY: KENTUCKY’S CPCN LAW

The CPCN law in Kentucky protected existing moving companies and excluded new entrants.

- Between 2007 and 2012, 39 applicants sought CPCNs to operate as moving companies in Kentucky. Nineteen had their applications “protested” by existing firms. All but three immediately withdrew their applications, because every protested application was always denied.
- None of the applications were denied for reasons related to public health and safety; all were denied because the state decided that existing moving services were “adequate,” regardless of the applicant’s qualifications or skills.
- During the same time period, applicants who instead bought an existing firm were never protested.

Kentucky’s CPCN requirement did not relate to protecting public safety and welfare, but instead operated to restrict competition for the benefit of privileged insiders.

POTENTIAL REFORMS

Courts have often failed to protect economic freedom from state regulation. While it is important for the courts to enforce constitutional rights, more immediate reform must come from Congress. Of the three possible reforms described below, two can come from Congress:

- *Civil rights legislation.* Congress could use its power to pass civil rights enforcement legislation under the Fourteenth Amendment to protect economic liberty. In order to assuage concerns that courts might have about expanding constitutional rights beyond the protections of the Constitution, Congress should thoroughly document historical state violations of the right to economic liberty while allowing states to retain some power to engage in legitimate regulation.

- *Spending conditions.* While Congress has in the past used the Spending Clause to condition funds given to states in order to unjustly take over matters that ought to be left to the states, it can and should use its power to condition federal funding when such conditions protect constitutional rights. For example, Congress could condition funding for job creation and employment training on the states not imposing burdens on economic liberty.
- *Antitrust reform.* Current law allows an exception to antitrust law, according to which businesses may form a cartel by establishing their group as a state board, such as the “State Moving Board.” The Supreme Court should narrow this exception by employing a higher standard of scrutiny—intermediate scrutiny—for state regulatory schemes that require licensing or approval from businesses and their competitors. While states would still be able to allow regulatory agencies to restrain trade in some important instances, they would no longer be able to allow anticompetitive restrictions simply for the sake of protecting existing businesses.

CONCLUSION

CPCN laws raise prices for consumers, stifle innovation, and—worst of all—deprive hard-working entrepreneurs of their right to economic freedom. The Constitution protects every person’s right to earn a living without unreasonable government interference. Yet courts often refuse to enforce that right, instead deferring to legislatures, which succumb to special-interest lobbying for such laws. Federal protection is necessary to stop states from rewarding cronies and blocking the path of economic opportunity.