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Going Once, Going Twice; The Dubious Legality and Necessity of North Carolina's Auctioneer License Statute

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“GOING ONCE, GOING TWICE . . . ”:
THE DUBIOUS LEGALITY AND NECESSITY
OF NORTH CAROLINA’S AUCTIONEER
LICENSE STATUTE*

ENRIQUE ARMIJO**

Calling an auction in North Carolina without a state-granted license is illegal. More than half the states in the United States have also criminalized unlicensed auctioneering. North Carolina restricts who may call an auction to protect the public from frauds. It has even gone so far as to claim the restriction applies to online auctioneers.

The history of auctioneering, however, as manifested in a range of self-regulatory protections developed over time to protect actors in the state’s own loose-leaf tobacco auction markets, demonstrates the capacity of auction systems to deter fraudulent conduct by auctioneers without legislative intervention. In addition, state constitutional law, which protects the individual’s right to practice the trade of his choice, bars use of the police power to limit occupational entry. And auctioneering’s status as an expressive occupation raises free speech concerns with imposing a prior restraint on who can speak (or more precisely, be paid to speak) in such a manner. Finally, criminal fraud and common law tort and contract actions have long served to protect bidders wronged by fraudulent auctioneers or sellers.

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** Assistant Professor, Elon University School of Law. Thanks to my current colleague, Jim Exum, and my former teacher, John V. Orth, both of whom brought their significant expertise to bear on my admittedly idiosyncratic approach to this topic. Also thanks to Orley Ashenfelter, who deserves a specific disclaimer as to any endorsement of my discussion of auction theory, as well as Steve Friedland, Eric Fink, Andy Haile, Margaret Kantlehner, and Tom Molony, who all commented on earlier drafts. Thanks as well to the staff of the North Carolina Collection of UNC-Chapel Hill’s Southern Historical Collection for assistance in accessing materials, and to the Faculty Development Committee at Elon Law School for their advice and support. Special thanks to Garris Neil Yarborough, General Counsel of the North Carolina Auctioneer’s Board, for his participation, as well as to Jonathan Crook, John Warren, and Cindy Hirsch in the Elon Law Library for exemplary research assistance.

Given the many incentives to act honestly during auctions for goods, the legitimate constitutional concerns an auctioneer licensing requirement raises, and the effectiveness and availability of buyer-side ex post remedies, an ex ante, state-imposed limitation on auction calling is both legally suspect and practically unnecessary.

Auctions produce, from their very nature, the Gross Fraud of Fictitious Biddings; . . . Who does not believe that persons are sent by owners of goods . . . to raise the price on the ignorant and the unwary? Where is the buyer who is not convinced that many Auctioneers, while they are selling goods, make fictitious bidding themselves, to obtain higher prices for their employers?

Letter, “Reasons Why The Present System of Auctions Ought To Be Abolished”¹

Now is the season and the day thereof when the clarion tones of the auctioneer is heard throughout the land, and the busy buyer looks wise as he buries his nose deep into the fragrant weed and winks his other eye half a cent’s worth. . . . Now comes the wary pinhooker, and speaks softly to the chuckling farmer, and each “does” the other, and each is satisfied, and both are stuck.

Southern Tobacconist and Manufacturers Record²

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1. ROBERT L. PHILLIPS, THE HISTORY OF AUCTIONEERING IN GUILFORD COUNTY 13 (1995) (quoting “Reasons Why The Present System Of Auctions Ought To Be Abolished” (1828)) (on file with North Carolina Collection, University of North Carolina at Chapel Hill).

2. NANNIE MAE TILLEY, THE BRIGHT-TOBACCO INDUSTRY 1860-1929, at 204 (1948) (quoting Southern Tobacconist and Manufacturers Record (William E. Dibrell, ed.), Aug. 9, 1904). A “pinhooker” was a speculative purchaser of tobacco at auction who bought with the intent to resell. See *id.* at 298-302.

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INTRODUCTION

In his book, *Auctions: The Social Construction of Value*, Charles Smith lists the "striking potpourri" of objects, otherwise having nothing in common, that are likely to be sold at auction, ranging from "a portrait by Rembrandt" to "ten tons of freshly caught haddock" to a lot of "slightly damaged digital watches" to "a fairly worn antique Caucasian scatter rug" to "a pair of Imelda Marcos's shoes."³ One

3. CHARLES W. SMITH, *AUCTIONS: THE SOCIAL CONSTRUCTION OF VALUE* 1 (1989).

could add many more items to the list, such as a late-1800s mahogany barrister's bookcase, a Civil War-era Calvary saber, or a shoebox-full of ceramic imitation Hummel figurines. Though Smith is undoubtedly correct that auctions serve as the method of conveyance of title for items from the unique to the mundane, with values from millions to pennies, this miscellany of objects shares a subsidiary commonality as well: if the sale took place in North Carolina or one of nearly thirty other states, it is highly likely that the auctioneer who sold these and countless other goods was required to be licensed by the government.

For forty years, calling an auction without a license in North Carolina has been a misdemeanor.⁴ The State exercises its police power in this manner, it argues, to protect a particularly susceptible public from frauds.⁵ The claim is a longstanding one: the "very nature" of soliciting bids for the sale of goods, as the first epigraph above argues, encourages a range of auctioneer-side fraudulent conduct, from false bids to phantom bidders to misrepresentations of value and quality. And the emergence of online auctions has drawn the attention of licensing entities in several states, with some going so far as to argue that an eBay seller from another state advertising goods for sale without a license is violating the law.⁶

Even if such misconduct is inherent to auctions, however, both law and practice, here in North Carolina and elsewhere, have long taken steps to alleviate it.⁷ In fact, the agricultural history of our own state provides a telling example of the self-regulatory capacity of auction markets to deter frauds. From the mid-to-late 1800s to the early 1900s, the buyers, growers, auctioneers, warehousemen, and local boards of trade involved in tobacco auctioneering developed a host of self-regulatory practices intended to ensure that transactions were as free of frauds as possible.⁸ The most important of these practices—a pre-sale inspection right for potential bidders—continues today as a powerful deterrent against possible frauds committed by auctioneers.⁹ In addition, the Supreme Court of North Carolina's recognition of the state constitution's protections for occupational freedom, the freedom of speech considerations as set out by the United States Supreme Court in its commercial speech case law, and the long-standing efficacy of criminal fraud and private causes of

4. See *infra* text accompanying notes 104–05.

5. See *infra* text accompanying notes 92–93.

6. See *infra* Part II.C.2.

7. See *infra* Part IV.B–C.

8. See *infra* Part I.

9. See *infra* Parts I, IV.A.1, and IV.B.

action in common law tort to remediate auction-related wrongs, collectively establish that a licensing requirement for auctioneers is both legally dubious and unnecessary.¹⁰

Accordingly, the protections granted by the right to pre-bid inspection, combined with (i) the constitutional concerns raised by occupational licensing, (ii) existing economic and social self-regulation against fraud at auctions, including the need for both buyers and auctioneers to convey accurate information concerning the good for sale, and (iii) the effectiveness of both criminal fraud law and private rights of action to safeguard bidders' rights, all call into question whether a licensure requirement for auctioneers is a proper, necessary, or effective use of the state's police power. This Article argues the answer is no.

Part I of the Article focuses, by way of a detailed example of how auctions self-regulate, on historical and professional customs associated with tobacco auctioneering. Given North Carolina's deep ties to tobacco production and sale, Part I provides a historical overview of the agricultural and economic history of tobacco auctions to show how the auction process contains inherent incentives on all sides to deter fraudulent conduct. Part II discusses North Carolina's auctioneering statute and the role of the Auctioneer Licensing Board in the statute's implementation. This Part also examines the Licensing Board's efforts to apply the statute to online auctions directed at prospective North Carolina buyers. Part III analyzes the statute's legality given, *inter alia*, the North Carolina Constitution's right for individuals to "enjoy the fruits of their own labor" and First Amendment protections for auctioneer speech. Part IV considers the inherent disadvantages to fraudulent auctioneering, as evidenced by economic and sociological auction theory. It also reviews the history and efficacy of criminal fraud protections for buyers, as well as fraud-based causes of action in common law tort and contract law that have long protected the rights of buyers and sellers in auction markets.

I. TOBACCO AUCTIONS: OCCUPATIONAL CUSTOMS AS SELF-REGULATION

No interaction around the sale of a commodity is more ingrained in North Carolina's history, or more colorful, than the loose-leaf tobacco auction. The rolling, rhythmic chants of the auctioneer; across the large piles of loose tobacco from him, the line of buyers, raising fists, grunting, winking, and nodding their bids as they finger

10. *See infra* Parts III–IV.

through the leaf pile; the sun casting wide beams of dusted light into the warehouse through large windows in the roof; and, of course, the sweet smell of the cured crop.

This bustling, seemingly ad hoc, and fairly chaotic process was actually the result of decades of collaboration, negotiation, and conflict, in which actors in the tobacco market developed, refined, and embedded into the sales system a range of techniques and practices to deter frauds, misrepresentations, and restraints on trade. And these practices remain evident in most modern auctions for goods.¹¹ As demonstrated below, modifications to the tobacco auction system illustrate a process of self-regulation and articulate a cultural history of the region. There is much to learn about how auctions are conducted today, and how fraud is deterred in those auctions without regulatory intervention's heavy hand, by revisiting the North Carolina tobacco barns of the 1800s and 1900s.

A. *From Sealed Barrel Sales to Loose-Leaf Auctions*

The loose-leaf auction system that formed such a large part of North Carolina's agricultural economy came into prominence as a response to seller-side frauds in tobacco sales. Prior to the 1850s, growers brought tobacco to sale in large sealed wooden barrels, or "hogsheads."¹² Hogshead packing initially developed due to challenges associated with moving large amounts of tobacco crop long distances from farms to sale sites.¹³ A hogshead was designed to be rolled on its side behind a horse-drawn carriage.¹⁴ As one tobacco historian from the period described the process:

Two hickory saplings are affixed to the hogshead, for shafts by boring an auger-hole through them to receive the gudgeons or pivots, in the manner of a field rolling-stone . . . [wood pins affixed to the sapling rails are then] driven a considerable depth into the solid [packed] tobacco.¹⁵

11. See *infra* Part IV.

12. See E.R. BILLINGS, *TOBACCO: ITS HISTORY, VARIETIES, CULTURE, MANUFACTURE AND COMMERCE* 73 (1875); JOHN VAN WILLIGEN & SUSAN C. EASTWOOD, *TOBACCO CULTURE: FARMING KENTUCKY'S BURLEY BELT* 161 (1998).

13. See VAN WILLIGEN & EASTWOOD, *supra* note 12, at 161.

14. See BILLINGS, *supra* note 12, at 73.

15. *Id.*



The pre-loose-leaf era: "Carrying tobacco to market."

Credit: E.R. Billings, "Tobacco: Its Culture, Manufacture, & Use," p. 73.

What began as a transport-related convenience, however, soon became a vehicle for trickery. When filling their hogsheads, sellers developed the practice of "nesting," or packing tobacco in a hogshead in a manner that placed high-quality tobacco leaves on top and poorer-quality crop—or even material such as tobacco stalks, tree leaves, or other debris—deep inside the hogshead.¹⁶ Merchants at auction, who could not tear apart a packed hogshead to inspect its inner contents prior to purchase, were the scheme's marks.¹⁷ A buyer would often purchase what was characterized by the seller as top-grade tobacco, only to open the hogshead and find starch or rail spikes inside.¹⁸

A number of laws were passed in an attempt to safeguard tobacco buyers from nesting planters. For example, from 1619 to 1785, southern colonies passed several laws to protect merchants from buying or trading nested tobacco.¹⁹ One such law established an inspection system, soon adopted widely across tobacco markets, whereby nominally independent inspectors appointed by the colonial leadership would pass judgment on the quality of hogsheads brought for sale.²⁰ The inspector's grade would then establish the hogshead's

16. See RICHARD B. TENNANT, *THE AMERICAN CIGARETTE INDUSTRY: A STUDY IN ECONOMIC ANALYSIS AND PUBLIC POLICY* 211 (1971); Wilbur Wright Yeargin, Jr., *The History of the Tobacco Auction System and the Tobacco Auctioneer* 6, 10 (1989) (unpublished M.A.L.S. thesis, Duke University) (on file with North Carolina Collection, University of North Carolina at Chapel Hill).

17. See TENNANT, *supra* note 16, at 211.

18. See *id.*; Yeargin, *supra* note 16, at 6, 10.

19. Yeargin, *supra* note 16, at 6–7.

20. *Id.* at 7.

sale price.²¹ This process generally took place in inspection rooms, outside of the presence of bidders for the same crop; growers would simply present an inspector-provided "tobacco note" to support their stated price at market.²² The inspector's influence was all-encompassing; as one contemporary agricultural historian described it:

When the inspectors have procured specimens of the [tobacco for sale from the hogshead], it follows to pronounce their judgment; a sentence, indeed, which is of no small importance to the crop-master, the fate of whose whole year's employment is now brought to the test of official opinion; and it rests [with the inspector and his assistant] alone to say (in effect) whether he merits pay for his labor or not.²³

Government-appointed inspectors who were granted statutory power to set prices soon proved themselves too amenable to bribes from growers.²⁴ Concerns over nesting and distrust of the ethically dubious government inspectors, however, cracked open the hogsheads permanently.²⁵ In response to perceived unfairness on the inspectors' part, some buyers began sending representatives to inspection stations during the tobacco season to try to ensure a fairer transaction, taking greater initiative to personally examine the tobacco on which they planned to bid, and pushing sellers to allow them to do so.²⁶ By 1810, buyers, as a matter of practice, began personally inspecting hogsheads after they had been opened, and planters began selling to those buyers directly.²⁷ Most importantly, by the 1820s, private auctioneers and warehouse owners began advertising their services for hire to planters as work-arounds to

21. *Id.*; see also TENNANT, *supra* note 16, at 211.

22. WILLIAM TATHAM, AN HISTORICAL AND PRACTICAL ESSAY ON THE CULTURE AND COMMERCE OF TOBACCO (1800), reprinted in G. MELVIN HERNDON, WILLIAM TATHAM AND THE CULTURE OF TOBACCO 1, 74-75, 80-81 (1969).

23. *Id.* at 76.

24. See G. MELVIN HERNDON, WILLIAM TATHAM AND THE CULTURE OF TOBACCO 435 (1969) ("[L]ax and sometime corrupt inspections resulted in the decline of the reputation of the inspectors and the tobacco noté, and careful buyers began to demand that the tobacco be re-inspected."). *But see* TATHAM, *supra* note 22, at 73 ("It is an office of high trust and importance in trade; and to the great credit of the institution, it has scarcely produced an instance of corruption.").

25. See HERNDON, *supra* note 24, at 435.

26. *See id.*

27. *Id.*

circumvent the tainted inspector system.²⁸ The first to do so was H.B. Montague of Richmond, Virginia, who advertised himself in the *Richmond Inquirer* as an “*Independent Tobacco Auctioneer, one of integrity.*”²⁹ Granting control over the sale to a third party who, though a fiduciary to the selling grower, was nominally independent had obvious appeal to tobacco buyers. Planters also eventually came to prefer the auction method for marketing their crops over an inspector-set sales price, as it arrogated responsibility from the government appointee and permitted the planter to procure the best possible value for his crop at the fastest rate.³⁰

By the 1850s, the “loose leaf” style of sale, in which planters presented their crops in large, loosely hand-woven bales instead of sealed barrels, began to take hold in Virginia and North Carolina.³¹ An open bale permitted buyers to inspect the entirety of a yield in preparing their bids and making their internal valuations³²—a necessity when bidding against other prospective buyers.

Moving from sale-by-the-hogshead to loose-leaf auctions granted significant fraud protections to prospective buyers. First, as noted, loose-leaf auctioneering helped buyers “to eliminate chances of paying for a quality which did not measure up to the sample drawn [from a hogshead],” and gave them the “opportunity to examine [their] prospective purchases under more favorable conditions.”³³ Under the loose-leaf auction system, “the work of examining the tobacco and determining its value became the responsibility of the buyer, not a government inspector.”³⁴ Since prospective buyers were able to inspect tobacco themselves, government inspectors became redundant, reducing opportunities for seller/inspector collusion as to quality and price.³⁵

The auction system had significant advantages for growers as well. As hogsheads fell into disuse, growers’ packing time decreased

28. See JOSEPH CLARKE ROBERT, *THE TOBACCO KINGDOM: PLANTATION, MARKET, AND FACTORY IN VIRGINIA AND NORTH CAROLINA, 1800–1860*, at 99–100 (1965).

29. BILLY YEARGIN, *NORTH CAROLINA TOBACCO: A HISTORY* 53 (2008) (emphasis added).

30. See BARBARA HAHN, *MAKING TOBACCO BRIGHT: CREATING AN AMERICAN COMMODITY, 1617–1937*, at 110 (2011); TILLEY, *supra* note 2, at 199–200.

31. See Yeargin, *supra* note 16, at 28–31.

32. See *id.*

33. TILLEY, *supra* note 2, at 199–200.

34. HAHN, *supra* note 30, at 110.

35. See JONATHAN WATTS HULL, *TOBACCO IN TRANSITION: A SPECIAL SERIES REPORT OF THE SOUTHERN LEGISLATIVE CONFERENCE* 7–8 (2002).

accordingly.³⁶ And because auctions took place more often than did sales under the old hogshead/government inspection system, the new process enabled growers to market their crops in an easier form at more convenient times.³⁷ By shortening the harvesting season and thereby adding more regular opportunities at market, the auction system also increased grower control over supply and sales.³⁸ Eliminating opportunities for fraud, which had persisted under the hogshead and inspection system, thus permitted tobacco to be sold fairly and at a better informed price.

B. The Roles of the Auctioneer and Warehouseman

1. Development of Auctioneering as Expressive Activity

Though the private auctioneer first emerged as an independent middleman who could facilitate fairer prices for tobacco, he soon became the most integral part of the marketing of the grower's crop. By developing a unique system of calling bids and prices, auctioneers created attention and excitement for planters eager to make quick sales. The father of the modern-day tobacco auctioneer was Chiswell Dabney "Chillie" Langhorne, a cousin of Mark Twain.³⁹ Langhorne pioneered the rapid-fire, "gobble-gobble" auction call, which he "modeled after [a] gregorian chant of a Catholic Priest" he had heard "while attending Mass with a friend in Richmond."⁴⁰ Langhorne imposed a faster staccato rhythm into the priest's melodic chanting pattern and interspersed it with his own comic patter in inventing the gobble-gobble.⁴¹

Langhorne would later go on to make his fortune in railroad construction (and to sire Lady Nancy Astor, who married into the Waldorf-Astoria family and became the first woman to sit as a Conservative Member of Parliament in the House of Commons⁴²), but his influence on the art and craft of auction calling was arguably his most indelible accomplishment.⁴³ As auctioneers used

36. See Charles E. Gage, *Historical Factors Affecting American Tobacco Types and Uses and the Evolution of the Auction Market*, 11 AGRIC. HIST. 43, 56 (1937).

37. See *id.*

38. See *id.*

39. Yeargin, *supra* note 16, at 50–51.

40. *Id.* at 50.

41. See *id.*

42. See Courtney Wilson, "Our Nancy": *The Story of Nancy Astor and Her Gift to the University of Virginia*, U. VA., http://xroads.virginia.edu/~MA04/ranger/astor_collection/journancy.html (last visited Aug. 19, 2013).

43. See Yeargin, *supra* note 16, at 50.

Langhorne's innovations as a base to develop their own styles, buyers wanted in on the fun and developed a range of expressive ways to signal their bids, such as winking, nodding, laying a finger on the side of their noses, silently opening and closing their mouths, and sticking out their tongues.⁴⁴ The customs of call-and-bid eventually became so refined that by the 1930s, some tobacco warehouses averaged about 360 sales per hour.⁴⁵ According to one historian, "scarcely ten minutes elapsed between the actual sale" at auction and "delivery of payment to the seller."⁴⁶



Interior of Loose-leaf Auction Warehouse, Wilson, N.C.

Credit: N.C. Collection, Southern Historical Collection, UNC-Chapel Hill.

Tobacco chanting was an expressive process, an act rooted "in many areas of history, including religion and social rituals" as well as more conventional marketing techniques.⁴⁷ Drawing upon this history, auctioneers constantly borrowed techniques from one another. For example, in June 1937, George Washington Hill, Jr., son and namesake of the president of the American Tobacco Company,

44. See JOSEPH C. ROBERT, *THE STORY OF TOBACCO IN AMERICA* 194 (1949); Nicole Edwards Mallay, *The Sound That Sells: The Musical and Improvisatory Practices of the American Auctioneer* 214 (May 2012) (unpublished Ph.D. dissertation, University of Iowa), available at <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=3083&context=etd>.

45. ROBERT, *supra* note 44, at 194.

46. TILLEY, *supra* note 2, at 205.

47. BILLY YEARGIN, *REMEMBERING NORTH CAROLINA TOBACCO* 40 (2008).

used a warehouse chant he had heard earlier that season in a radio advertisement.⁴⁸ Furthermore, auctioneers also played an increasingly critical role in marketing tobacco outside of calling sales and accepting bids. Not only did their infectious auction calling prod bidders to participate, auctioneers also chanted outside warehouses in between auctions to attract passing growers to sell their yields inside.⁴⁹ The auctioneer thus became an integral part of advertising crop for sale—more important than the newspaper advertisements that provided advance notice of those sales.

2. The Warehouseman, a Fair-Dealing, "Wide-Awake" Middleman

The warehouseman, a warehouse owner or manager who brokered the relationship between auctioneer and grower and charged the grower a fee for his services, also marketed himself to growers as evening the playing field between rural growers and sophisticated buyers. Chief Justice Hughes described the role of the warehouseman, as well as the loose-leaf auction process generally, in *Townsend v. Yeomans*⁵⁰:

After the tobacco has been cured and is ready for the market, the grower grades it as best he can and the resulting "piles" of loose leaves are placed in sheets which are then tied and the tobacco is so transported to the selected warehouse for sale. Auction sales are held daily during five days of the week, and in any particular warehouse as often as sufficient tobacco accumulates. It is essential that there be present the warehouseman, an auctioneer and other skilled help, and one set of buyers. The warehouseman makes the opening bid. . . . [T]he bidding continues until the sale is announced. The grower or other owner may turn down the sale and in such case he may hold the tobacco for a later sale or remove it. After the sale has been completed, the tobacco is delivered to the purchaser who removes it from the floor. The purchaser has it reweighed and pays the warehouseman. The warehouseman then pays the seller the purchase price, less warehouse charges.⁵¹

A well-run warehouse stocked with a "set of buyers," to use Chief Justice Hughes's phrase, gave the grower the fairest price, as free as possible of the frauds that plagued the old system.⁵² Though

48. ROBERT, *supra* note 44, at 193.

49. *Id.* at 193–94.

50. 301 U.S. 441 (1937).

51. *Id.* at 445.

52. *See infra* note 59 and accompanying text.

the warehouseman was in effect an agent of the grower, he pitched himself as a fair dealer and an extra set of eyes that would protect all parties involved.⁵³ The Wilson Tobacco Warehouse's first newspaper advertisement, which ran in *The Wilson Mirror* on September 3, 1890, advertised the warehouse's opening as "presided over by the genial Ed Pace, one of the best, widest awake, and most active tobacco warehouse managers in the whole country."⁵⁴ Five thousand people were expected to be on hand and "take part in the sales and eat the barbecue and the trimmings that will be provided by [the] warehouse's wide awake and liberal and generous merchants."⁵⁵ And if buyers and sellers still did not get the message that Pace's warehouse staff were diligent to potential shenanigans, the advertisement reiterated a third time that the warehouse's "people [would be] fully aroused and wide awake."⁵⁶ Accordingly, a deft auctioneer, a watchful warehouseman, and a busy warehouse secured growers fair prices as well as high ones. Some even attribute the city of Wilson's nickname of "Wide-Awake Wilson" to claims of fair-dealing made by local businessmen during the tobacco auction era.⁵⁷ An auctioneer's being perceived as fair was essential to the success of the loose-leaf system and to the confidence both buyers and sellers had in the integrity of the sale.⁵⁸

Indeed, as Mr. Pace's advertisement implied, much of the warehouseman's efforts at grower assurance were a direct response to the power imbalance between buyers and sellers. As one historian of the period wrote:

[Once the grower loads his tobacco and drives it to market,]
[h]e goes alone and blind into a market in which the buyers are
experts backed by giant corporations or even by foreign

53. See *infra* text accompanying notes 59–60.

54. Hugh Buckner Johnston, Tobacco Marketing Came to Wilson via its Defunct Cemetery: A Contemporary Account of the Opening of the First Warehouse in 1890 for the Auction of Tobacco (unpublished manuscript) (on file with North Carolina Collection, University of North Carolina at Chapel Hill).

55. *Id.*

56. *Id.*

57. PETER BENSON, TOBACCO CAPITALISM: GROWERS, MIGRANT WORKERS, AND THE CHANGING FACE OF A GLOBAL INDUSTRY 69, 76 (2012); see also J. ROBERT BOYKIN III, HISTORIC WILSON: IN VINTAGE POSTCARDS 9 (2003) ("Wilson's past slogans have included . . . 'Wide-Awake Wilson' . . .").

58. Robert Gary Branch, Sr., The Structure of the Tobacco Auction: A Sociological Analysis 84 (1970) (unpublished Ph.D. dissertation, University of Georgia) (on file with the U.S. Dep't of Agric. Nat'l Agric. Library) ("In the allocation of sales, [the auctioneer] must maintain the buyers' good will and confidence in his fairness. Unhappy, disgruntled buyers are not open-handed in their bidding.").

governments. He sells a hundred pounds or so at a time to men who think in terms of averages for millions of pounds. He sells the product of more than a year of labor and worry to men who pause some ten seconds at each basket, appraising, bidding on, and buying, a one man crop of perhaps 2,000 pounds in not more than three minutes. . . . It is purely a buyer's market⁵⁹

In addition, though the more frequent sales under the auction system increased grower leverage, the warehouse system preserved a number of structural advantages held by bidders. "[L]imiting sales to open on particular days in particular markets gave buyers more control over leaf prices,"⁶⁰ and under the loose-leaf system the real fraud threat was not misrepresentations by sellers or their auctioneers, but rather collusion among buyers traveling together from warehouse to warehouse—"follow[ing] sale," to use the industry term.⁶¹ Buyers following sale, who often stayed at the same hotels and shared communal fish fries and barbecues between auctions,⁶² enjoyed a camaraderie that would have made Adam Smith⁶³ nod in knowing recognition:

Buyers from the major and the lesser tobacco manufacturers, representatives of foreign buyers, brokers and petty speculators (the "pin-hookers" who buy undervalued mixed lots which they quickly re-sort and resell) visit warehouses in a group. Such a group, known as a set, moves from one warehouse to another in scheduled rotation.⁶⁴

The auction warehouse system also made it easier for growers to comply with a number of post-Civil War laws passed by the federal

59. SAMUEL THOMAS EMORY, *BRIGHT TOBACCO IN THE AGRICULTURE, INDUSTRY AND FOREIGN TRADE OF NORTH CAROLINA* 83, 85 (1939); see also ANTHONY J. BADGER, *PROSPERITY ROAD: THE NEW DEAL, TOBACCO, AND NORTH CAROLINA* 18-21 (1980) (arguing that growers were at a structural disadvantage compared to buyers, which was compounded by the auction warehouse system); John Hanna, *Agricultural Cooperation in Tobacco*, 1 L. & CONTEMP. PROBS. 292, 298 (1934) (noting growers' "weak economic position" and "particularly weak" bargaining power against tobacco manufacturing companies during the marketing process).

60. HAHN, *supra* note 30, at 207 n.21.

61. See MAURICE DUKE & DANIEL P. JORDAN, *TOBACCO MERCHANT: THE STORY OF UNIVERSAL LEAF TOBACCO COMPANY* 85 (1995).

62. ROBERT, *supra* note 44, at 196.

63. See 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 117 (J.M. Dent & Sons Ltd. 1910) (1776) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in . . . some contrivance to raise prices.").

64. JEROME E. BROOKS, *THE MIGHTY LEAF: TOBACCO THROUGH THE CENTURIES* 293-94 (1953).

government, in particular the Tariff and Internal Revenue Law of June 6, 1872,⁶⁵ which called for imposing a sales tax on tobacco sales.⁶⁶ In response, warehousemen adverted to growers that their auctioneers would provide itemized bills of sale. Just days after the legislation was passed, one warehouse in Danville, Virginia fired off a letter to the “Planters of Virginia and N. Carolina” noting that “[a]ny farmer selling at our Warehouse, after the first of July next, need only carry home with him and preserve the statement of sales furnished by us, and he will be always prepared to answer the inquiries of the United States officials, promptly and with accuracy.”⁶⁷ By providing hard-copy records of amount, quality, and price, these bills of sale also increased confidence in the tobacco auctioning system.⁶⁸ A survey of warehousemen and farmers conducted by a University of Kentucky graduate student during 1919’s crop reported that both parties were satisfied with the warehouse auction system.⁶⁹

C. *Formal Self-Regulation: The Boards of Trade*

Despite advances in the marketing and sale of tobacco, fraudulent practices lingered. Some warehouse owners or their representatives became known as “drummers” due to their practice of spending much of the growing offseason, and even in some cases the growing months, drumming up growers to sell at their warehouses.⁷⁰ These drummers occasionally engaged in frauds such as purporting to guarantee higher sale prices than other houses could deliver or promising “first sales,” whereby the drummer told several growers that their crop would be sold earliest in the day and thus the grower would not have to wait around the warehouse for his sale.⁷¹ Growers were increasingly interrupted in their work by visiting drummers bearing these false promises.⁷²

In response to such practices (as well as to the specter of potential federal regulation⁷³), growers established their own local and state-wide boards of trade intended to restrict or end drumming. For example, in 1903, the Virginia-Carolina Warehouse Association

65. Act of June 6, 1872, ch. 315, § 31, 17 Stat. 230, 249–55.

66. See TILLEY, *supra* note 2, at 202.

67. *Id.* (quoting Broadside from Neal Brothers, Operators of Planter’s Warehouse (June 20, 1872)).

68. See *id.*

69. ROBERT, *supra* note 44, at 201.

70. See Yeargin, *supra* note 16, at 41–42.

71. See *id.*

72. See *id.*

73. See *infra* text accompanying notes 77–82.

passed a series of resolutions to that effect, and other boards began developing additional rules to promote fair play.⁷⁴ Boards established “committees for arbitrating disputes, regulating the order of sales, . . . and handling numerous other vexatious questions” concerning warehouse operations and in the process “promulgat[ed] reforms and improvements.”⁷⁵ Boards also “create[d] and enforce[d] agreements regarding fees and qualities and prices” and “exerted powerful pressure in mediating markets between buyers and sellers.”⁷⁶

Additionally, in July 1934, Congress sought to pass an onerous bill that would have licensed warehousemen and slowed the sale of auctions.⁷⁷ Boards of trade responded by agreeing to a self-regulatory code that, *inter alia*, limited the speed of auction selling to 375 lots per hour, allowed growers up to fifteen minutes to reject final bids, and outlawed speculation by warehousemen.⁷⁸ Even at the height of the New Deal’s intervention into agricultural markets, federal grading for tobacco sold at auction was imposed via the Tobacco Inspection Act⁷⁹ only if two-thirds of growers selling at a particular warehouse voted in favor.⁸⁰ The board of trade system and the attendant codes of conduct promulgated by individual boards thus became fully integrated into the regulation of tobacco sales.⁸¹ The pervasive influence of the boards of trade demonstrated that auction markets were able to self-regulate, as well as protect buyers from fraud, without governmental interventions.⁸² Occupational custom and contract law were a means to avoid unnecessary state control.

74. See TILLEY, *supra* note 2, at 228–30, 289–90; Yeargin, *supra* note 16, at 41–42.

75. TILLEY, *supra* note 2, at 250.

76. HAHN, *supra* note 30, at 119–20.

77. See BADGER, *supra* note 59, at 105–06.

78. *Id.* at 106.

79. Tobacco Inspection Act, ch. 623, § 5, 49 Stat. 731, 732 (1935) (codified as amended at 7 U.S.C. § 511d (2006)).

80. *Id.*; see also BADGER, *supra* note 59, at 210. Boards of trade did occasionally overstep their bounds in attempting to protect their members’ share of the tobacco market. See, e.g., Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 740, 71 S.E.2d 21, 24 (1952) (rejecting a board’s attempt to require the defendant to bid at an end-of-season auction, deeming such a demand as “revolutionary in principle [that] strikes at the heart of our system of free enterprise”); Bright Belt Warehouse Ass’n v. Tobacco Planters Warehouse, Inc., 231 N.C. 142, 147, 56 S.E.2d 391, 395 (1949) (rejecting a board’s attempt to enjoin a warehouse from holding sales when a minimum number of buyers would not be present).

81. See HAHN, *supra* note 30, at 119, 169 (noting that when the federal government created a regulatory scheme during the Great Depression, “local boards of trade submitted their standards” to the government and thus the “government could take its cues from established market structures”).

82. See BADGER, *supra* note 59, at 104–06.

D. Conclusion

The history and development of tobacco auctions show that sellers and auctioneers consistently acted, in the absence of government interference, to minimize frauds. Doing so was in their immediate interest, as it ensured a well-functioning and reliable market for their crop, and their long-term interest, as auctioneers that were perceived as fair-dealing could be counted on to solicit more bids in future sales, thereby raising sales and prices over time.

After reviewing North Carolina's auctioneer licensing statute and its legality, this Article next shows how the protections present in southern tobacco barns in the 1800s and 1900s continue to protect bidders from fraud today.

II. NORTH CAROLINA'S AUCTIONEERING STATUTE

The primary practices of auctioneers, sellers, and bidders in the tobacco auction system that protected against fraud—a right to pre-bid inspection, an auctioneer transparently providing initial valuations and running sales, and post-fraud recourse—are present in modern-day auctions, regardless of the particular goods up for bid. As discussed in Parts III and IV below, these practices operate to this day in modern auction systems to deter frauds. However, an auctioneer's skill at drumming up bids is no longer the sole determinant of his ability to earn his keep. As discussed below, and in the name of consumer protection, the State has seen fit to pass judgment on the auctioneer's qualifications to take up the trade.

A. Auction Licenses: Their Grant and Revocation

The North Carolina Auctioneers Law⁸³ (the "Law") was passed in 1973.⁸⁴ It requires individuals conducting auctions to be licensed by the State.⁸⁵ Twenty-six states have similar bars on auctioneering without a license,⁸⁶ at least some of which were passed around the

83. N.C. GEN. STAT. §§ 85B-1 to -9 (2011).

84. Act of May 17, 1973, ch. 552, 1973 N.C. Sess. Laws 863 (codified as amended at N.C. GEN. STAT. §§ 85B-1 to -9 (2011)).

85. N.C. GEN. STAT. § 85B-4.

86. See W. VA. CODE ANN. § 19-2C-2 (LexisNexis 2007) ("After the thirtieth day of June, one thousand nine hundred seventy-four, no person shall conduct an auction as an auctioneer in this State unless he shall have first obtained from the commissioner a license therefor."); see also ALA. CODE § 34-4-20 (LexisNexis 2010); ARK. CODE ANN. § 17-17-105 (2010); FLA. STAT. ANN. § 468.385 (West 2007); GA. CODE ANN. § 43-6-9 (2011); 225 ILL. COMP. STAT. ANN. 407/10-1 (West 2012); IND. CODE ANN. § 25-6.1-3-2 (LexisNexis 2006 & Supp. 2012); KY. REV. STAT. ANN. § 330.030 (LexisNexis 2011); LA. REV. STAT. ANN. § 37:3101 (2007); ME. REV. STAT. ANN. tit. 32, § 285 (Supp. 2012); MASS. ANN.

same time.⁸⁷ Eleven other states limit the auctioning of certain property without a license⁸⁸ or delegate licensing authority to a municipality in the state.⁸⁹ Though there is little legislative history surrounding the Law's passage, according to one source, in the 1970s and 80s, voluntary state auctioneer associations around the country actively lobbied their respective legislatures for a statutory licensing requirement.⁹⁰ The North Carolina Auctioneers Licensing Commission, the entity created by the Law to enforce it,⁹¹ states that the Law "establishes specific standards of conduct that serve to protect the public."⁹² The Commission also states that "[l]icensing auctioneers and auction businesses increases public confidence in the profession by providing a means of determining the ability, general knowledge, integrity, and good character of those permitted to practice, and a means of deterring fraudulent or dishonest dealings and unethical conduct."⁹³ Likewise, other states' licensing statutes that include a statement of purpose find, for example, that "unqualified auctioneers and apprentices and unreliable auction

LAWS ch. 100, § 2 (LexisNexis 2010); MISS. CODE ANN. § 73-4-5 (West 2010); MO. ANN. STAT. § 343.010 (West 2012); NEB. REV. STAT. § 81-887.02 (2008); N.H. REV. STAT. ANN. § 311-B:4 (LexisNexis 2005 & Supp. 2012); N.D. CENT. CODE § 51-05.1-01 (2007); OHIO REV. CODE ANN. § 4707.02(A) (LexisNexis 2006 & Supp. 2012); 63 PA. STAT. ANN. § 734.3 (West 2010); R.I. GEN. LAWS § 5-58-1 (2009); S.C. CODE ANN. § 40-6-250 (2011); TENN. CODE ANN. § 62-19-102 (2009); TEX. OCC. CODE ANN. § 1802.051 (West 2012); VT. STAT. ANN. tit. 26, § 4603 (2006 & Supp. 2012); VA. CODE ANN. § 54.1-603 (2009 & Supp. 2012); WASH. REV. CODE ANN. § 18.11.070 (West 2005); WIS. STAT. ANN. § 480.08 (West 2012).

87. See, e.g., Act of Sept. 5, 1973, No. 811, §§ 3, 19, 1973 Ala. Acts 1236 (codified at ALA. CODE § 34-4-20 (LexisNexis 2010)); Act of Mar. 11, 1975, § 1, 1975 Ga. Laws 53 (codified as amended at GA. CODE ANN. § 43-6-9 (2011)); Act of Apr. 8, 1975, ch. 449, § 1, 1975 N.D. Laws 1238 (codified as amended at N.D. CENT. CODE § 51-05.1-01 (2007)); Act of Apr. 13, 1973, ch. 11, 1973 W. Va. Acts 112 (codified at W. VA. CODE ANN. § 19-2C-2 (LexisNexis 2007)).

88. See ARIZ. REV. STAT. ANN. § 44-1672 (2003); KAN. STAT. ANN. § 58-1016 (2005); N.J. STAT. ANN. §§ 45:17-4 to 17-5 (West 2009); N.M. STAT. ANN. § 61-16-5 (West 2009); OKLA. STAT. ANN. tit. 59, § 983 (West 2010).

89. See COL. REV. STAT. ANN. §§ 12-51-101 to 12-51-102 (West 2012) (authorizing counties to license public auctioneers); CONN. GEN. STAT. ANN. § 21-1 (West 2006); MICH. COMP. LAWS ANN. § 446.51 (West 2002); MINN. STAT. ANN. § 330.01(a) (West 2011); N.Y. TOWN LAW § 136 (McKinney 2004), S.D. CODIFIED LAWS § 9-34-7 (2004).

90. *Auctioneer Licensing—The Debate*, AUCTION LAW (Dec. 25, 2011, 5:59 PM), <http://auctionlaw.wordpress.com/2011/12/25/auctioneer-licensing-the-debate/>. This theory is borne out by the dates of passage of several state statutes. See session laws cited *supra* note 87.

91. See *infra* text accompanying notes 104–05, 110–14.

92. *What We Do*, N.C. AUCTIONEER LICENSING BOARD, <http://www.ncalb.org/whatwedo.cfm> (last visited Aug. 19, 2013).

93. *Id.*

businesses present a significant threat to the public,”⁹⁴ or that the statute is necessary in “order to prevent fraud, deception, and misrepresentation upon the buying public.”⁹⁵

The Law defines an “Auction” as

the sale of goods or real estate by means of exchanges between an auctioneer and members of an audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, offers by members of the audience, and the acceptance by the auctioneer of the highest or most favorable offer.⁹⁶

An “Auctioneer” for the Law’s purposes is an individual who conducts such auctions.⁹⁷ Relatedly, “Auctioneering” includes, “in addition to the actual calling of bids,” *inter alia*, “[a]dvertising an auction,” “[o]ffering items for sale at auction,” “[a]ccepting payment or disbursing monies for items sold at auction,” and “[o]therwise soliciting” an auction, or “holding oneself out as an auctioneer or auction firm.”⁹⁸

The Law requires any Auctioneer conducting a nonexempt Auction to hold a license.⁹⁹ Among other requirements, to be licensed as an Auctioneer, a person must be eighteen years old or older, have graduated from high school, and not have pled guilty to or been convicted of a felony or “any act involving fraud or moral turpitude.”¹⁰⁰ To be granted an auctioneer license, an applicant must have either served as a licensed “apprentice auctioneer” for two years prior to application or undertaken eighty hours of classroom instruction in approved courses on topics such as “Bid Calling, Voice Control, Proper Breathing Techniques, and Use of Sequence of

94. FLA. STAT. ANN. § 468.381 (West 2007).

95. N.M. STAT. ANN. § 61-16-3 (West 2009); *see also* 225 ILL. COMP. STAT. ANN. 407/5-5 (West 2012) (reasoning that without legislation, the State of Illinois “does not have the ability to evaluate the competency of persons engaged in the auction business or to regulate this business for the protection of the public”).

96. N.C. GEN. STAT. § 85B-1(1) (2011). The Law exempts a limited number of auctions, including estate sales, foreclosure sales of real property by a public authority, sales conducted by a trustee or charitable organization, and bankruptcy-related sales. *See id.* § 85B-2. Another important exception, especially in the context of online auctioneers, is for sales of property owned by the auctioneer. *See id.* § 85B-2(a)(1).

97. *See id.* § 85B-1(2).

98. *Id.* § 85B-1(8).

99. *Id.* § 85B-4; *see also id.* § 85B-2(a) (listing the auctions which are deemed exempt and thus do not require a licensed auctioneer).

100. *Id.* § 85B-4(b).

Numbers,”¹⁰¹ as well as advertising, contract drafting, ethics, and accounting.¹⁰² In either case, successful passage of a written examination is a prerequisite to the granting of a license.¹⁰³ Calling an auction without a license is a Class 1 misdemeanor, and the Law gives the North Carolina Auctioneers Commission¹⁰⁴ the authority to “seek injunctive relief” to “restrain any violation *or anticipated violation*” of the Law, including the calling of an auction without a license.¹⁰⁵ Out-of-state auctioneers—again, a term not limited to in-person auction callers but rather any person who “[a]ccept[s] payment . . . for items sold at auction”¹⁰⁶—must also be licensed.¹⁰⁷

Finally, the Law sets out a number of grounds for the “denial, suspension, or revocation” of a license, as well as a civil penalty.¹⁰⁸ The majority of these grounds are anti-fraud measures. For example, an auctioneer can have his license revoked for “[a] continued and flagrant course of misrepresentation or making false promises, either by the licensee, an employee of the licensee, or by someone acting on behalf of and with the licensee’s consent,” “[a]ny false, misleading, or untruthful advertising,” “[k]nowingly using false bidders, cappers, or pullers, or knowingly making a material false statement or representation,” “any act involving fraud or moral turpitude,” or “[a]ny act of conduct in connection with a sales transaction which demonstrates bad faith or dishonesty.”¹⁰⁹

B. The North Carolina Auctioneers Commission

As alluded to earlier, the Law establishes an “Auctioneers Commission,” more commonly referred to as the Auctioneer Licensing Board (the “Board”), and grants the Board the power to administer the Law, including the issuance, denial, suspension, and revocation of licenses.¹¹⁰ The Board is made up of five members appointed by the North Carolina Governor, at least three of whom are auctioneers nominated by the Auctioneers Association of North

101. 21 N.C. ADMIN. CODE 4B.0502(a) (2012). Other areas of instruction approved auctioneering schools must provide include “Body Language,” “Ring Work,” and “Hygiene and Personal Appearance.” *Id.*

102. See N.C. GEN. STAT. § 85B-4(d).

103. *Id.*

104. For discussion of the Auctioneers Commission, see *infra* Part II.B.

105. N.C. GEN. STAT. § 85B-9(b) (emphasis added).

106. *Id.* § 85B-1(8)(e).

107. *Id.* § 85B-5. This provision’s application to online auctions is analyzed *infra* Part II.C.

108. *Id.* § 85B-8.

109. *Id.* § 85B-8(a).

110. See *id.* § 85B-3.1.

Carolina (“AANC”).¹¹¹ One seat on the Board is reserved for a non-auctioneer “who shall represent the public at large and shall not be licensed under this Chapter,” presumably to curb the protectionist impulses of an all-auctioneer licensing board.¹¹² As part of its licensing function, the Board establishes the application process, including developing the required written examination and checking all license applicants’ criminal histories.¹¹³ It also promulgates and approves continuing education requirements for auctioneers, and certifies auctioneering schools after ensuring that the proposed school’s curriculum matches the Board’s regulations.¹¹⁴

Additionally, the Law sets up an Auctioneer Recovery Fund with proceeds from license fees.¹¹⁵ Pursuant to its licensing authority, the Board has the power to receive and investigate complaints by “[a]n aggrieved person who has suffered a monetary loss as a direct result of the conversion of funds or property or other fraudulent act or conduct by a licensed auctioneer,” and to grant such a person an award from the Fund if the auctioneer is himself unable to satisfy a fraud-related judgment against him.¹¹⁶ In addition to this power, the Board also has the authority, “upon its own motion or upon the complaint in writing of any person . . . [to] hold a hearing and investigate the auctions of any auctioneer,” to impose a civil penalty, to reprimand or censure a licensee, and/or to suspend or revoke any license.¹¹⁷ Generally, the auctioneer has due process rights in such proceedings; however, if “the health, safety, or welfare of the public is at risk, such as in the event of a potential loss of consigned items or

111. *Id.* § 85B-3(a).

112. *Id.* § 85B-3(b). As the Supreme Court of North Carolina commented with respect to another licensing board similarly composed, a government-empowered licensure body grants to incumbent businessmen the “power of exclusion of fellow workers in the same field” via the “discretion . . . to set up standards of their own” to enter the field “according to whatever rules or regulations they may conceive to be related” to public health or safety. *State v. Harris*, 216 N.C. 746, 752, 754, 6 S.E.2d 854, 859–60 (1940), discussed *infra* text accompanying notes 180–94.

113. See N.C. GEN. STAT. § 85B-3.2. The Board can deny an applicant’s license if the records check “reveals one or more convictions of a crime that is punishable as a felony offense, or the conviction of any crime involving fraud or moral turpitude.” *Id.* § 85B-3.2(d).

114. 21 N.C. ADMIN. CODE 4B.0502(a)(1)–(2) (2012). For a sampling of the Board’s required courses, see *supra* notes 101–02 and accompanying text. The Board’s regulations also establish requirements concerning “instructor conduct and performance,” including “[t]he ability to present an effective visual image to a class by appearance and physical mannerisms” and refraining from “criticism of any other person, agency or organization.” 21 N.C. ADMIN. CODE 4B.0815(b).

115. N.C. GEN. STAT. § 85B-4.1.

116. *Id.* § 85B-4.2.

117. *Id.* § 85B-8(e)(1).

potential loss of funds,” the Board has the power, “upon its own motion,” to “summarily suspend a license.”¹¹⁸

C. Online Auctions

1. North Carolina’s Approach to Online Auctions

The Board has intermittently sought to extend the Law’s reach to online auctions aimed at potential North Carolina bidders. In the late 1990s, both the AANC and the Board turned their focus on the rising trend of online auctions. In October 1998, the then-general counsel for the Board co-authored an article in *The North Carolina Auctioneer*, a trade periodical published by the AANC, which first set out the Board’s stance on internet auctions.¹¹⁹ In the article, he wrote, “Internet auctions . . . are no different than any other non-traditional auction. If the bids are solicited, received, or awarded in North Carolina, a North Carolina license is required. Period.”¹²⁰ At the November 1999 regular monthly meeting of the Board, the members unanimously voted to approve a policy which stated:

If an individual or business is located in North Carolina and 1. they solicit auctions; 2. contract for auctions; 3. accept consignments for auctions; 4. advertise for auctions; 5. offer items for sale at auctions; 6. accept payment and/or disburse monies for items sold at auction; 7. accept bids for items that are not their own goods; and, 8. buy goods for resale at auction over the Internet, the minimum requirement for those individuals or businesses is to hold a current auctioneer license or if no live exchanges occurred, then hold an auction firm license.¹²¹

Less than a week after the Board had clarified its internal policies and distributed a pamphlet which laid out the changes, it was

118. *Id.* § 85B-8(e)(2).

119. Jeffrey P. Gray & W. Wayne Woodward, *It’s the Law: Non-Traditional Auctions Continue to Cause a Stir*, NORTH CAROLINA AUCTIONEER, Oct. 1998, reprinted in ROBERT A. HAMILTON, INTERNET AUCTION ISSUES IN NORTH CAROLINA: A WRITTEN SUMMARY PROVIDED TO THE FEDERAL TRADE COMMISSION’S PUBLIC WORKSHOP “POSSIBLE ANTICOMPETITIVE EFFORTS TO RESTRICT COMPETITION ON THE INTERNET” 7, 7, available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/hamilton.pdf> (last visited Aug. 19, 2013).

120. *Id.* at 8.

121. ROBERT A. HAMILTON, INTERNET AUCTION ISSUES IN NORTH CAROLINA: A WRITTEN SUMMARY PROVIDED TO THE FEDERAL TRADE COMMISSION’S PUBLIC WORKSHOP “POSSIBLE ANTICOMPETITIVE EFFORTS TO RESTRICT COMPETITION ON THE INTERNET” 2, available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/hamilton.pdf> (last visited Aug. 19, 2013).

contacted by local and national media, the public, and international businesses—all requesting information about the “new law.”¹²² At the Board’s December 1999 meeting, likely in response to the hullabaloo caused by the pamphlet, two North Carolina legislators asked that the Board “defer action” on the regulation of internet auctioneers so that the Joint Select Committee on Information Technology could have enough time to study the issue in case the General Assembly wanted to officially change the language of the statute.¹²³ The request was unanimously approved, and the Board temporarily suspended the regulation of online transactions.¹²⁴ There is no evidence that the Joint Committee actually undertook this review; however, a bill was introduced to the House of Representatives during the 2005 session which would have excluded “internet-based sales” from the Auctioneering statute.¹²⁵ But after a series of revisions, the bill was signed into law stripped of its original language pertaining to internet sales.¹²⁶

The Board’s position has changed only incrementally since the 1999 statement. In an internal newsletter written on June 30, 2009, the then-chairman of the Board, Lloyd “Mickey” Meekins, Jr., stated that the Board “will start as soon as possible working on Internet Auction Regulations. These regulations will resemble those in Pennsylvania, which subject online auctioneers to that state’s licensing requirement,¹²⁷ and will be designed to protect the public from non-licensed auctioneers doing auction business through the Internet.”¹²⁸ The Board’s enforcement action has been consistent with this aggressive position; in June 2012, a journalist from the *Winston-Salem Journal* wrote a story about Diane Pearce, the sole proprietor of the company Consigning Women, who was asked by the Board to cease

122. *See id.* at 3.

123. *See id.*

124. *See id.* at 3–4.

125. *See* An Act to Exclude Internet-Based Sales from Activities Regulated by Laws Pertaining to Auctions and Auctioneers, N.C. GEN. ASSEMBLY (Apr. 21, 2005), <http://ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=H1388>.

126. *See* Act of July 11, 2006, ch. 134, 2006 N.C. Sess. Laws 472 (codified as amended at N.C. GEN. STAT. §§ 58-70-5, 58-70-40, 58-70-65(c) (2011)).

127. *See infra* Part II.C.2.

128. Lloyd Meekins, *NCALB Chairman’s Corner*, N.C. AUCTIONEER LICENSING BOARD NEWSL. (N.C. Auctioneering Licensing Bd., Fuquay Varina, N.C.), June 30, 2009, at 1, 2, available at <http://www.ncalb.org/documents/Newsletter%20bi-yearly%206-30-09.pdf>.

and desist her online business for lack of a license.¹²⁹ The title of the skeptically toned piece was “Little-known N.C. licensing board discovers the Internet.”¹³⁰ In it, both the journalist and Pearce express disbelief that a regulatory board had the authority to shut her business down.¹³¹ The article describes the Board as “an obscure arm of state government that apparently just became clued into the World Wide Web.”¹³²

A recent article in the Board’s November 2012 newsletter, however, takes a more nuanced stance, perhaps in response to fall-out from the incident described in the *Winston-Salem Journal* earlier that year. The article, written by the Board’s current legal counsel, Garris Neil Yarborough, first sets out the Board’s new goals with regard to online regulation:

In interpreting our North Carolina Auctioneer Licensing Laws, the Board has attempted to differentiate between legitimate internet “trading platforms,” payment systems, advertising activities, and unlicensed auctioneering activities, which simply use the internet as the medium for conducting auctions. This is sometimes a difficult task, but through the Board’s enforcement program, we have identified several clear-cut means for identifying violations: the easiest being identifying individuals or businesses that are unlicensed, but use some form of the word “auction” in their business name.¹³³

Under the statutory definitions provided since the Law’s enactment, certain activities are inherently within the scope of regulation, regardless of whether the medium used to carry out those activities happens to be the internet.¹³⁴ According to Yarborough, the statute was always intended to be silent when it came to the medium over which an auction occurred; in the Board’s view, it was the action that was meant to be regulated, not the medium.¹³⁵ As Yarborough describes it, “[the Law] is neutral as to the medium one uses. Live

129. Scott Sexton, *Little-Known N.C. Licensing Board Discovers the Internet*, WINSTON-SALEM J. (June 10, 2012, 1:00 AM), http://www.journalnow.com/news/columnists/scott_sexton/article_46f412d5-5aaa-5189-b065-12aa5bc1543a.html.

130. *Id.*

131. *Id.*

132. *Id.*

133. Garris Neil Yarborough, *Article*, N.C. AUCTIONEER LICENSING BOARD NEWSL. (N.C. Auctioneer Licensing Bd., Fuquay Varina, N.C.), Nov. 2012, at 1–2, available at <http://www.ncalb.org/documents/Nov%202012-Vol%202%20issue%206.pdf>.

134. *See id.* at 2.

135. Telephone Interview with Garris Neil Yarborough, Legal Counsel, N.C. Auctioneer Licensing Bd. (Jan. 2, 2013).

telephone, letter, etc.—it doesn't speak to the means of communication. As far as they're concerned, if you're engaging with certain things that engage in auctioneering, you need a license."¹³⁶

Yarborough notes in the newsletter and during an interview that the Board's current stance is to tackle this issue on a case-by-case basis because the mechanical definitions used by the 1999 Board's policymakers simply do not fit the current understanding of how the internet works.¹³⁷ As Yarborough explains,

eBay is the telephone. It is providing the medium for the communication. Selling your table on eBay is not auctioneering. But if Fred's Internet Auction house solicits to take the table and auction it off for me on the internet, it could be a transaction for which a license was needed. Just because they use the internet doesn't mean they don't need a license.¹³⁸

In Yarborough's opinion, the statute does not need amending since it already has sound definitions which cover specific actions that the State deems important enough to regulate.¹³⁹ Because technology changes constantly, Yarborough believes it would be foolhardy to attempt to keep up with it by changing the statute every time a new disruptive technology becomes widely used.¹⁴⁰ "You can't define murder by the weapon," he said.¹⁴¹ "It makes sense to define the crime by the activity rather than the means."¹⁴² The current key for Yarborough and the Board in how they regulate online auctioneers therefore seems to be the manner in which the auctioneers hold themselves out to the public.¹⁴³ "If we see 'auction' in the name of a company, that is the first thing that pops up."¹⁴⁴ According to Yarborough, the Board receives tips from the public all the time about various companies which are acting essentially as online auction houses.¹⁴⁵

136. *Id.*

137. *Id.*; Yarborough, *supra* note 133, at 2.

138. Telephone Interview with Garriss Neil Yarborough, *supra* note 135. Yarborough's interpretation here is consistent with the Law's exception for sales of property owned by the auctioneer. See N.C. GEN. STAT. § 85B-2(a)(1) (2011).

139. Telephone Interview with Garriss Neil Yarborough, *supra* note 135.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

2. Other States' Approaches to Online Auctions

As alluded to above, other states have taken affirmative steps either to expressly include or exempt online auctioneering from licensing requirements. The legislative bodies in two states, Texas and North Dakota, have explicitly removed online auctions from the scope of their regulatory provisions.¹⁴⁶ The legislatures of both those states decided that online auctions were categorically different from the types of auctions that their licensing laws intend to regulate.¹⁴⁷

In contrast, beginning in the mid-2000s, a growing number of states, including Illinois,¹⁴⁸ New Hampshire,¹⁴⁹ and Pennsylvania,¹⁵⁰ have added provisions that aim to bring online auctioneers within statutory licensing schemes. Although the ostensible goal for these provisions is mainly to protect the public from frauds by itinerant auction sites, it is clear that the expansion of auctioneering statutes to cover online transactions also supplies monetary incentives for the state in the form of a larger take for license fees or civil penalties. For example, New Hampshire requires all online auctioneers to "complete a study or an apprenticeship, pass a state examination, hold a \$10,000 bond, and pay an annual \$85 fee" to the state

146. See *Auctioneers Frequently Asked Questions*, TEX. DEPT OF LICENSING AND REG., <http://www.tdlr.state.tx.us/auc/aucfaq.htm#l27> (last visited Aug. 19, 2013) ("[Q:] Does an online auction need a licensed auctioneer? [A:] No. The Texas Department of Licensing and Regulation would not consider someone conducting an online auction to need a license from this agency, since it is not 'bid calling.' The definition of 'auctioneer' pursuant to Chapter 1802.001(5) Texas Occupations Code (Auctioneer Law) includes that he or she act as a 'bid caller.' Online auctions do not have an auctioneer as a 'bid caller.'"); see also N.D. CENT. CODE § 51-05.1-04 (Supp. 2011) ("A person conducting, or employed by a person conducting, an internet auction is not an auctioneer or clerk within the meaning of this chapter.").

147. See *Auctioneers Frequently Asked Questions*, *supra* note 146; N.D. CENT. CODE § 51-05.1-04.

148. See Act of May 23, 2002, P.A. 92-0797, 2002 Ill. Laws. 2730, 2731-34 (codified as amended at 225 ILL. COMP. STAT. ANN. 407/10-27 (West 2012)); see also *Internet Auction Listing Service Required to Register*, ILL. DEPT OF FIN. & PROFILING REG., <http://www.idfpr.com/dpr/re/NEWS/IALSReg.asp> (last visited Aug. 19, 2013).

149. See Act of July 13, 2010, ch. 291, 2010 N.H. Laws 476 (codified in scattered sections of N.H. REV. STAT. ANN. 311-B and 358-G (LexisNexis 2005 & Supp. 2012)); see also Larry Theurer, *Summary of Testimony for the Federal Trade Commission: Possible Anticompetitive Efforts to Restrict Competition on the Internet Workshop*, FTC.GOV, <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/theurer.pdf> (last visited Aug. 19, 2013).

150. See Act of Oct. 8, 2008, No. 2008-89, §§ 2, 5, 2008 Pa. Laws 1080 (codified at 63 PA. STAT. ANN. §§ 734.2, 734.10.1 (West 2010)); see also Gene Friedman & Catherine Saunders-Watson, *New Pa. Law Requires Online Trading Assistants to be Licensed, Bonded*, AUCTION CENT. NEWS (Oct. 14, 2008, 10:01 AM), <http://acn.liveauctioneers.com/index.php/features/auction-houses/41-houses/212-new-pa-law-requires-online-trading-assistants-to-be-licensed-bonded>.

regulatory agency.¹⁵¹ Though the legislature did not alter the wording in Georgia's licensing statute with regard to online auctions, the State's view on the issue of online auctioneers and licensing was made clear after the Governor's Office of Consumer Protection in Georgia took action against www.wavee.com, a penny auction website, because state officials said that the site was operating illegally by not being registered with the Georgia Auctioneers Commission.¹⁵² The Governor's Office ordered Wavee to pay "civil fines and penalties of \$50,000 and pay restitution of \$202,210.10, a civil penalty of \$35,000 and \$15,000 in administrative/investigation expenses. Plus, Wavee [paid] \$50,000 to the state to establish a trust account."¹⁵³ Before changes were made to Pennsylvania's regulatory statutes, third-party sellers of property in timed online auctions were exempted from obtaining an auctioneer's license.¹⁵⁴ However, a new bill was enacted to require these "trading assistants" to register with the state and pay a biennial fee of \$100 to the State Board of Auctioneer Examiners.¹⁵⁵

The online auction site eBay took significant steps to oppose these legislative efforts. While amendments were under consideration in Pennsylvania, eBay posted a notice on its website that the company "oppose[d] attempts to extend state auction licensing requirements to either eBay sellers or eBay itself."¹⁵⁶ eBay had lobbyists in as many as twenty-five states in 2006, all working to get states to deregulate online transactions and to prevent them from bringing eBay

151. Theurer, *supra* note 149, at 2.

152. Amanda Lee, *The State of Georgia Shuts Down Wavee*, PENNY AUCTION WATCH, <http://www.pennyauctionwatch.com/2011/07/the-state-of-georgia-shuts-down-wavee-com-governors-office-of-consumer-protection> (last visited Aug. 19, 2013). The complaint stated:

The Administrator alleges that the Respondents have used unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce as declared unlawful by the [Georgia consumer protection statute]. Specifically, the Administrator alleges that Respondents have committed the following unfair or deceptive acts or practices: A. Respondents advertised that www.wavee.com is a "penny auction" website and conducted thousands of auctions on this website without the authority to do so. Respondents were not authorized to conduct such auctions because they were not registered with the Georgia Auctioneers Commission, as required by O.C.G.A. 43-6-9.

Id.

153. *Id.*

154. See Friedman & Saunders-Watson, *supra* note 150.

155. *Id.*

156. Ina Steiner, *Pennsylvania Latest Battleground in eBay Consignment-Sales Regulation*, ECOMMERCEBYTES (Apr. 23, 2007), <http://www.ecommercebytes.com/cab/abn/y07/m04/i23/s02> (internal quotation marks omitted).

customers into the auctioneering statutes' scope.¹⁵⁷ eBay eventually lost its battle with Pennsylvania, or at least decided to stop fighting. It used to host a website which allowed concerned parties to contact state legislatures, urging them to "speak up by opposing legislation to regulate eBay or eBay sellers."¹⁵⁸ On eBay Main Street, the company's advocacy site which lists its stances on hot button issues, there are currently no pages that address state regulation of online auctioneers.¹⁵⁹ It seems that eBay has at least impliedly accepted that states are able to bring online transactions into their respective licensing schemes. Ina Steiner, editor of the website *ecommercebytes.com*, may have proved to be prophetic when she said in 2006 that in the face of these legislative efforts, "eBay doesn't have a choice."¹⁶⁰

However, while Pennsylvania's legislature took affirmative steps to regulate and license what it referred to as "online trading assistants" against eBay's wishes, it also did so with some recognition of the inherent differences between traditional and online auctions. The sponsor of the senate bill which brought online trading assistants into the legislative framework, Senator Rob Wonderling, remarked on the Senate floor:

Senate Bill No. 908 seeks to remedy a situation where, today in Pennsylvania, we have countless numbers of individuals who derive income, whether in part or in total, making a living by selling goods and items on Internet platforms. . . . We had a situation in which there was a defect in the statute which would have required such e-sellers, if you will, to become licensed auctioneers in what I would describe as a traditional 20th century model that required training. Literally, the requirement would have been to have these folks attending Reading Area Community College and learn how to talk fast. It does not make sense when you are putting an item up for sale on eBay.¹⁶¹

157. Katie Hafner, *Going Once . . . Going Twice . . . Gone!: How eBay Makes Regulations Disappear*, N.Y. TIMES, June 4, 2006, at B1.

158. See Nino, eBay Staff Member, *eBay fights State Internet Auctioneering Regulation*, CHATTER NEWSL., <http://pages.ebay.com/community/chatter/2005april/govtrel.html> (last visited Aug. 19, 2013).

159. See *id.* (clicking on the old links to eBay's list of state legislatures brings up a "Page Not Found" alert.) Also, see eBay's old government affairs site at <http://pages.ebay.com/governmentrelations/> (clicking the "Auctioneering Regulation" tab leads to a page on new page on Main Street). Auctioneering regulation is no longer one of the issues listed.

160. Hafner, *supra* note 157.

161. S. 192, 61 Sess., at 2562 (Pa. 2008), available at <http://www.legis.state.pa.us/WU01/LI/SJ/2008/0/Sj20080924.pdf#page=18>.

Though Senator Wonderling's comments assumed that online sellers would be required to be licensed in his state under current law, he also acknowledged that traditional justifications for auctioneer training do not apply to participation in online trading platforms, since those sales are not made face-to-face. This is one distinction North Carolina auctioneering regulators appear to have overlooked. What Senator Wonderling refers to as a statutory "defect"—the idea of forcing online sellers to undergo the same training as live auctioneers—still appears to be policy in North Carolina.¹⁶²

3. Special Considerations for Regulating Online Auctions

According to eBay's Director of Operations, the already dubious justifications for regulating traditional auctioneers with licensing boards and training are even weaker for applying such standards to online sellers. Catherine England, a spokesperson for eBay, succinctly summed up the problems with attempting such regulation:

Since eBay and eBay sellers perform functions distinct and non-equivalent to those of traditional auctioneers, they should not be subject to the same regulation and licensing requirements There is no evidence that imposing new regulations and licensing requirements upon eBay or eBay sellers would provide any additional consumer protection. However, new regulations would impose unneeded costs and burdens upon both buyers and sellers, many of whom rely on their eBay transactions for their primary source of income.¹⁶³

The differences between online and live auctions, though significant, do not call for state-imposed protections for bidders in the online space, since online auctions have developed a host of market-based solutions for seller-side frauds. In addition to the common law remedies available to buyers generally, online buyers have the benefit of additional anti-fraud measures taken by the companies providing the online trading platforms. For example, eBay, in addition to its ubiquitous seller rating system and guides for buyers on avoiding scams, also permits sellers to advertise their certifications from the buySafe bonding service, which guarantees reimbursement in the

162. See, e.g., Sexton, *supra* note 129 (noting that the Board wanted the online seller to "take courses to become a real, live auctioneer").

163. Ina Steiner, *eBay Opposes Regulation while Pennsylvania Sellers Face Fines*, ECOMMERCEBYTES (Nov. 20, 2007), <http://www.ecommercebytes.com/cab/abn/y07/m11/i20/s01> (quoting Catherine England).

event a winning bidder is defrauded.¹⁶⁴ eBay also has an Asset Protection Team, which handles law enforcement “eRequests” from its customers and works to collaborate with local law enforcement officials to track down criminals.¹⁶⁵ Moreover, buyers who use PayPal for most online transactions are covered by the service’s Purchase Protection program, which reimburses defrauded buyers.¹⁶⁶

Accordingly, fraud is deterred in online auctions in much the same way as it was in loose-leaf tobacco auctions. Both examples show that where market-based processes are in place for self-protection and are buttressed by both industry custom and contract law, the protections nominally afforded to buyers by a licensing regime become redundant. It makes little sense to protect a bidder from a prospective auctioneer who *might in theory* act fraudulently when there are a range of remedies available to buyers who are *in fact* defrauded.

III. THE LEGALITY OF THE AUCTIONEER LICENSING STATUTE

Even with the market-based protective mechanisms described above in the tobacco auction context but common to nearly all modern auctions, requiring auctioneers to be licensed by the state may, at first blush, seem like a common-sense consumer protection measure. But the Law must be read in light of the North Carolina Constitution’s express guarantee to choose one’s occupation and protection of one’s right to engage in free speech, whether that speech be commercial or for hire.

A. *The North Carolina Constitution’s Right to “Enjoy the Fruits of [One’s] Labor”*

1. Rational Basis Review and the “Professional”/“Ordinary Trade” Distinction Generally

Article I, section 1 of the North Carolina Constitution, adopted by the state’s constitutional convention of 1868,¹⁶⁷ grants the state’s

164. See *buySAFE Bonded on eBay*, BUYSAFE, INC., https://www.buysafe.com/seller_solutions/supporting/for_ebay.html (last visited Aug. 19, 2013).

165. See *Law Enforcement eRequest System*, EBAY, INC., <https://lers.corp.ebay.com/AIP/portal/home.do> (last visited Aug. 19, 2013).

166. See *Security*, PAYPAL, INC., <https://www.paypal.com/webapps/mpp/paypal-safety-and-security> (last visited Aug. 19, 2013).

167. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA AT ITS SESSION 1868, at 226–27, 232, available at <http://docsouth.unc.edu/nc/conv1868/conv1868.html>.

citizens the right to “enjoy[] the fruits of their own labor.”¹⁶⁸ As the Supreme Court of North Carolina recognized in an occupational restrictions challenge, the provision borrows from the Federal Declaration of Independence, and its drafters interpolated the reference to “enjoyment of the fruits of [a citizen’s] labor” between the more familiar reference to “life, liberty” and “the pursuit of happiness” from the Declaration’s famous second sentence.¹⁶⁹ The court further defined the scope of “liberty” in that case to include “the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling,” and “to pursue any livelihood or vocation.”¹⁷⁰

Though article I, section 1 was essentially a rider added to the Declaration’s tripartite list of inalienable rights, the North Carolina Constitution’s specific affirmation of the right to earn a living was consistent with Founding-era thinkers’ views as to the right’s nature and scope. For example, Thomas Jefferson in his essay *Thoughts on Lotteries* noted that “every one has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence.”¹⁷¹ George Mason expressed the same thought several years earlier in the Virginia Declaration of Rights, which affirmed the Virginia Convention of Delegates’ view of man’s inalienable right to “the means of acquiring” property.¹⁷² Similarly, James Madison wrote that “a[n] unjust government . . . [places] arbitrary restrictions, exemptions, and monopolies [to] deny to part of its citizens that free use of their faculties, and free choice of their occupations.”¹⁷³ Jefferson and Madison’s view of the liberty to choose an occupation of one’s choice as a natural right, as well as their conception of the right as a piece of other inalienable property-based rights, was

168. N.C. CONST. art. I, § 1.

169. See *State v. Ballance*, 229 N.C. 764, 768, 51 S.E.2d 731, 734 (1949). The full text of article I, section 1 of the North Carolina Constitution reads “We hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.” N.C. CONST. art. I, § 1.

170. *Ballance*, 229 N.C. at 769, 51 S.E.2d at 734. Similarly, though outside the scope of this Article, the State has also declared in the context of labor relations that “[t]he exercise of the right to work must be protected and maintained free from undue restraints and coercion.” N.C. GEN. STAT. § 95-78 (2011).

171. THOMAS JEFFERSON, *THOUGHTS ON LOTTERIES* (1826), reprinted in 17 THE WRITINGS OF THOMAS JEFFERSON 448, 449 (Albert Ellery Bergh ed., 1907).

172. THE VIRGINIA DECLARATION OF RIGHTS, reprinted in THE GEORGE MASON LECTURES: HONORING THE TWO HUNDREDTH ANNIVERSARY OF THE VIRGINIA DECLARATION OF RIGHTS 20 (The Colonial Williamsburg Found. ed., 1976).

173. JAMES MADISON, *PROPERTY* (1792), reprinted in JAMES MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999).

informed by John Locke, who wrote in his *Two Treatises of Government* that "every man has a *Property* in his own *Person*. This no Body has any Right but to himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly His."¹⁷⁴

North Carolina Supreme Court and Court of Appeals opinions interpreting article I, section 1 hew closely to the Founders' inalienable rights language. In two typical passages, the court of appeals stated that article I, section 1 "creates a right to . . . earn a livelihood that is 'fundamental' for purposes of state constitutional analysis,"¹⁷⁵ and that the Section grants "a property right that cannot be taken away except under the police power of the State in the paramount public interest."¹⁷⁶

The cases recognize, however, that even though "the right to earn a living must be regarded as inalienable" and "a law which destroys the opportunity" to do so "by the erection of educational and moral standards of fitness is legal grotesquery,"¹⁷⁷ the right to choose one's occupation is not absolute. In application, this standard has essentially boiled down to rational basis review. As the Supreme Court of North Carolina stated in *Poor Richard's, Inc. v. Stone*,¹⁷⁸ the "constitutional protections" of article 1, section 1

have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose. . . . [The] [i]nquiry is thus twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?¹⁷⁹

174. JOHN LOCKE, OF PROPERTY (1679), *reprinted in* JOHN LOCKE: TWO TREATISES OF GOVERNMENT 303, 305-06 (Peter Laslett ed., 1960) (emphasis in original). The conception of the right to choose one's occupation as a natural one is also influenced by the interpretation of work as a manifestation of free will. Some historians, of course, dispute the extent of Locke's influence on Jefferson generally and the Declaration in particular. *See, e.g.*, GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 169-75 (1978). This Article is not the place to revisit or re-litigate that battle.

175. *Treants Enters., Inc. v. Onslow Cnty.*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987); *see also* *Cline v. McCullen*, 148 N.C. App. 147, 151, 557 S.E.2d 588, 591 (2001) (using the *Treants* court's interpretation of this right to analyze an action for interference with business relations).

176. *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983).

177. *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940).

178. 322 N.C. 61, 366 S.E.2d 697 (1988).

179. *Id.* at 64, 366 S.E.2d at 699.

Despite this relatively deferential articulation of the standard, though, cases analyzing challenges to occupational limitations made under article I, section 1 have given meaningful review to the government's claimed interests in justifying the limitation. For example, in *State v. Harris*,¹⁸⁰ a dry cleaner, J.P. Harris, was arrested and convicted for practicing his trade without the license issued by the State Dry Cleaners Commission and required by statute.¹⁸¹ The licensing statute granted the Dry Cleaners Commission the authority to develop and implement an "examination to cover subjects deemed necessary [by the Commission] to promote the public health, safety and welfare of the people of the State of North Carolina."¹⁸² The Commission, composed of three members in the industry and two members with no connection to the industry,¹⁸³ closely tracked that of the Auctioneers Licensing Board.¹⁸⁴ In defending the licensing scheme, the State argued that the statute was intended to "empower the Commission to apply standards of educational and moral fitness to those who desire to choose and carry on the" occupation of dry cleaning.¹⁸⁵

The court found that the licensing scheme constituted a "fundamental . . . invasion of personal liberty and the freedom to choose and pursue one of the ordinary harmless callings of life" granted Harris by article I, section 1.¹⁸⁶ In so doing, the court characterized the statute before it as granting a "power of exclusion of fellow workers in the same field"¹⁸⁷ by granting the Commission the "unlimited discretion . . . to set up standards of their own for admission to the business . . . according to whatever rules or regulations they may conceive to be related to the 'public health, safety, and welfare of the people.' "¹⁸⁸ In affirming Harris's challenge, the court distinguished between (i) the State's ability to "create[] and enforce[] by laws" examination and licensing requirements for "those desiring to engage in the learned professions, and in occupations

180. 216 N.C. 746, 6 S.E.2d 854 (1940).

181. *Id.* at 748, 6 S.E.2d at 856.

182. *Id.* at 750, 6 S.E.2d at 857.

183. *Id.* at 749, 6 S.E.2d at 857 (quoting Act of Feb. 11, 1937, ch. 30, § 2, 1937 N.C. Sess. Laws 69, 70) ("The Commission consists of five members, 'three of whom shall have been engaged in the dry cleaning, dyeing and/or pressing business in the State of North Carolina for at least five years next preceding his appointment, and two of whom shall not be connected with said business but shall be from the public at large.'").

184. *See supra* text accompanying notes 111–12.

185. *Harris*, 216 N.C. at 752, 6 S.E.2d at 859.

186. *Id.* at 753, 6 S.E.2d at 859.

187. *Id.* at 752, 6 S.E.2d at 859.

188. *Id.* at 754, 6 S.E.2d at 860.

requiring scientific or technical knowledge and skill, some of which bring about a relation of trust or confidence between those who practice the trades or occupations and the clientele they serve"; and (ii) those trades "[a]t the other end of the occupational scale": the "ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right, as to which it is uniformly held that such standards may not be applied."¹⁸⁹ "Somewhere between these extremes," the court stated, "the slendering thread of police authority must come to an end, and constitutional guaranties of personal liberty must supervene."¹⁹⁰ Determining where police power ended and liberty began required a close look at the occupation from which the State sought to exclude:

[R]egulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare. . . . [T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it.¹⁹¹

The court found that dry cleaning had no such distinguishing features. Claims by the State that dry cleaning's use of allegedly "inflammable liquids in the cleaning process" failed to justify requiring an occupational entrance exam, since the use of such material was "a matter more related to intelligence and prudence than to education," and working with such liquids was not sufficient to impose examination requirements on "filling station attendants, cooks, and many others exposed to similar dangers."¹⁹²

More importantly for present purposes, as to the State's claim that "the statute is justified as a measure intended to protect the public against fraud," the court found that "there is no business or occupation which is not likely to have its quota of dishonest men," and that "[t]he danger to the public comes from the character of the man and not from any unusual opportunity afforded him in the business."¹⁹³ "If occasional opportunity for fraud is to be the test," the court held, "there is no reason why every grocer, every merchant, every automobile dealer, every keeper of a garage, every

189. *Id.* at 756, 6 S.E.2d at 861.

190. *Id.*

191. *Id.* at 758-59, 6 S.E.2d at 863.

192. *Id.* at 760, 6 S.E.2d at 864.

193. *Id.* at 761, 6 S.E.2d at 864.

manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of the real estate agent or salesman,” may also be subject to a licensure requirement.¹⁹⁴ As the court would state in a later case, “[a] regulatory act justified only by reason of a desire to protect the public against fraud and dishonesty may not be sustained.”¹⁹⁵

Subsequent article I, section 1 cases applied *Harris*’s “professional”/“ordinary trade” distinction and affirmed its holding that fraud deterrence is an insufficient public purpose to justify an occupational licensing requirement in the face of an inalienable right to choose one’s vocation. For example, in the above-cited *State v. Ballance*,¹⁹⁶ the state supreme court overturned a conviction for practicing photography without a license.¹⁹⁷ There, section 92-1 of the General Statutes of North Carolina established a State Board of Photographic Examiners and prohibited the practice of photography without a license from the Board.¹⁹⁸ The Board was empowered to refuse licenses on moral and/or competency grounds, a delegation of authority the court found “promote[d] a monopoly in what is essentially a private business.”¹⁹⁹ The court in *Ballance* also expressly rejected a fraud-based justification for the licensing requirement, finding such reasoning to

run[] counter to the economic philosophy generally accepted in this country that ordinarily the public is best served by the free competition of free men in a free market. . . . [F]raud has been practiced on occasion in all relations of life since the serpent invaded Eden and misrepresented the qualities of the forbidden fruit to the woman.²⁰⁰

Similarly, in *Roller v. Allen*,²⁰¹ the Supreme Court of North Carolina enjoined the execution of a licensing scheme for tile and marble installation which was to be implemented and enforced by the North Carolina Licensing Board for Tile Contractors.²⁰² As in *Harris*

194. *Id.*

195. *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 664 (1960).

196. 229 N.C. 764, 51 S.E.2d 731 (1949).

197. *Id.* at 772, 51 S.E.2d at 736. In so doing, the court overturned its prior case upholding the photographer license requirement, following the analogous decisions of several other states. *See id.*

198. *See id.* at 766, 51 S.E.2d at 732.

199. *Id.* at 772, 51 S.E.2d at 736.

200. *Id.* at 771, 51 S.E.2d at 736.

201. 245 N.C. 516, 96 S.E.2d 851 (1957).

202. *See id.* at 526, 96 S.E.2d at 859.

and *Ballance*, the State provided a fraud-based justification for the licensing requirement, arguing that "tile installing is a trade in which it is easy to practice fraud upon the public by doing shoddy work and that by policing the industry the public welfare will be promoted," but, also as in *Harris* and *Ballance*, the court rejected fraud as a basis for licensure.²⁰³ In addition, the court took particular offense to the Board's rejection of a license to the plaintiff for having failed his written examination, noting that "[s]uccessful tile contracting consists in doing the work rather than describing it in a written examination paper," and that "in all probability the average worker could learn to do acceptable tile work as quickly as he can learn to describe it on paper."²⁰⁴

2. "Professional"/"Ordinary Trade" Distinction as Applied to Auctioneering

Given the "professional"/"ordinary trade" distinction, the cases upholding licensing restrictions against article I, section 1 challenges are predictable. They include challenges brought by unlicensed attorneys,²⁰⁵ barbers,²⁰⁶ dentists,²⁰⁷ physicians,²⁰⁸ and surgeons.²⁰⁹ The

203. *Id.* at 523, 96 S.E.2d at 857.

204. *Id.* at 522, 96 S.E.2d at 857.

205. See *In re Applicants for License*, 143 N.C. 1, 15, 55 S.E. 635, 639-40 (1906).

206. See *State v. Locky*, 198 N.C. 551, 555-56, 152 S.E. 693, 695 (1930).

207. See *State v. Hicks*, 143 N.C. 689, 693, 57 S.E. 441, 442-43 (1907).

208. See *State v. Call*, 121 N.C. 643, 645-46, 28 S.E. 517, 517 (1897); see also *State v. Siler*, 169 N.C. 314, 318, 84 S.E. 1015, 1016-17 (1915) (upholding application of the law to "all nondrug-giving practitioners," including chiropractors).

209. See *State v. Van Doran*, 109 N.C. 864, 868-69, 14 S.E. 32, 33 (1891). Real estate seller/broker licensure statutes have also been found constitutional by most state supreme courts, including North Carolina's. See, e.g., *State v. Warren*, 252 N.C. 690, 695-96, 114 S.E.2d 660, 665-66 (1960); *State v. Polakow's Realty Experts, Inc.*, 10 So. 2d 461, 466-67 (Ala. 1942); *Riley v. Chambers*, 185 P. 855, 857 (Cal. 1919); *State v. Spears*, 259 P.2d 356, 363-64 (N.M. 1953). But these holdings are justified by concerns related to the "professional" side of the "professional"/"ordinary trade" distinction, namely educational requirements necessary for the valid conveyance of real property, in addition to generalized fraud concerns. As the future Justice Cardozo explained in *Roman v. Lobe*:

Callings, it is said, there are so inveterate and basic, so elementary and innocent, that they must be left open to all alike, whether virtuous or vicious. If this be assumed, that of broker is not one of them. The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside. Less obtrusive, but not negligible, are the perils of incompetence. The safeguards against incompetence need not long detain us, for they were added to the statute after the services were rendered. We recall

court has not yet decided on which side of the “professional”/“ordinary trade” line auctioneering falls. What is clear, however, is that fraud alone, or even the potential for fraud, is not a sufficient state interest to characterize a vocation as sufficiently “professional” as to permit the State to bar entry.

Early cases from other jurisdictions recognized that the state interest in regulating the practice of auctioneering is a weak one when balanced against a state constitution-granted right to choose one’s occupation, and to the extent an interest actually existed, it was the protectionist impulse of existing auctioneers to exclude new entrants. In the 1884 case of *City of Mankato v. Fowler*,²¹⁰ the Minnesota Supreme Court recognized that “the business of an auctioneer is a lawful and useful one, and there would seem to be no reasonable warrant . . . for exacting so large a sum as a license fee, the result of which, it appears, is not to regulate but to suppress such business.”²¹¹ Similarly, in 1927’s *Balesh v. City of Hot Springs*,²¹² the Arkansas Supreme Court, relying on language from the state constitution guaranteeing the same right to choose one’s occupation as North Carolina’s article I, section 1, invalidated an ordinance making it a misdemeanor to sell goods by auction within the city of Hot Springs.²¹³ And in 1869’s *Hayes v. City of Appleton*,²¹⁴ the Wisconsin Supreme Court overturned a city ordinance that granted Appleton’s council the power “to regulate the time, place and manner of holding

them at this time for the light that they cast upon the Legislature’s conception of the mischief to be remedied. The broker should know his duty. To that end, he should have “a general and fair understanding of the obligations between principal and agent.” Disloyalty may have its origin in ignorance as well as fraud. He should know, so the Legislature has said, what is meant by a deed or a lease or a mortgage. At any moment he may have to make report as to such matters to expectant buyers or lessees. Often he goes farther, perhaps too far, and prepares a memorandum of the contract. He is accredited by his calling in the minds of the inexperienced or the ignorant with a knowledge greater than their own.

152 N.E. 461, 462–63 (N.Y. 1926) (internal citations omitted). Differences in value between the sales of real property that occupy a real estate broker and the usual chattels sold at auction also favor a finding that real estate seller/brokers are “professionals” for purposes of article I, section 1. See *Warren*, 252 N.C. at 695, 114 S.E.2d at 665 (“Real estate is one of the two great divisions of property rights, and bears as close a relation to public peace and welfare in our civilization as any species of private rights. . . . There is involved in the relation of real estate broker and client a measure of trust analogous to that of an attorney at law to his client, or agent to his principal.”).

210. 20 N.W. 361 (Minn. 1884).

211. *Id.* at 362.

212. 293 S.W. 14 (Ark. 1927).

213. *Id.* at 14–15 (citing ARK. CONST. art. I, § 2 (“[A]cquiring, possessing, and protecting property” is an “inherent and inalienable right.”)).

214. 24 Wis. 542 (1869).

public auctions.”²¹⁵ The court stated that “[t]he selling of property at public auction [was] a lawful business,” and it followed that, because of its breadth and the inability of the city to articulate a justification for it, the ordinance was “an unreasonable and unlawful interference with the freedom of trade” and thus was “void.”²¹⁶

Though not directly addressing an auctioneer’s license requirement, early North Carolina law is consistent with the principle that restraints on auctioneering are inherent limitations on trade, and thus must be justified by a significant interest. For example, returning to the tobacco auction context, in *Gray v. Central Warehouse Co.*,²¹⁷ the Kinston Board of Trade barred plaintiff George Gray from membership and, therefore, from bidding at its members’ warehouse auctions, because it alleged that Gray had nested tobacco as a grower.²¹⁸ The Supreme Court of North Carolina held that the association could not exclude Gray from participation due to his lack of membership.²¹⁹ In so doing, the court analogized a tobacco warehouse’s function to that of a “common carrier[,]” and found that once a warehouseman holds a public sale, “[h]e can no more refuse to sell the tobacco of the producer at auction, or deny the right of any to bid when offered, than the owner of a stage or steamboat line may decline to take passengers.”²²⁰ Running a warehouse was a public function subject to nondiscrimination, the court held, because

[t]here is no subject in which the protection of the producers against extortion and combinations to reduce prices is more important. . . . [T]o permit discrimination would be to place this great agricultural industry in the absolute power of any combination, which, by reducing the number of buyers and

215. *Id.* at 543, 545.

216. *Id.* at 545; see also *State ex rel. Cook v. Bates*, 112 N.W. 67, 68 (Minn. 1907) (upholding a city ordinance barring the auctioning of jewelry and watches because “such special sales are liable to be attended with great abuses, and to result in cheating and defrauding the unsophisticated, *which is not the case with the general business of an auctioneer*” (emphasis added)). The United States Supreme Court’s sole foray into the legality of auctioneer licensing occurred in *Toyota v. Territory of Hawaii*, where a Honolulu-based auctioneer argued that Hawaii’s discrimination in requiring a \$600 fee for auction licenses in Honolulu but only \$15 for other districts denied the auctioneer equal protection of the law. 226 U.S. 184, 190 (1912). The Court found that a state’s power “to decide upon the amount of fees to be charged . . . must have a wide range of discretion [and] is not reviewable unless palpably arbitrary.” *Id.* at 191–92 (internal quotation marks and citations omitted).

217. 181 N.C. 166, 106 S.E. 657 (1921).

218. *Id.* at 169, 106 S.E. at 658.

219. *Id.*

220. *Id.* at 170, 106 S.E. at 659.

admitting only those acceptable to great combinations, would place the producers of tobacco at their mercy.²²¹

Similarly, in *Kinston Tobacco Board of Trade v. Liggett & Myers Tobacco Co.*,²²² the court rejected the same Board of Trade's attempt to require the defendant to bid at an end-of-season auction under terms and conditions established by the Board, finding that the Board's demand "str[uck] at the heart of our system of free enterprise."²²³

Though this reasoning may at first glance appear to support regulation of auctioneers, the court in *Gray* and *Liggett & Myers* understood that barriers to entry, even if intended to protect auction participants from frauds, are essentially anticompetitive—and that discrimination on the basis of industry-determined ethics and standards favored buyers over sellers. As the *Gray* court noted:

Should any seller or buyer misconduct himself as by fake sales or fake purchases or otherwise, his conduct is a matter to be settled by prosecution for disorderly conduct or other misdemeanor in the courts. . . . To permit [the warehouseman to prohibit said seller or buyer from participating in auctions] would be to lay wide open the road to the exercise of an undue restriction upon trade, which, always forbidden by the common law, is now indictable under both State and Federal laws.²²⁴

3. Auctioneers as "Professionals"? The Professional Malpractice Cases

Since neither the Supreme Court of North Carolina nor the North Carolina Court of Appeals has answered the question within the context of article I, section 1, it may be arguable whether auctioneers are "professionals" for constitutional law purposes. But courts have considered this question in the context of the Law itself, in particular whether it provides the basis for a professional malpractice claim or any other private right of action. Thus far, the answer has been no.

In *Thomas, Lord of Shalford v. Shelley's Jewelry, Inc.*,²²⁵ the Western District of North Carolina noted, in response to a plaintiff's claim that an auctioneer's negligence constituted professional malpractice, that it had "found no North Carolina case recognizing a

221. *Id.* at 172, 178, 106 S.E. at 660, 663.

222. 235 N.C. 737, 71 S.E.2d 21 (1952).

223. *Id.* at 740, 71 S.E.2d at 24.

224. 181 N.C. at 176, 106 S.E. at 662.

225. 127 F. Supp. 2d 779 (W.D.N.C. 2000).

cause of action for auctioneer malpractice," and that such a claim is properly grounded in common law tort.²²⁶ In so finding, the court stated that "[d]espite the fact that auctioneers are required by statute to be licensed in North Carolina," it could not "conclude [that] their services fall within the realm of professional services, such as those performed by physicians, attorneys, architects, and others who achieve their status by virtue of long and often arduous educations and apprenticeships. Nor has the [court] found any other state which recognizes auctioneers as a profession."²²⁷

In rejecting the professional malpractice claim against auctioneers, the *Thomas, Lord of Shalford* court defined "professional" as an occupation "involving specialized knowledge, labor, or skill."²²⁸ This definition aligns closely to the definition of professional in the *Harris* case, which, as previously discussed, was concerned with determining when an occupation crosses the line into "professional" such that the State may exercise its police power over the occupation and require licensure.²²⁹ In the *Harris* case, the court defined professional occupations as being those "requiring scientific or technical knowledge and skill, some of which bring about a relation of trust or confidence between those who practice the trades or occupations and the clientele they serve."²³⁰

Thus, to the extent auctioneering falls on the "ordinary" side of the "professional"/"ordinary trade" distinction for the reasons stated above and in *Thomas, Lord of Shalford*, it would seem that a license requirement likely runs afoul of article I, section 1. Though auctioneers are unlike photographers or tile-layers in that they make a market for others' goods rather than sell work of their own, the ability to advertise goods and set prices (in collaboration with bidders) provides no greater opportunity for fraud, and likely provides far fewer opportunities for fraud, than those available to a craftsman establishing his own value for the goods or services he personally provides. The auctioneer actually sells *speech*, not goods. And, as demonstrated by the artistry of "Chillie" Langhorne and the thousands of other auctioneers who came along in his wake,²³¹ the speech being sold is inherently expressive, and barring prospective

226. *Id.* at 786.

227. *Id.*

228. *See id.* (quoting *Taylor v. Vencor*, 136 N.C. App. 528, 530, 525 S.E.2d 201, 203 (2000)).

229. *See supra* text accompanying notes 180-94.

230. *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940).

231. *See supra* notes 39-41, 47-49.

auctioneers from the profession thus raises another constitutional concern—this time under the First Amendment.

B. Auction Calling as Protected Expressive Activity

Auctioneering's status as what I would call an "expressive occupation" raises free speech-related concerns with a licensing requirement of the type imposed by the North Carolina statute. As demonstrated in Part I, tobacco auctioneers were as much advertisers as sellers, and the auctioneer's exercise of creative judgment about the kind of bid-soliciting activity to which bidders will respond continues today. In addition, the auctioneer was hired not simply to sell, but also to speak. This also remains true today. Commercial speech-related case law demonstrates that this type of activity, whether characterized as speech-for-hire or as promoting or facilitating a transaction between a buyer and seller, is inherently expressive, and thus deserving of protection under the First Amendment's Speech Clause.²³²

The United States Supreme Court has consistently held that commercial speech soliciting a transaction is protected, so long as the speech "concerns lawful activities and is not misleading"; such speech may only be banned or regulated if doing so "directly advance[s] a substantial governmental interest," and the ban is "appropriately tailored to that purpose."²³³ As to tailoring, the Court has held that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."²³⁴ And the Court has found that outright bans of marketing-related commercial speech are not appropriately tailored. For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²³⁵ a statute prohibiting advertising the prices of prescription drugs was both content-based and insufficiently tailored.²³⁶ A statute that, in effect, barred the communication of "I will sell you the X prescription drug at the Y

232. Cf. Daniel A. Farber, *Afterword: Property and Free Speech*, 93 NW. U. L. REV. 1239, 1256 (1999) (noting that a tax on tobacco advertising "raises special constitutional concerns, since the basis for the tax would be expressive conduct").

233. *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 485 (1988) (O'Connor, J., dissenting) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

234. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

235. 425 U.S. 748 (1976).

236. *Id.* at 761–62.

price”²³⁷ “single[d] out speech of a particular content and s[ought] to prevent its dissemination completely.”²³⁸ Similarly, a local ordinance forbidding the display of “for sale” signs²³⁹ and a statute prohibiting the advertisement of contraceptives²⁴⁰ were both struck down, even though in both cases the barred speech at issue was proposing a transaction.

There is no speech-related barrier to criminalizing fraud *ex post*, since such speech is intended to mislead; the problem only arises when, as here, a licensing requirement is imposed on speech *ex ante* in order to prevent a possible fraud from happening. Since “state rules that are designed to prevent the ‘potential for deception and confusion [in transactions] may be no broader than reasonably necessary to prevent the’ perceived evil,”²⁴¹ it seems clear that criminalizing the calling of auctions without a license, particularly when the sole justification for the proscription is to protect buyers from potential fraud, should be constitutionally suspect under the First Amendment. Without a state grant of approval, a prospective auctioneer is barred from calling auctions at all. And as discussed in more detail in Part IV, several less restrictive alternatives to outright bans on auctioneering without a license exist that would interfere less with speech.²⁴²

The United States Supreme Court has looked skeptically upon bars on marketing-related speech for nominally fraud-protective purposes. For example, in the recently decided *Sorrell v. IMS Health, Inc.*,²⁴³ the United States Supreme Court struck down on First Amendment grounds a Vermont statute that barred pharmaceutical marketers from using prescription-related information for the “marketing or promoting [of] a prescription drug, unless the prescriber consents.”²⁴⁴ The Court found that the statute at issue “impose[d] burdens that are based on the content of speech and that are aimed at a particular viewpoint,” and thus higher judicial scrutiny was warranted.²⁴⁵ Similarly, in *United States v. Caronia*,²⁴⁶ the Second

237. *Id.* at 761.

238. *Id.* at 771.

239. *See Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 86–87 (1977).

240. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

241. *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

242. *See infra* Part IV.C; *see also infra* Part IV.B (discussing the deterrence effect of criminal laws against fraud in lieu of bans on auctioneering without a license).

243. 131 S. Ct. 2653 (2011).

244. *Id.* at 2660 (quoting VT. STAT. ANN. tit. 18, § 4631(d)).

245. *Id.* at 2663–64.

Circuit found that a statute punishing a criminal defendant for marketing and promoting “off-label” pharmaceutical uses violated the defendant’s First Amendment rights because, by criminalizing a certain *type* of marketing-related speech, the statute discriminated against speech on the basis of its content.²⁴⁷ Under the statute at issue in *Caronia*, off-label marketing—which often occurred in face-to-face encounters between pharmaceutical sales representatives and healthcare providers—was a misdemeanor, as is calling an unlicensed auction under the Law.²⁴⁸ Furthermore, the Court also held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*²⁴⁹ that even speech that “does no more than propose a commercial transaction” is protected by the First Amendment;²⁵⁰ this rule has been applied to a range of marketing- and advertising-related speech, including the “information on [a] beer label”²⁵¹ or a credit report.²⁵² Following *Virginia State Board of Pharmacy*, lower courts have deemed that speech proposing transactions such as car sales is entitled to constitutional protection.²⁵³ Applying the Court’s logic from *Sorrell*, if auctioneering affects bidding decisions, it does so because bidders “find it persuasive.”²⁵⁴ A prior restraint on such speech in the form of a licensing requirement—or worse, a power to *enjoin* speech if the Board believes an unlicensed auction is about to take place—thus implicates the First Amendment’s guarantees.

Indeed, it may well be the case that calling an auction may not be commercial speech at all. In a challenge to the District of Columbia’s tour guide licensing scheme, the D.C. District Court distinguished commercial “speech which does no more than propose a commercial transaction” from “speech carried in a form that is sold for profit,”

246. 703 F.3d 149 (2d Cir. 2012).

247. *Id.* at 168–69.

248. Compare 21 U.S.C. §§ 331(a), 333(a)(1) (2006) (making misbranding of a pharmaceutical drug a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment for up to one year), with N.C. GEN. STAT. §§ 85B-4(a), 85B-9(a) (2011) (requiring auctioneers to possess an auctioneering license and noting that “[a]ny person, corporation or association of persons violating [this requirement] shall be guilty of a Class 1 misdemeanor”).

249. 425 U.S. 748 (1976).

250. *Id.* at 776.

251. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995).

252. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985).

253. See, e.g., *Pagan v. Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007).

254. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2670 (2011) (“If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”).

which is not commercial speech at all.²⁵⁵ Where “the speech is the substance of the transaction”—*i.e.*, where the speaker is being *paid to speak*—the speaker’s own First Amendment rights are implicated.²⁵⁶ As the Eighth Circuit also noted in a challenge to a law prohibiting fortunetelling for profit:

The speech itself, fortunetelling, is not commercial simply because someone pays for it. The speech covered by the ordinance, for the most part, does not simply propose a commercial transaction. Rather, it *is* the transaction. The speech itself is what the “client” is paying for. . . . There is a distinct difference between the offer to tell a fortune (“I’ll tell your fortune for twenty dollars.”), which is commercial speech, and the actual telling of the fortune (“I see in your future . . .”), which is not.²⁵⁷

Similarly for present purposes, the difference is between (i) advertising oneself as an auctioneer, or even advertising an auction, which would be commercial speech, and (ii) calling an auction for commission, which would arguably not be.

It is true that even after finding speech subjected to licensing requirements as “more than commercial speech,” the D.C. District Court found the tour guide licensing requirement as content-neutral and upheld the regulation under intermediate scrutiny.²⁵⁸ But it did so because the regulations at issue were “triggered by the conduct: the guiding or directing of a sightseeing trip or tour,” rather than any speech offered to paying customers in the course of that tour.²⁵⁹ The effect on speech was thus incidental, because a tour guide was required to be licensed “whether they choose to speak or not.”²⁶⁰ Similarly, the licensing restriction at issue was narrowly tailored because, *inter alia*, it left “ample alternatives for communication”—*i.e.*, aspiring tour guides could still provide tourists information, but

255. *Edwards v. D.C.*, 765 F. Supp. 2d 3, 13 (D.D.C. 2011) (internal citations omitted).

256. *Id.*

257. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998).

258. *Edwards*, 765 F. Supp. 2d at 12.

259. *Id.* at 15.

260. *Id.* at 17. Another restriction on tour guides, this one imposed by the Department of the Interior and applicable to the national parks, was justified on the ground that “regulation . . . of business conducted on national park grounds” was a substantial governmental interest. *Wash. Tour Guides Ass’n v. Nat’l Park Serv.*, 808 F. Supp. 877, 880 (D.D.C. 1992). “[P]reventing commercial exploitation of park visitors” by fraudulent tour guides was only one aspect of that interest; the others were preserving the parks and “ensur[ing] pleasurable experiences for those who visit” there. *Id.* at 880–81. Thus, the government’s interest as a landowner and operator, as well as any claims to consumer fraud protection, justified the exclusion.

could not “conduct[] their tours for profit.”²⁶¹ A license as a mandatory prerequisite to auction calling, by contrast, is aimed directly at speech rather than conduct, and as mentioned above, it leaves no alternative for unlicensed individuals who choose to express themselves (and earn profit) by calling auctions.²⁶²

In addition, there is little doubt that the threat of prosecution under the licensing statute chills First Amendment rights. As the Fourth Circuit recently stated in upholding a challenge to North Carolina’s dietician licensing statute, where a “non-moribund statute facially restricts expressive activity” by an unlicensed practitioner of the occupation with which the statute is concerned, a First Amendment injury has occurred.²⁶³

It is also true that some licensing and like restrictions have been upheld against First Amendment challenges. For example, in *Locke v. Shore*,²⁶⁴ the Eleventh Circuit held that the Speech Clause did not bar Florida from requiring licensure for interior designers working for nonresidential commercial clients.²⁶⁵ The court there found that “[t]here is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients,” and since the licensing statute “regulate[d] solely the latter,” it implicated no First Amendment interest.²⁶⁶ But the inhibition on speech was permissible because it was “merely the incidental effect of observing an otherwise legitimate regulation.”²⁶⁷ Similarly, in *Accountant’s Society of Virginia v. Bowman*,²⁶⁸ a group of non-CPA accountants challenged a Virginia statute that barred unlicensed accountants from using a range of standards-based terms such as “generally accepted accounting standards” and “audit report.”²⁶⁹ The Fourth Circuit upheld the statute on the ground that it restricted “only accountants’ communications with and on behalf of their clients, as a means of

261. *Edwards*, 765 F. Supp. 2d at 19.

262. *Cf. Walker v. Flitton*, 364 F. Supp. 2d 503, 525 (M.D. Pa. 2005) (stating that where a state occupational board “deign[ed] to prohibit all solicitation or contract by unlicensed individuals, leaving no other alternative for unlicensed [practitioners] . . . to engage in commercial speech in this area,” the board’s licensing requirement was not narrowly tailored to serve the governmental interest asserted).

263. *Cooksey v. Futurell*, No. 12-2084, 2013 WL 3215240, at *22 (4th Cir. June 27, 2013) (quoting *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999)).

264. 634 F.3d 1185 (11th Cir. 2011).

265. *Id.* at 1191.

266. *Id.*

267. *Id.*

268. 860 F.2d 602 (4th Cir. 1988).

269. *Id.* at 603.

regulating the professional activities of non-CPAs,” and thus the statute was “the permissible regulation of a profession, not an abridgement of speech.”²⁷⁰ In the case of licensing auctioneering, however, the effects on speech can hardly be said to be incidental. In Florida and Virginia, respectively, interior decoration and accountancy were still permissible occupations even if the statutes at issue in *Locke* and *Bowman* were presumed to be valid. Auctioneers do not simply provide advice to sellers on the value of goods; they are market-makers. And making a market requires communicating not just to one’s clients, but to the public at large—prospective buyers, as well as actual ones.

Relatedly, courts have consistently invalidated statutes that impose prior restraints on in-person solicitations.²⁷¹ In many ways, these solicitations, at least when conducted door-to-door, are akin to the face-to-face sales at most auctions. In-person solicitations, such as the solicitation of donations by religious groups, are usually analyzed as non-commercial speech.²⁷² But as discussed above, the line between commercial and non-commercial solicitation is hardly clear, and that line is rarely respected when the government seeks to ban the speech in question. For example, in the recent *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*,²⁷³ the Ninth Circuit, sitting en banc, invalidated an ordinance²⁷⁴ that barred individuals from standing near or on a street and soliciting employment or business from passing motorists.²⁷⁵ Although the labor organizations petitioning the court for relief did not claim that the statute only implicated commercial speech, and the Ninth Circuit’s decision was not based on existing commercial speech precedent,²⁷⁶

270. *Id.* at 605.

271. See, e.g., *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564 (6th Cir. 2012) (invalidating a municipal ordinance that banned door-to-door solicitation between 6 p.m. and 9 a.m. on First Amendment grounds).

272. See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. . . . Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.”).

273. 657 F.3d 936 (9th Cir. 2011) (en banc).

274. REDONDO BEACH, CAL. MUN. CODE § 3-7.1601(a) (1989), http://www.qcode.us/codes/redondobeach/view.php?topic=3-7-16-3_7_1601&frames=off.

275. *Comite De Jornaleros De Redono Beach*, 657 F.3d at 940.

276. See *id.* at 945 n.2.

the court nonetheless found that the ordinance did not survive First Amendment scrutiny.²⁷⁷ It is certainly good for speech that the door-to-door solicitation cases seem to have retained the protective patina of the neighborhood proselytizer plaintiff, even if the anti-solicitation statutes analyzed in those cases are intentionally aimed at commercial conduct, such as the one in *Redondo Beach*. But it also seems clear that even under commercial speech-like intermediate scrutiny, regulations criminalizing speech are suspect. A State “cannot totally ban speech,” even speech characterized as commercial, “if its goal is to prevent dissemination of false and/or misleading information.”²⁷⁸

Recognizing First Amendment protection for commercial solicitation would not grant every salesman a potential constitutional claim for alleged government interferences with his sales pitches (though it is undisputed that door-to-door canvassing is constitutionally protected, even if the canvasser is more Willy Loman than Charles Taze Russell).²⁷⁹ Rather, it would affirm that a licensing requirement targeted at a particular form of speech—especially one which provides for criminal penalties in the event of noncompliance with the Law—should be subjected to meaningful scrutiny before being used to bar an individual from engaging in an expressive occupation.²⁸⁰ The state’s belief that an auctioneer might make the

277. *Id.* at 940.

278. *Walker v. Flitton*, 364 F. Supp. 2d 503, 520 (M.D. Pa. 2005) (citing *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 476 (1988); *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

279. *See Project 80s, Inc. v. City of Pocatello*, 942 F.2d 635, 637 (9th Cir. 1991) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980)). The *Project 80s* court discussed a four-prong test for determining when an ordinance can be said to “impermissibly burden[] commercial speech.” *Id.* The first prong under this test is that the speech sought to be protected “must concern lawful activity and not be misleading.” *Id.* at 637 n.4. Thus, if a salesman’s commercial speech does not satisfy this prong, he may not be said to have a constitutional claim for alleged government interferences. Charles Taze Russell was a Pennsylvania pastor and a forefather of the Jehovah’s Witnesses. Hollis W. Barber, *Religious Liberty v. Police Power: Jehovah’s Witnesses*, 41 AM. POL. SCI. REV. 226, 226 (1947). The Witnesses, of course, brought several First Amendment cases in the United States Supreme Court in the 1930s and 1940s, one of the most famous of which was *Cantwell v. Connecticut*, which affirmed the First Amendment’s protection of door-to-door religious solicitation. *See* 310 U.S. 296, 310 (1940) (“We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.”). Willy Loman is the famous title character in Arthur Miller’s *Death of a Salesman*. ARTHUR MILLER, *DEATH OF A SALESMAN*, in ARTHUR MILLER’S COLLECTED PLAYS 130 (1957).

280. *See Project 80s, Inc.*, 942 F.2d at 637. Here, the court struck down ordinances barring door-to-door solicitation after finding that the City did not “affirmatively prove that the ordinances are narrowly tailored to serve substantial government interests.” *Id.*

purchaser of a good more susceptible to fraud cannot justify making the unlicensed calling of an auction a crime punishable by four months in prison. As the Court also stated in *Sorrell*, “[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”²⁸¹

IV. THE NECESSITY OF THE AUCTIONEER LICENSING STATUTE

Even though the legality of the licensing statute is questionable, perhaps one could argue that the utility of the licensing statute nevertheless justifies retaining it. However, as demonstrated below, this is not so. Self-regulation, existing criminal law proscriptions, and common law alternatives provide more than adequate protection for consumers.

A. *Self-Regulation Against Fraud: A Look at Auction Theory*

1. Economic Auction Theory

To best understand the potential efficacy of self-regulation as opposed to regulation by the State against fraud in auction markets, a (mercifully) brief review of auction theory may be helpful. In short, auction theory confirms the premise that where the buyers have the right to inspect the object for sale, all parties involved, including auctioneers, already have the incentive by virtue of an auction’s structure to provide truthful information concerning the objects up for bid. This is as true in modern auctions as it was in the loose-leaf tobacco barns of the early 1900s.

Most auctions falling within the bailiwick of occupational licensing schemes involve “English” ascending-bid auctions, whereby the sale price of an object is successively raised (by bidders as facilitated by the seller’s auctioneer, for present purposes) “until only one bidder remains, and that bidder wins the object at the final price.”²⁸² It bears retaining in mind two points: (1) in the absence of a reserve price, it is bidders, not sellers or even auctioneers, who establish prices in ascending-bid auctions; and (2) each bidder’s maximum bid is based on the bidder’s own valuation of the auctioned object.²⁸³ Auction theory literature refers to this latter valuation

281. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011).

282. PAUL KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* 11 (2004).

283. *Id.* at 11, 13.

process and the knowledge the bidder uses to arrive at it as “private information”; any difference between the bidder’s private information and his winning (or final) bid is known as the bidder’s surplus or profit.²⁸⁴ The final price paid for the object thus reflects *each* bidder’s private information, since through bids, each bidder’s valuation has been publicly signaled to every other bidder during the auction call.²⁸⁵ And if there happen to be asymmetries in private information, a bidder with an informational advantage will likely either (1) bid more aggressively, if the advantage would result in a higher personal surplus, or (2) drop out, if the advantage would result in a lower one.²⁸⁶ In either case, the sale price contemplates and incorporates those asymmetries as well. In other words, “the sale price converge[s] to the true value” of the object, “fully aggregating all of the economy’s information *even though each bidder has only partial information.*”²⁸⁷

Moreover, even if one assumes an imperfect auction-derived object valuation based on asymmetrical information, such an undervaluation is not perpetual. Rather, it will eventually correct, because even when bidders “have disparate prior beliefs about the value of the object being sold, well-functioning resale markets and durability of the object will ensure a common *ex post* valuation.”²⁸⁸

For the same reasons, the *seller* has incentives to “pre-commit to revealing . . . honestly” any valuation information he may have concerning the auctioned object.²⁸⁹ The sharing of that information raises expected revenue by providing additional information that bidders can use to form their private valuations leading up to and during the bidding process; thus “the seller benefits by establishing a

284. *Id.* at 13, 21. Different auction theory scholars refer to the bidder’s *reservation value*, the maximum price the bidder is willing to pay based on private information, and the bid, which is the publicly declared price the bidder is willing to pay, and call the difference between bid and reservation value the bidder’s expected utility or gain. See Mamata Jenamani, Yuhui Zhong, & Bharat Bhargava, *Cheating in Online Auction—Towards Explaining the Popularity of English Auction*, 6 ELEC. COM. RES. & APPLICATIONS 53, 55 (2007).

285. See KLEMPERER, *supra* note 282, at 13.

286. See *id.* at 23; see also Paul R. Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089, 1104 (1982) (“When there are three or more bidders, . . . the bidding behavior of those who drop out early in an English auction can convey information to those who keep bidding . . .”).

287. KLEMPERER, *supra* note 282, at 27 (emphasis added).

288. Kenneth Hendricks & Robert H. Porter, *Collusion in Auctions*, 15/16 ANNALES D’ECONOMIE ET DE STATISTIQUE 218, 219 (1989). So to the extent the price I pay for a lamp at auction reflects numerous uncertainties as to its value, it is unlikely that all of those uncertainties will be passed on to every subsequent buyer of the lamp.

289. KLEMPERER, *supra* note 282, at 21.

policy of complete disclosure of his information.”²⁹⁰ The seller “reveals honestly” through his fiduciary, the auctioneer.²⁹¹

What happens, then, in the case of seller fraud in the form of knowing misrepresentations that the auctioneer relays to bidders concerning the auction goods? In order for such a misrepresentation to have a significant effect on the object’s final sale price, it would have to effectively cancel out almost *any* independently obtained or developed private information in the internal valuation of *every* bidder.

To illustrate why, imagine an auction with three Bidders, A, B, and C, all of whom have inspected the object for sale. Assume Auctioneer has knowingly misrepresented the auctioned object, the Lamp, as an Original with value n . In fact, the Lamp is a Reproduction with value $n - 1$. Bidder A, who knows that the Lamp is a Reproduction, will rationally bid for the Lamp only up to $n - 1$, or more likely to some value short of $n - 1$ if Bidder A wants to obtain a surplus. Once the bids go above $n - 1$, however, Bidder A exits the auction.²⁹² This will result in Bidder B or C winning the Lamp with a bid very likely less than their own personal misvaluations based on the misrepresentation, because auction theory shows that a bidder’s exit from the auction decreases the aggressiveness of the remaining bidders’ bidding activity, and thus results in lower winning bids.²⁹³ A bidder who observes more bidders bidding at or near the same value grows more confident in his own valuation and grows less afraid of the possibility that he may have overestimated in coming to that valuation; conversely, fewer bidders results in less aggressive bidding. This also means that even if Bidders B and C *ignore* Bidder A’s bid activity and continue to bid for the Lamp believing it to be an Original based on Auctioneer’s misrepresentation, the sale price will nevertheless still be lower due to Bidder A’s exit. The boards of trade during the tobacco auction era, as well as the auctioneers themselves,

290. Milgrom & Weber, *supra* note 286, at 1114; *see also* KLEMPERER, *supra* note 282, at 21.

291. There is one caveat: auction theory finds that for purposes of increasing profit, a seller’s resources are best spent adding additional bidders. *See* KLEMPERER, *supra* note 282, at 27.

292. *Cf.* Robert E. Clark and Larry J. Halford, *Going . . . Going . . . Gone: Some Preliminary Observations on “Deals” at Auctions*, 7 J. CONTEMP. ETHNOGRAPHY 285, 288 (1978) (quoting a buyer as stating, “If I can buy [the auctioned item] reasonable, okay [whereas] if it goes too high, then I quit, or if I don’t know its value I don’t even bid”).

293. *See, e.g.*, Lance Branman, J. Douglass Klein, & Leonard W. Weiss, *The Price Effects of Increased Competition in Auction Markets*, 69 REV. ECON. & STAT. 24, 24 (1987) (“Auction theory predicts that an increased number of bidders increases winning bids.”).

fully recognized this principle.²⁹⁴ Therefore, by passing along value-related misrepresentations, the Auctioneer significantly increases the risk of losing bidders with accurate private information, as is the case here—and therefore drives down his own price by reducing his bid pool.²⁹⁵ The Auctioneer's chances of profiting from his misrepresentation thus decrease whenever *any* bidder has private information concerning actual value and bids based on that information.²⁹⁶

And what if the auctioneer and/or seller enlist puffers to drive up bids during the auction call? Again, the structure of ascending-bid auctions minimizes the potential harm. The current bid for the object includes a part of the total information concerning value, but this is only one part. Since private information sets the value of the bidder's surplus and establishes the scope of other bidders' participation in the auction as price rises, rational bidders with better private information will generally stop bidding rather than follow a puffer's fraudulent bids all the way to an inflated value for the object. Though it is true that puffer misrepresentations can also add to the object's valuation if actual bidders rely on them, harms attributable to puffer-related frauds are inherently limited.

2. Sociological Auction Theory

Sociological analysis of the interaction between auctioneer and bidders confirms the conclusions of economic auction theory. According to this literature, auction mechanisms “rely upon a social organization—common assumptions, beliefs, understandings and communities of practice—that underpin the structure and integrity of the process.”²⁹⁷ In order for an auction to serve its function as a

294. See *Bright Belt Warehouse Ass'n v. Tobacco Planters Warehouse*, 231 N.C. 142, 144, 56 S.E.2d 391, 393 (1949) (stating that according to a board of trade regulations, “an essential element of a bona fide sale of tobacco at auction is that there shall be assigned to such sale an adequate set of buyers prepared to bid at the competitive sale,” with “adequate set of buyers” meaning buyers representing “each of the three major domestic tobacco companies” and “[b]uyers of at least three other recognized companies purchasing tobacco for export”).

295. See KLEMPERER, *supra* note 282, at 21 (“If the seller has access to any private source of information, her optimal policy is to pre-commit to revealing it honestly. The general principle that expected revenue is raised by linking the winner's payment to information that is affiliated with the winner's information, is known as the Linkage Principle.”).

296. Of course, Bidder A may not bid at all based on his private information concerning the Lamp's actual value. But this scenario also results in a likely winning bid short of n , for the same reasons discussed above.

297. Christian Heath & Paul Luff, *Ordering Competition: The Interactional Accomplishment of the Sale of Art and Antiques at Auction*, 58 BRIT. J. SOC. 63, 65 (2007).

legitimate mechanism for establishing a price and exchange system for a good whose precise value might be uncertain, the auction's participants must view the bidding process as a fair and transparent one. Bidders must affirmatively believe in the "neutrality of the auctioneer and auction house, and the integrity of bids"—more precisely, that bids are real and "represent[] actual demand."²⁹⁸ Necessary to this belief is the presumed integrity of the calling of the auction by the auctioneer; participants must assume that the bids that the auctioneer recognizes "are indeed genuine contributions from more than one potential buyer and represent actual competition for the goods in question."²⁹⁹

Think back to the genial Ed Pace from Part I above, "one of the best, widest awake, and most active tobacco warehouse managers in the whole country,"³⁰⁰ or to the "[i]ndependent," uncorrupted H.B. Montague of Richmond.³⁰¹ It is critical to the auction process that bidders view the auctioneer as independent. If an auctioneer intentionally misvalues a good or lot for bid, either *sua sponte* or at the instruction of the good's owner, two things will likely happen: (i) bidders with accurate private information will leave the auction, resulting in a lower final bid;³⁰² and (ii) those spectators who may not be bidding on the particular good or lot will question the legitimacy of the valuation of *other* goods that will come up for bid, which will also result in a lower overall take for the good's owner.³⁰³ Prospective bidders, repeat players, and even nonbidding audience members play

298. *Id.* at 64.

299. *Id.* at 72.

300. See Johnston, *supra* note 54.

301. See *supra* text accompanying note 29.

302. See *supra* Part IV.A.1.

303. Heath & Luff, *supra* note 297, at 72. As Heath and Luff state:

[I]t is important to note the public and visible character of sales and the ways in which the escalation of price and the final sale of goods is undertaken in the presence of others, many of whom do not have a particular interest in any specific lot in question. The conduct of the auctioneer is critical in this regard, not just in establishing a run with a rising incremental sale, but in demonstrating the integrity of bids and the legitimacy of the value that the goods achieve.

Id. The fluidity between the roles of auctioneer and bidder is an important deterrent as well. See Orley Ashenfelter, *How Auctions Work for Wine and Art*, 3 J. ECON. PERSP., Summer 1989, at 23, 25 ("[I]nventing fictitious bids above the reserve price is certainly unethical and probably illegal, too. Since the auctioneer's rules are known to an entire array of personnel who often move on to become bidders or their agents, it would soon become common knowledge if an auction house systematically engaged in the generation of fictitious bids above the reserve price. No auction house that values its reputation—and the long run profits its reputation secures—would systematically engage in this practice.").

a critical role in ensuring fair and transparent valuations, since their conversations among themselves, along with actual bidders, are a “means of monitoring interest levels and probable prices for particular items at the sale and, at the same time, keeping alert for opportunities to acquire or dispose of merchandise outside the auction setting.”³⁰⁴ This market-within-a-market informs price-setting and private information, and encourages auctioneers to keep it honest.³⁰⁵ And though these structural protections may rely on regulars in the auction market more so than first-timers, the novice bidder benefits from these various social pressures in the form of more accurate valuations and less fraud in bid-calling.³⁰⁶

For these reasons, less restrictive options that build upon the need for auctioneers to be seen as fair can be effectively used to help prevent frauds. The profession of auctioneering already uses a range of voluntary accreditation designations for auctioneers; these signals are indicia of trustworthiness to prospective sellers and bidders.³⁰⁷ BuySafe, mentioned earlier, provides similar indicia for ecommerce sites.³⁰⁸ If buyers and prospective sellers can decide for themselves which auctioneers are most trustworthy, and accreditation can assist in that process, then a licensing requirement adds little more to the process except an opportunity for industry protectionism.

Finally, and relatedly, there is the potential problem of conspiracy among bidders. Though bidder-side fraud is not the harm

304. Robert Jarvenpa, *Collective Witnessing: Performance, Drama, and Circulation of Valuables in the Rural Auction and Antiques Trade*, 32 J. CONTEMP. ETHNOGRAPHY 555, 571 (2003).

305. See *id.* at 571–72. Contract law plays a role here as well. In most contracts, “sellers are forbidden by contract with the auctioneer from bidding in the auction. This is the protection that the auctioneer offers to the prospective buyers to ensure that they are not being artificially ‘bid up.’” Ashenfelter, *supra* note 303, at 25; see also U.C.C. § 2-328(4) (2012).

306. See *supra* Part IV.A.1.

307. See, e.g., *Education - Professional Auctioneering Designations, Certified Auctioneer Institute (CAI)*, NAT’L AUCTIONEERS ASS’N, <http://www.auctioneers.org/designations/cai> (last visited Aug. 19, 2013). State-level auctioneering associations also exist and encourage the public to utilize their member lists to locate “professional” auctioneers. See AUCTIONEERS ASS’N OF N.C., <http://northcarolinaauctioneers.org/> (last visited Aug. 19, 2013) (“To find a qualified professional auctioneer, click on our AANC membership list.”); see also COUNCIL OF AFFILIATED STATE AUCTIONEERS ASS’NS, <http://auctionassociations.org/members/> (last visited Aug. 19, 2013) (listing state-level associations).

308. See *What is buySAFE?*, BUYSAFE BLOG (Aug. 3, 2009), <http://blog.buysafe.com/buysafeblog/2009/08/what-is-buysafe.html> (“The buySAFE Seal provides an explicit 3rd party endorsement of a merchant’s quality and reliability, thereby eliminating consumer uncertainty. The buySAFE Seal reassures shoppers that the business behind the website is stable, reliable, trustworthy and able to deliver on the promises made.”).

an auctioneer licensing statute is intended to remedy, it is worthwhile to note that ascending-bid auctions constrain bidder collusion as well. A collusive agreement in such an auction requires "the bidders [in a cartel to] agree [in advance] that the designated winner bid an arbitrarily small amount, while all the others bid zero, and all the others then have a substantial incentive to cheat on the agreement."³⁰⁹ Once a bidder cheats on the agreement, the cartel "cannot react instantaneously" to the cheat because "it is impossible to react to a [cartel] defector's bid if the bid occurs just before the auction shuts down."³¹⁰ The remaining members of the cartel thus "must instead rely on expulsion threats or other future retaliatory measures," which will bear little if any relevance to the sale price of the item currently up for bid.³¹¹ Tobacco buyers may have colluded on loose-leaf prices over fish fries in motel parking lots in the days of the warehouse auction, but the payoff for such collusion was a limited one.

B. The Deterrence Effect of Criminal Fraud in the Auction Context

As previously demonstrated, regulating commercial conduct *ex ante* through a licensing requirement, even to deter frauds that potentially may occur during the course of that conduct, raises meaningful liberty-based concerns.³¹² Licensing as a mechanism for reducing fraud bars a wide range of lawful conduct. Fortunately, however, no one disputes that the State's police power permits it to deter such frauds in a more targeted fashion: outlawing the frauds themselves.

Notably, in light of Part I, the Auctioneers' Law exempts loose-leaf tobacco auctions from its licensing requirement.³¹³ No legislative history explains the exemption. However, the Law justifies the exemption by referencing another statute's governance over loose-leaf auctions, *i.e.* Chapter 106, Article 40 of the General Statutes of North Carolina, which was initially passed in 1933.³¹⁴ There, the protections against seller frauds discussed in Part I and developed

309. KLEMPERER, *supra* note 282, at 28.

310. Hendricks & Porter, *supra* note 288, at 223.

311. *Id.* at 222–23. Moreover, the opportunity for self-help against the cheater is always an option since "the designated winner can immediately respond to any unanticipated bid, by remaining in the auction." *Id.*

312. *See supra* Part III.B.

313. *See* N.C. GEN. STAT. § 85B-2(a)(6) (2011).

314. *Id.* § 85B-2(a) ("This Chapter shall apply to all auctions held in this State except . . . (6) Leaf tobacco sales conducted in accordance with the provision of Chapter 106 of the General Statutes."). Chapter 106, Article 40 was first adopted in 1933. *See* Act of May 12, 1933, ch. 467, 1933 N.C. Sess. Laws 815.

over time were expressly codified. For example, it is unlawful to “nest” tobacco on a warehouse floor such that “it is impossible for the buyer thereof to pull leaves from the bottom of such pile for the purpose of inspection”³¹⁵; to “shingle” tobacco, *i.e.*, arrange “a pile of tobacco that a better quality of tobacco appears upon the outside and tobacco of inferior quality appears on the inside of such pile”³¹⁶; and to “overhang” tobacco, *i.e.*, arrange “a pile of tobacco” that “alternate[s] bundles of good and sorry tobacco.”³¹⁷ Chapter 106, Article 40 also makes it illegal to call an auction “in the name” of anyone other than its “true owner,” who must register with the selling warehouse.³¹⁸ Violating any of these provisions is a Class 3 misdemeanor.³¹⁹ In addition, Chapter 106, Article 40 establishes the rights of warehousemen and purchasers to establish boards of trade such as those discussed above, which are formed to “make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction.”³²⁰

The fact that historical right-to-inspect-related self-regulatory protections in tobacco auctions were codified might lead one to conclude that market mechanisms were (and are) insufficient to protect buyers from auction-related frauds. But the opposite conclusion is just as easily reached: the legislature’s codification of those protections actually *affirms* the market-based protections developed there. The legislature’s exclusion of tobacco auctioneering from the Law’s licensing requirement because of Chapter 106, Article 40’s protections is at least a tacit admission that where buyers are protected from misrepresentations of value via criminal fraud law, a licensing requirement is not necessary. In addition, the State could draft specific criminal statutes barring fraud in calling auctions of any type, similar to those set out in Chapter 106,³²¹ that would supplement North Carolina’s general criminal false pretenses statute, which would also apply to any fraudulent conduct by an auctioneer or seller.³²² And as discussed below, common law fraud and unfair trade practices law impose the same obligations on other sellers in auction

315. N.C. GEN. STAT. § 106-461(1).

316. *Id.* § 106-461(2).

317. *Id.* § 106-461(3).

318. *Id.* § 106-462.

319. *Id.* § 106-464.

320. *Id.* § 106-465.

321. *See supra* text accompanying notes 314–19.

322. *See* N.C. GEN. STAT. § 14-100; *see also* *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”).

markets that Chapter 106, Article 40 imposes on tobacco sellers, though not with the same specificity.

A legislature could codify a specific inspection right and specific anti-fraud protections in all types of auctions, but doing so would not resolve the question raised here: if these protections are available or fraud-related harms are mitigated by law and/or market custom, then what explains the necessity of the additional "protection" provided by an auctioneer licensing requirement? So long as the essential protections of a neutral third-party seller, a meaningful right to inspect,³²³ and post-sale recourse are prevalent in a particular market, then those protections should be sufficient, whether their presence is attributed to law, culture, or both. Where speech or a right to earn a living are concerned, *ex post* remedies are always preferable to *ex ante* restrictions.

C. *Alternative Remedies for Buyers*

If the Law is, as I conclude, legally questionable, one might next ask whether its necessity nonetheless compels a vigorous defense of it, even if auctions carry inherent bidder-side protections as reviewed in Parts I and III.A. But for nearly as long as goods have been auctioned, wronged buyers, sellers, and even auctioneers have availed themselves of common law remedies to undo fraudulent sales, win compensation from negligent auctioneers, or otherwise make themselves whole. The Law's alleged purpose is to protect bidders; it turns out, however, that thanks to tort and contract law, those bidders do not need the protections the State deems it necessary to provide.

323. Courts have long recognized the capacity for self-inspection to deter frauds in auctions. *See, e.g.,* Biddles, Inc. v. Enright, 146 N.E. 625, 627 (N.Y. 1925) (upholding a New York statute that required most auctions for goods to be held during daylight hours, because "[t]he practice of selling goods by auction at night, when their qualities could not be accurately distinguished [by prospective bidders], had frequently resulted in the unwary being imposed upon, and great frauds committed"). In the absence of such harms, however, such restrictions can themselves be found unconstitutional, as was the case in *People v. Gibbs*:

Auctioneering, honestly conducted, is a business within the legitimate scope of trade, traffic or merchandizing. When by ordinance all fraud and misrepresentation in effecting sales and when all questionable methods of attracting attention or conducting sales, which are recognized as likely to develop in that special line of business, and which may tend to public annoyance, imposition, and disturbance of public peace and safety of a community, have been guarded against and prohibited, further restriction extends beyond the fair scope of powers granted to regulate for the protection of society.

152 N.W. 1053, 1055 (Mich. 1915).

The structure of auctions deters fraud, but that of course does not mean that they have always been fraud-free. Historical materials on the law of auctions make clear that common law tort causes of action have long been used for parties wronged by fraud or other misconduct during an auction.

For example, in his 1818 *Treatise on The Law of Principal and Agent, and of Sales By Auction*, Samuel Livermore noted that English law recognized the rule that “an auctioneer is personally liable to an action for the recovery of the deposit money at the suit of the bidder, provided a good title [to the auctioned property] cannot be made.”³²⁴ In the case Livermore cited, the English court deemed that because the relevant title defect was a “circumstance which ought to have been disclosed at the time of bidding,” the winning bidder was entitled to a return of his £50 deposit from the auctioneer, who was “a mere depository . . . [who] ought not to have parted” with the deposit until the sale was completed and any clouds on the title were clear.³²⁵ Actions in conversion by third parties against auctioneers for selling property in which the third party rather than the seller had title have a similarly long pedigree; in Livermore’s words, “[i]f an auctioneer employed to sell any property, has notice that what he is about to sell is not his principal’s, and he yet continues to sell, he is personally liable in an action for the produce of the sale.”³²⁶ Both tort and contract law provided a remedy for auctioneer misrepresentations concerning the condition or other attributes of auctioned goods; if an auctioneer’s “misdescription be wilful [*sic*] and designed, it amounts to a fraud; and fraud, upon general principles of law, renders a contract voidable.”³²⁷ As Nokes wrote, “statements made by the

324. 2 SAMUEL LIVERMORE, *TREATISE ON THE LAW OF PRINCIPAL AND AGENT, AND OF SALES BY AUCTION* 314 (1818).

325. *Id.* at 314–15.

326. *Id.* at 317. In the cited case, an auctioneer had sold 260 chaldrons of soil after the soil’s owner became bankrupt and the sheriff sold the soil in execution of the bankruptcy. *Id.* The auctioneer “did not communicate to the bidders that there was a dispute respecting the title to the soil.” *Id.* A similar case rejected a theory that an auctioneer could not be sued in tort for such a sale on the ground that the auctioneer was “only an agent employed by the [seller] to sell; and that therefore the action should have been brought against the [sellers],” who were principals. *Id.* at 318; *see also* G. D. NOKES, *AN OUTLINE OF THE LAW RELATING TO SALES BY AUCTION* 119 (1925) (“[T]he auctioneer may be personally liable, and may be sued . . . for conversion, as when he resells goods purchased at the auction to a person other than the original purchaser.”).

327. JOSEPH BATEMAN, *A PRACTICAL TREATISE ON THE LAW OF AUCTIONS; WITH FORMS AND DIRECTIONS TO AUCTIONEERS* 51 (1883).

auctioneer may form part of the contract of sale . . . a breach of which gives the purchaser a right to rescind the contract."³²⁸

Similarly, English courts acknowledged that puffing constitutes actionable fraud that will, *inter alia*, relieve the "winning" bidder of his obligation to pay. As Livermore noted:

If the owner of an estate, or of goods, put up to sale by auction, employ puffers to bid for him, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract. . . . [In an auction,] the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder[;] [t]hat could never be the case, if the owner might secretly and privately enhance the price by a person employed for that purpose; . . . It is a fraud upon the sale and upon the public.³²⁹

A sale in which the auctioneer pretended to see bids where no bidder has signaled—or as Nokes called it, "trotting"—could also be voided on fraud-related grounds.³³⁰

At common law, bidders were also protected from sellers who sought to claim that their goods had never been for sale, despite the fact that the auctioneer's sale for such goods had already closed. As the New York's highest court held in finding such a seller had been estopped from challenging the sale, if

the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. . . . In the words of Lord Ellenborough, uttered more than a century ago, "if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody?"³³¹

Accordingly, courts respected a bona fide sale by an auctioneer as a matter of course, which would serve to deter goods' owners from challenging those sales after the fact.

Relatedly, and consistent with the discussion of criminal frauds in the General Statutes of North Carolina above,³³² the criminal law also historically protected buyers against bid-rigging schemes. As G.D.

328. NOKES, *supra* note 326, at 63–64.

329. LIVERMORE, *supra* note 324, at 335, 337–38.

330. NOKES, *supra* note 326, at 74.

331. *Zendman v. Harry Winston, Inc.*, 111 N.E.2d 871, 875–76 (N.Y. 1953).

332. *See supra* Part IV.B.

Nokes noted in his 1925 *Outline of the Law Relating to Sales By Auction*:

When an auctioneer enters into an agreement with a number of persons, who have no intention of buying, that they shall bid for the purpose of causing a purchaser to buy property at a grossly excessive price, all the parties to the agreement to hold such a mock auction may be indicted for the common law offence of conspiracy.³³³

Wronged auctioneers could also avail themselves of common law remedies via tort claims against fraudulent buyers. Livermore's 1818 treatise noted the historical right of an auctioneer to bring an action in tort against a buyer who failed to pay for the auctioned goods on the theory that the buyer defrauded the auctioneer of his commission.³³⁴ A judge in the English case quoted by Livermore found that "an auctioneer has a possession, coupled with an interest, in goods in which he is employed to sell," and the auctioneer's claim was not barred merely because the sale was for a third party's goods "on the premises of [the goods'] owner."³³⁵

An auctioneer's fiduciary duty to his seller obligated the auctioneer/agent to "use due diligence and skill in the performance of his duties."³³⁶ As Nokes wrote,

when a person holds himself out as willing to act for reward as an auctioneer, the principal who employs him so to act is entitled to expect that the auctioneer will act in the performance of his duties with necessary diligence and skill; and if he fails to so act he may be held liable in damages to his principal for negligence [and also] if the auctioneer acts fraudulently.³³⁷

333. NOKES, *supra* note 326, at 75. This principle was also recognized by equity courts in the United States. See, e.g., *Veazie v. Williams*, 49 U.S. 134, 153 (1850) (citing numerous state court cases for the proposition that "by-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud [on the bidder] and avoids the sale."). This opinion from the *Veazie* case also notes that it does not "lessen the injury or fraud if the by-bidding be by the auctioneer himself." *Id.* at 154.

334. LIVERMORE, *supra* note 324, at 312.

335. *Id.*; see also NOKES, *supra* note 326, at 10 ("[W]hen goods are sent to an auctioneer for sale by the owner, the latter remains the owner until the goods are sold, but before sale the auctioneer has possession [and thus] what is called a special property in them . . .").

336. NOKES, *supra* note 326, at 20.

337. *Id.*

Turning back to North Carolina, in the 1800s, our courts also recognized the common law's built-in protections against frauds in auctions. In 1829, the Supreme Court of North Carolina noted that

[a] sale at auction is a sale to the best bidder, its object a fair price, its means competition. Any agreement, therefore, to stifle competition, is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other—policy alone forbidding that the last mentioned should be enforced, but both policy and justice uniting to condemn the former.³³⁸

Likewise, in the 1826 case of *Morehead v. Hunt*,³³⁹ the defendants had advertised several lots of land in Rockingham County that were to be sold at auction, stating that the lots had “immediately in [their] vicinity an inexhaustible bank of pit coal, an extensive quarry of excellent slate, and a number of excellent sites for mills and other water works.”³⁴⁰ Plaintiffs not only claimed post-sale that these representations were untrue, but also that the defendants used “puffers” to inflate the prices paid at auction.³⁴¹ The court found that both the advertising-related misrepresentations made by the defendants and the puffery engineered by their auctioneers called for setting aside the sale.³⁴²

The state's cases also recognize that a critical aspect of common law protection from fraud is the same privilege that tobacco buyers fought for years to win—the right to self-inspect the goods to be sold. For example, in the 1848 case of *McNeely v. Hart*,³⁴³ the Supreme Court of North Carolina granted the appellant a new trial for conversion against an auctioneer when the items sold at auction were not present at the time of sale and “[t]he bidders could not at the moment see them, nor examine their quality and value, and of course were invited to bid in ignorance of these essential particulars.”³⁴⁴ The court found that an auction

[m]ust be conducted in such manner, that every person, who may come up be fore [*sic*] the articles are knocked down by the

338. *Smith v. Greenlee*, 13 N.C. (2 Dev.) 126, 128 (1829).

339. 16 N.C. (1 Dev. Eq.) 35 (1826).

340. *Id.* at 35.

341. *Id.* at 36.

342. *Id.* at 35.

343. 30 N.C. (8 Ired.) 492 (1848).

344. *Id.* at 494.

auctioneer, may see and examine them, so as to enable him to become a bidder if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition, which the law so much desires in sales of this kind.³⁴⁵

Because the facts in evidence were not clear as to whether the auctioned goods were available for inspection, the court remanded for a new trial.³⁴⁶

Accordingly, as set out by these authorities, parties have historically availed themselves of the courts to redress auction-related wrongs.³⁴⁷ To be sure, however, governments have imposed statutory requirements on prospective auctioneers for nearly as long as the common law has recognized fraud actions against them. The United Kingdom's Auctioneers Act of 1845 obliged "[e]very Person who exercises or carries on the Trade or Business of an Auctioneer . . . [to] be required to take out [the] License as by this Act directed."³⁴⁸ But this requirement was to ensure the collection of excise taxes rather

345. *Id.*

346. This principle merely extends the common law fraud rule that where "the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie." *Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983). The failure-to-inspect rule has been understood to apply to fraud claims brought by bidders against auctioneers. *Greene v. Rogers Realty & Auction Co.*, 159 N.C. App. 665, 670, 586 S.E.2d 278, 281 (2003) (rejecting a bidder's claim against auctioneer as "analogous to that of buyers that fail to inspect the property before purchasing it"). For similar reasons, North Carolina products liability law grants immunity to the sellers of products who lacked the opportunity to inspect those products for defects. *See* N.C. GEN. STAT. § 99B-2(a) (2011).

347. Also relevant but not addressed in detail here is potential redress for defrauded buyers under North Carolina's Unfair and Deceptive Trade Practices Act ("NCUDTPA"), which provides an action for damages for "unfair or deceptive acts or practices in . . . commerce." N.C. GEN. STAT. § 75-1.1(a). Relevant to the article I, section 1 "professional"/"ordinary trade" discussion *supra* Part III.A.1–2, the NCUDTPA immunizes "learned professionals" from claims arising from their rendering of "professional services." *Id.* § 75-1.1(b). No auctioneer sued under the NCUDTPA has won immunity from suit under the "professional services" exception.

348. *The Auctioneers Act of 1845*, reprinted in *NOKES*, *supra* note 326, at 128. The Act also required an auctioneer,

before beginning any auction, [to] affix or suspend . . . a Ticket or Board containing his true and full Christian and Surname and Residence painted, printed, or written in large Letters publicly visible and legible in some conspicuous Part of the Room or Place where the Auction is held, so that all Persons may read the same.

Id. at 129.

than to regulate entry into the profession.³⁴⁹ As one 1883 treatise interpreting the Auctioneers Act noted, “the object of the legislature in requiring auctioneers to be licensed is to recruit the revenue, and not to protect the public”; accordingly, “it [is] left to the public to decide upon the fitness of the parties licensed” to “carr[y] on the business of an auctioneer.”³⁵⁰ In addition, the licensing function was performed not by a licensing board made up of auctioneers, but rather by “the commissioners of inland revenue.”³⁵¹ The Act even assisted a bidder in need of asserting his rights by requiring an auctioneer to display his full “Christian name, surname, and residence in large letters on a ticket or board affixed or suspended in a conspicuous part of the room or place where the sale is held.”³⁵² This transparency enabled wronged bidders to assert their rights against fleeting, often itinerant auctioneers in the event of a contestable sale. As in the loose-leaf auction example, and as evidenced a century-and-a-half later by the popularity of seller ratings on eBay, transparency was the best antidote to potential frauds.

CONCLUSION

The tobacco auctioneer, seller, and bidder, by negotiating and collaborating, regulated the auction system themselves. The self-correcting nature of the loose-leaf warehouse auction market was not an anomaly, but rather typical of how many auctions operate even today. Protections such as the bidder’s right to inspect prior to sale and the auctioneer’s twin desires to protect his reputation as a fair dealer, as well as to keep as many prospective buyers bidding as possible, deter fraudulent conduct. And even new auction markets have developed their own fraud-detering practices, such as seller ratings and bond-based guarantees for buyers. In addition, the Supreme Court of North Carolina has held that a desire to protect the public from frauds is an invalid justification, standing alone, to support an occupational restriction imposed by the State.

Despite all this, it may be the case that buyers in auction markets need greater protection from fraud than tort, contract, and self-regulation provide, particularly if, for example, the good being auctioned is quite perishable, which would deprive a buyer the ability to mitigate his damages via resale, or if first-time bidders or sellers in

349. See BATEMAN, *supra* note 327, at 11. (“It is still, however, necessary that any one acting as an auctioneer should be provided with an excise license.”).

350. *Id.* at 12, 15.

351. *Id.* at 18.

352. *Id.* at 24; see also NOKES, *supra* note 326, at 129.

a particular type of auction are prevalent. But the answer to such a problem is voluntary accreditation, not state-imposed barriers to entry. An accreditation from an established association can signal to prospective sellers and buyers that an auctioneer is qualified and trustworthy, to the extent those qualities require additional assurance in some contexts beyond the auctioneer's own word. And the converse is true as well; a bidder may purchase from a non-accredited auctioneer, but he does so at his own risk, and as noted, he is always free to sue either the auctioneer or the seller, or both, if he learns later that the nature or quality goods bought were misrepresented during the sale.

Occupational licensing is *not per se* protectionism in disguise. But for such a law to stand, it must be both legal and necessary. Otherwise, the State's police power has extended its reach past the boundaries set by individual liberty. It is not likely the case that if the North Carolina Auctioneering Law and other similar laws were repealed, then the number of wronged bidders would multiply exponentially; after all, eBay does not appear to be a breeding ground for fraud. But as the Supreme Court of North Carolina said in *State v. Harris*,³⁵³ the "danger to the public" raised by fraud "comes from the character of the man," not the nature of his occupation.³⁵⁴ Barring a state interest of the highest order, even men of allegedly dubious character have the right to choose their respective trades.

353. 216 N.C. 746, 6 S.E.2d 854 (1940).

354. *Id.* at 761, 6 S.E.2d at 864.

