PUBLIC POLICY BRIEF

The Right to Work:
Taming Occupational Licensure

LIBERTAS INSTITUTE

SUMMARY

A century ago, the U.S. Supreme Court noted that "the right to work for a living … is of the essence of that personal freedom and opportunity which it was the purpose of the Fourteenth Amendment to secure." Utah law should protect this freedom and opportunity.

But a report of occupational licensure laws by the Institute for Justice recently found that Utah has the 13th most burdensome laws compared to other states. Clearly, there is opportunity for reform.

Utah's Constitution says that "a free market system shall govern trade and commerce," but this principle is often violated. While reasonable regulations can protect public health and safety, occupational licensure laws in Utah often exceed this limited scope, creating unnecessary and unfair barriers to entry.

We propose a constitutional amendment to protect one's right to work, which will require the government's regulation of that right to be evidence-based and narrowly tailored.

The Utah Constitution should recognize and protect each person's right to pursue a lawful occupation.

Why would a person be required to spend more time and money on paid instruction to become a cosmetologist compared to police officers or teachers? And why do some states require a license—basically a government permission slip—in order to be a hair braider, florist, or upholsterer, while in other states those choosing these professions face no similar barrier?

Over 1,000 different professions are licensed by at least one state, but only a few dozen professions require a license in every state—chiropractors, lawyers, nurses, insurance agents, and more.[1] This patchwork of policy suggests that there is only a limited set of professions for which there can be a compelling case of public health or safety justifying the restriction of one's right to pursue their occupation.

The pre-emptive burdens imposed by occupational licensure laws on would-be workers—forms, fees, classes, exams, and more—must be narrowly tailored and evidence-based in order to be justified.

Unfortunately, without constitutional protection to the contrary, the state has justified these regulations with only a loose connection—if any—to a claim of necessity for public health and safety. In light of the increase in licensed occupations, the time has come to amend Utah's Constitution to protect each person's right to pursue their chosen profession.

A Brief History

After the Industrial Revolution, individuals no longer had to work at a subsistence level. Machinery, manufacturing processes, and other technological innovations enabled entrepreneurs to specialize in a specific craft, producing an abundance that could be exchanged for goods and services.

Before the late 19th century only medicine, law, and theology were considered "learned professions."[2] The specialization of economic activity in nearly all aspects of one's life—food production, medical care, manufacturing, education, etc.—created a new professional class.

Since medieval times, workers have often sought to impose barriers to entry by others into their profession, benefitting themselves at the expense of competitors and consumers.

At the turn of the 20th century, just over 4 percent of the labor force was engaged in a professional or technical occupation. A century later that figure rose to roughly 20 percent.[3] This increase was driven largely by an expansion of scientific knowledge that created entirely new fields of study, such as chemical, mechanical, electrical, and geological engineering.[4]

While many of these professions developed standards of best practice and codes of ethics to which practitioners were expected to adhere—especially as a condition of membership in the trade's professional organization or society—regulatory oversight quickly grew.

For example, while state governments began regulating certain occupations in the 1870s, it was during the progressive era of the early 1900s when most professions became regulated by government.[5]

Even then, licensure was limited since few Americans worked in occupations for which it was required. Increased economic and educational advancement changed this dynamic, leading more workers into regulated occupations. Where only 1 in roughly 20 workers required a license in 1950, today that number has dramatically increased to 1 in every 3.[6]

Professional restrictions certainly predate America. From the time of medieval guilds, people with specific skill sets have aimed to create artificial barriers for entry in order to increase their wages, as in 1742 when a town court jailed a woman after a complaint by the local nailsmith that she was "dealing in foreign nails, which violated the nailsmiths' guild ordinance, and damaged him in his craft," or as in 1662 when three Bohemian villagers were fined, after the local tailors' guild filed a complaint, for buying cheap garments from nonguilded competitors. The court ruled that the villagers had "premeditatedly tried to deceive the authorities and the court, and sought their own advantage."[7]

As one economist notes, "The history of guilds shows that occupational licensing, with its far-reaching effects, is not a modern phenomenon."[8] The trend toward occupational licensure has been a longstanding impediment for those who wish to work. An analysis of the various economic incentives involved in occupational licensure helps explain why these barriers to entry are so prevalent.

Economic Incentives

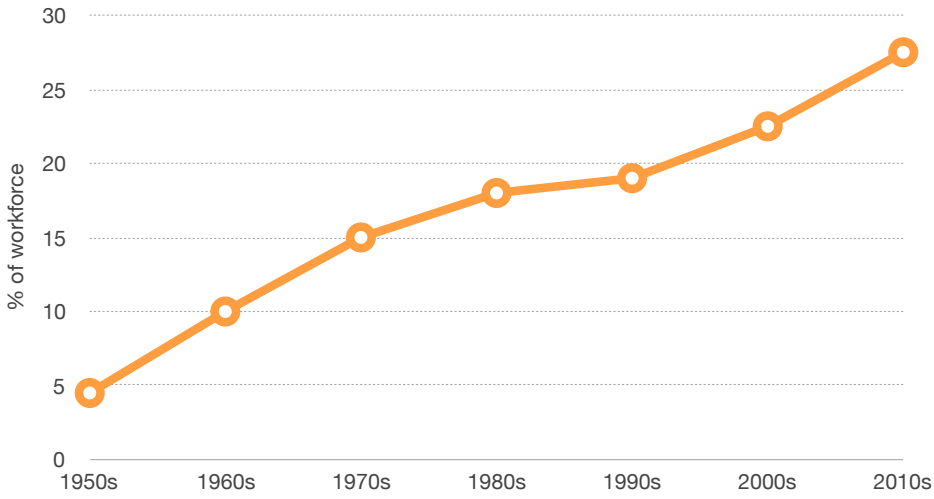
Strong incentives encourage incumbent industry participants to block would-be competitors. Artificial limits on the number of producers allows the favored few to increase costs to accumulate more wealth.

This action comes at the expense of consumers who inevitably pay more for goods and services than they otherwise would. This economic problem is called "concentrated benefit and dispersed costs." In this case, the *benefits* of restricting a person's ability to work are concentrated among those workers who have attained legal status and surmounted the regulatory barriers. They capture more market share and are shielded from competition. The *costs* of this restriction—a slight increase in consumer prices and decrease in quality—are dispersed among countless individuals who, because the impact is incremental and relatively small, do not have a similarly strong incentive to engage politically and contest the regulation.

This point was made even clearer, as it pertains to licensure, in a study by Dartmouth economist Charles Wheelan. Reviewing licensed and unlicensed professions in Illinois, Wheelan discovered that the stronger a profession's political organization, the more likely that profession became licensed.[9]

And in unsurprising contrast, the study found that consumers affected by the slightly higher costs of goods or services provided by licensed workers were unorganized and therefore underrepresented in the political process. When the negative impact is minimal, the likelihood of that person's getting involved politically or paying even more money to hire a lobbyist to advocate on their behalf is low.

% of American Workers with a State Occupational License



Source: "Occupational Licensing: A Framework for Policymakers," White House report, July 2015

Economic Impact

A recent report commissioned by the White House illustrates the toll taken by this regulatory imposition on the right to pursue an occupation. After accounting for differences in education, training, and experience, research indicates that licensing results in 10 to 15 percent higher wages for licensed workers compared to their unlicensed workers.[10]

The report also observes that the effect licensure has on rising consumer prices is "unequivocal" and points to nine separate studies finding that "significantly higher prices accompanied stricter licensing"[11] without providing any corresponding increase in quality.

Placing barriers between a person and their profession of choice also complicates the economics of migration, as employment opportunities are reduced for those who move from state to state. For example, roughly one-third of military spouses in the labor force are in a profession for which licensure is often required, and these individuals are ten times more likely to have relocated to another state within the last year than other workers not connected to the military.

Because licensure laws are rarely reciprocal or waived for those who can demonstrate competency, workers such as these—along with immigrants from other countries—have difficulty acquiring a new license when they move. These experienced and qualified professionals often end up working in another field merely to obtain gainful employment in order to provide for their family.[12]

Licensure also allows regulators to deny permission to work to a person with a criminal past, even if the past offense happened long before or is irrelevant to the profession.[13] This increases recidivism and places an unfortunate and unnecessary roadblock in the path of those needing to work.

A Right to Pursue a Profession?

The chief problem with occupational licensure is the denial of opportunity to a person who cannot or prefers not to meet the requirements imposed upon them as a condition of legally engaging in that occupation.

To analyze if an action is a right—whether gun ownership, consuming food grown on one's own property, owning a home, or speaking critically of the government, for example—one must consider the corresponding duty of others. A person's right to something implies that others must act in a certain way in order to guarantee that right.

The rights enshrined in the Declaration of Independence—life and liberty among them—are sometimes referred to as negative rights. This is because of the "negative" duties associated with them—the duty others have to *not* harm you. Others are obligated to abstain from actions that interfere with your right.

The assertion that a person has the right to pursue their chosen occupation must be analyzed in this context in order to understand whether it actually exists. If a laborer asserts the right to work in their chosen profession, what is the corresponding duty of others?

This assertion implies that the laborer should not have his activities interfered with by others—in this case, regulators and bureaucrats—so that he may peacefully pursue his chosen profession and provide his goods or services to consenting customers. And just as rights may be restricted when necessary and with cause—such as when public health or safety legitimately require it—in the absence of such justifications the person must be left alone.

"The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that the Constitution was designed to protect."

—Judge David Sam, District of Utah

With few exceptions, the courts have not favorably protected the right to pursue a lawful occupation. While some argue that such a right is protected by the Fourteenth Amendment's Due Process Clause, justices have subjected the alleged right to a "rational basis test" in which deference is given to almost any justification, however flimsy, offered by government in defense of its restriction of one's occupational and professional pursuits.

Before this deference became the norm, the U.S. Supreme Court recognized the right to earn a living in pre-New Deal cases. For example, in *Meyer v. Nebraska*, decided in 1923, the majority of justices wrote that the Due Process Clause "without doubt… denotes the right of the individual… to engage in any of the common occupations of life."[14]

Since that time, there have been only two cases before the U.S. Supreme Court dealing with the substantive right of an individual to pursue an occupation under the Due Process Clause of the Fourteenth Amendment.

The first case, *Williamson v. Lee Optical*, upheld a law in Oklahoma that prohibited opticians from fitting lenses for eyeglasses if they were not licensed as an optometrist or ophthalmologist. The Court concluded in 1955, without any evidence, that the law was constitutionally sound merely because the legislature *may* have had a reason for requiring a visit to an eye doctor that outweighed harm to opticians and consumers. No proof was necessary for the presumption of regulation.

The second case, *Ferguson v. Skrupa*, upheld a Kansas law that prohibited the practice of debt-adjusting by anyone but licensed attorneys. Justice Black, who wrote the unanimous majority opinion in 1963, repeatedly objected to using the "vague contours" of the Due Process Clause to protect "unenumerated rights." As long as a regulation did not violate a "specific federal constitutional prohibition" or a "valid federal law," then the Court deferred to the legislative bodies to decide what economic activity was reasonable or not to restrict or prohibit.[15]

This precedent has persisted until today, where elected officials and regulatory agencies are given wide latitude from the judicial branch to restrict one's right to pursue a lawful occupation, whether or not evidence exists to justify the regulation. A recent case in Utah, however, suggests that federal judges may be developing a new perspective on this policy question.

The Right to Braid Hair

Jestina Clayton began braiding hair as a child in Sierra Leone, and continued the culturally important practice in America, after fleeing her native country during a civil war. She started a business to offer her services in 2006, hoping to provide for her family while her husband finished his schooling.

An anonymous threat to report her business to the cosmetology board led Jestina to inquire with state regulators whether she needed a license to braid hair. She was told that she did in fact need the permission slip—one that would have required her to spend thousands of dollars on tuition for 2,000 hours of mandatory cosmetology training.[16]

Were she to have spent the same number of class hours pursuing other occupations, Jestina could have become an armed security guard, mortgage loan originator, real estate sales agent, EMT, and a midwife—not just one in the list, but all of them together.

Even more absurd, the licensed cosmetology schools she was required to attend taught little to nothing about African hair braiding. By that point in her life, Jestina had been braiding hair longer than most cosmetology students had been alive.

Her petition to the cosmetology board fell on deaf ears—an unsurprising result given that, by law, the board is controlled by existing workers in the industry who are disincentivized to allow access to competitors. She petitioned the legislature to fix the law, but that request was also ignored. So, with the help of the Institute for Justice, Jestina filed a federal lawsuit alleging that the regulatory scheme was not rationally related to any legitimate state interest.[17]

David Sam, a federal judge in the U.S. District Court for the District of Utah, agreed. Consistent with the U.S. Supreme Court precedent previously mentioned, Sam concluded, "The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that the Constitution was designed to protect."

Judge Sam also observed that "to premise Jestina's right to earn a living by braiding hair on that [regulatory] scheme is wholly irrational and a violation of her constitutionally protected rights."[18]

While Jestina's case applied narrowly to hair braiding, this decision shows a judicial willingness to protect one's right to work. But hundreds of thousands of other workers can't pay for litigation or wait for the judicial process to unfold in their favor. What should be done to protect their rights?

A Compelling Interest?

Because courts have largely deferred to legislative bodies, elected officials and regulators have rarely been restrained in imposing licensure requirements on those wishing to work in their chosen profession.

Over 1,100 occupations are regulated in at least one state, but fewer than 60 are regulated in all 50 states.[19] This substantial discrepancy in regulation suggests that licensure is often arbitrary and unnecessary; otherwise public health crises in locations with unlicensed workers would lead more governments to impose regulatory requirements as a condition for working in that occupation.

The Institute for Justice recently ranked the several states on their licensure laws, finding that Utah is 13th on the list of states having the most burdensome licensure laws. For example, Utah is among only ten states that require a license for upholsterers, and one of 21 states that license commercial floor sanders. And while emergency medical technicians need only about one month of training, other occupations with less of an impact on public health and safety require far more time, such as massage therapists (140 days), manicurists (70 days), and barbers (233 days).[20]

Because the fundamental right to work in one's chosen occupation is not recognized in the state or federal constitutions, judges have had to rely on protecting it as an "unenumerated right," as Justice Black pointed out in his opinion that undermined the alleged right. And while the U.S. Constitution's Ninth Amendment specifically states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," judges have been unable or unwilling to judicially protect people's right to pursue their occupation from an ever-growing regulatory scheme.

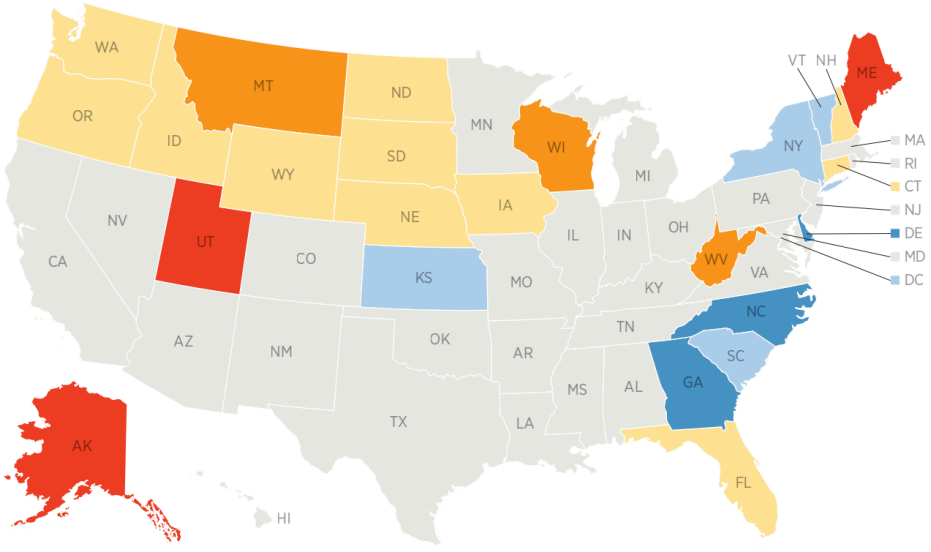
Establishing the right to work in the Utah Constitution would create a legal hurdle over which the state must pass in order to regulate—one that would not be insurmountable. For example, the right to speech can be regulated when the government shows a compelling state interest in limiting speech, such as time, place, and manner restrictions that narrowly restrict the expression of speech in specific instances where public safety is a valid, evidence-based concern.

Similarly, the right to keep and bear arms can be constitutionally restricted by law in cases where the government can show a compelling state interest, as in the case of excluding violent felons or people with severe mental handicaps from possessing lethal weaponry, or limiting certain locations where a firearm may be possessed, such as in a courthouse or airplane.

The onus must be on the state to justify its regulations, and without a constitutional hurdle, any arbitrary reason (or none) may be upheld by a judge. The presumption should be one of occupational freedom, not regulation; reasonable regulations must be narrowly tailored, relevant to the risk inherent in the profession, and validated by third party evidence—not merely the wishes of those already in the industry who are incentivized to limit competition.

A constitutional amendment to protect the natural right to work will safeguard each person's economic opportunity while fostering competition, restraining unnecessary regulation, and lowering consumer prices—a win-win for Utah.

States with Excess Occupational Licensure



Excess occupational licensure is defined as the difference between the observed licensure rate and the rate predicted by each state workforce's composition of occupation, age, race, and foreign-born status. Figures are approximates.

LICENSURE RATES COMPARED TO U.S. AVERAGE, IN PERCENTAGE POINTS
+4.5 ‡
+2.5 ‡
+1.2
+/–1.0
–1.2
–2.0 ‡

Source: "Understanding the Data on Occupational Licensing," Heritage Foundation, September 28, 2016

PROPOSED UTAH CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 30 [Right to Pursue an Occupation]

All persons have the inherent and inalienable right to pursue an honest trade, vocation, occupation, or career. The State shall not infringe on this right unless it can demonstrate that there is sufficient, articulable evidence that such infringement is necessary to advance a compelling governmental interest and that less restrictive alternatives have been duly considered.

In 1955, the Utah Legislature enacted a "Right to Work" statute, affirming the "right to work" and stating that its exercise "must be protected and maintained free from undue restraints and coercion." So important was this fundamental right that the people's representatives agreed that "the right to *live* includes the right to *work*." See Utah Code § 34-34-2.

Because these provisions are only in statute, the "rational basis test" has been sufficient to justify the state's regulations, thereby undermining the intent of this statute's declarations. Because it is a fundamental right, and because other fundamental rights are established in the Constitution to provide for greater judicial scrutiny and protection, the right to work—to pursue an honest trade—must be rescued from this statute so its intent can be upheld.

Upon passage of the constitutional amendment, the state may continue to enact reasonable regulations, provided it can point to evidence justifying its regulatory interest. Further, the amendment would require the state to continually explore less restrictive means to regulate each licensed profession to ensure that these burdens remain narrow and appropriate.

Endnotes

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3. "Statistical Abstract of the United States: 2001," United States Census Bureau (Government Printing Office: 2002).
4. Marc T. Law and Sukkoo Kim, "Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation," NBER Working Paper 10467, May 2004, http://www.nber.org/papers/w10467.pdf.
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9. Charles Wheelan, "Politics or Public Interest? An Empirical Examination of Occupational Licensure," Unpublished manuscript, University of Chicago (1999).
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11. Ibid.
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13. Ibid, 8.
14. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
15. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).
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FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES IS ESSENTIAL TO THE SECURITY OF INDIVIDUAL RIGHTS

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