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A Brief History of Occupational Licensing

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Abstract

The arc of history has tended toward the licensing of an ever-larger number of professions. Today, a number of them—such as barbers, bartenders, and florists—are subject to licensing requirements even though the regulated activities do not bear even a remote relation to protection of the life, health, and safety of community members. Licensing individuals before allowing them to claim that they are "able to heal, cure or relieve those suffering from any injury, deformity or disease" makes sense, but today's licensing regimes prohibit individuals, sometimes on pain of criminal liability, from engaging in conduct that poses no risk of harm to any person or to the community. Such a regime causes injury rather than protecting against it.

Early Versions of Occupational Licensing

Western nations have never operated as examples of pure *laissez-faire* capitalism.[1] Consider the English common law. It made three practices offenses against public trade: *Forestalling* (acquiring goods en route to the market); *regrating* (buying large quantities of a good at market and reselling them at a higher price in the same market); and *engrossing* (purchasing large quantities of foodstuffs for resale).[2] The Crown granted monopolies to particular, favored parties—the colony at Virginia was founded by just such a monopoly—and reserved land and mineral rights for itself.[3] England also had price controls, usury laws, and sumptuary laws (provisions forbidding certain types of immoral conduct, such as excessive spending, gambling, and prostitution).[4] Accordingly, the 17th and 18th century economies in England and on the Continent could not be described as *laissez-faire*.

This paper, in its entirety, can be found at **http://report.heritage.org/lm204**

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Key Points

- In 1889, the Supreme Court of the United States upheld the licensing of physicians. Since then, the courts have upheld various types of state licensing requirements imposed on a variety of other occupations as part of the state's police power.
- Sixty years ago, America's economy rested on manufactured goods, and only 4 percent–5 percent of occupations were subject to a licensing requirement. Today's economy is service-oriented, and the number of licensed positions has skyrocketed.
- Since 1950, the percentage of the domestic workforce in positions subject to a licensing requirement has multiplied 500 percent and now stands at no less than 25 percent of the economy. Two-thirds of that expansion stems from an increase in the number of occupations subject to a licensing requirement.
- Occupational licensing is now one of the nation's principal forms of economic regulation.

Colonial and early state governments in America also regulated property and the market.[5] "Regulation of business was primitive by modern standards," but "in some ways, it was fairly pervasive."[6] Maryland, Virginia, and New York, for example, not only imposed quality controls and inspection requirements over staples, such as tobacco, to maintain their reputation for quality and to increase the price,[7] but also adopted laws regulating the sale of such items as butter, fish, lumber, nails, shoes, and tobacco. They also imposed price or fee schedules as well as occupational license requirements.[8]

Licensing regimes have an ancient lineage.[9] Medieval guilds limited entry into various occupations, while the 13th and 14th centuries saw elementary forms of medical licensing in Germany, Naples, Sicily, and Spain.[10] The American Colonies subjected bakers, ferry services, innkeepers, lawyers, leather merchants, and peddlers to early forms of regulation.[11] In 19th century America, states and localities licensed barbers, embalmers, ferry operators, horseshoers, boarding house operators, insurance agents, midwives, pawnbrokers, physicians, real estate brokers, steamboat operators, taverns, undertakers, veterinarians, and anyone who did business with the Indian tribes.[12] The medical profession and allied fields were particular subjects for licensing. By the last quarter of the 19th century, more than half of the states required licenses to practice as a physician, dentist, or pharmacist.[13]

The U.S. Supreme Court Upholds the Constitutionality of Physician Licensing

During that period, the Supreme Court of the United States upheld the constitutionality of state occupational licensing regulation in the medical profession. In *Dent v. West Virginia*, the Court considered a state law requirement that to practice medicine, a physician must graduate from a reputable medical school and pass a qualifying examination or prove that he had practiced medicine in the state for 10 years.[14] The Court acknowledged that, because every individual has a right to pursue a lawful occupation, the legislature cannot arbitrarily deprive someone of that opportunity.[15] Nevertheless, the Court concluded that a state may adopt a physician licensing scheme as a way to protect the public health and safety.[16] Following its decision in *Dent*, the Supreme Court consistently upheld other types of state health care licensing programs,[17] as well as licensing requirements imposed on a variety of other occupations as part of the state's police power.[18]

The 20th Century Explosion in Occupational Licensing

Since then, there has been an explosion in the number of occupations subject to a licensing requirement.[19] Sixty years ago, the American economy rested on manufactured goods, and only 4 percent–5 percent of occupations were subject to a licensing requirement.[20] Today's economy, by contrast, is service-oriented, and the number of licensed positions has skyrocketed. Since 1950, the percentage of the domestic workforce in positions subject to a licensing requirement has multiplied 500 percent and now stands at no less than 25 percent of the economy.[21] Two-thirds of that expansion stems from an increase in the number of occupations subject to a licensing requirement.

Occupational licensing is now one of the nation's principal forms of economic regulation. Among the occupations subject to a licensing requirement are the following:

- Animal breeders,
- Auctioneers,
- Ballroom dance instructors,
- Barbers,
- Bartenders,
- Cat groomers,
- Cosmetologists,
- Elevator operators,
- Florists,
- Fortune tellers,
- Hair braiders,
- Home entertainment installers,

- Interior designers,
- Makeup artists,
- Manicurists and pedicurists,
- Motion picture projectionists,
- Plumbers,
- Sheep dealers,
- Taxi drivers,
- Tour or travel guides,
- Upholsterers, and
- Whitewater rafting guides.

As one critic has observed, "About the only people who are unlicensed in California are clergymen and university professors, apparently because no one takes them seriously."[22]

Conclusion

The arc of history has tended toward the licensing of an ever-larger number of professions. Today, a number of professions—such as barbers, bartenders, and florists—are subject to licensing requirements even though the regulated activities do not bear even a remote relation to protection of the life, health, and safety of community members. After all, "[t]he difference between a bad haircut and a good one is two days."[23]

To be sure, it makes sense to license individuals before they are allowed to claim that they are "able to heal, cure or relieve those suffering from any injury, deformity or disease."[24] Today's licensing regimes, however, prohibit individuals, sometimes on pain of criminal liability, from engaging in conduct that poses no risk of harm to any person or to the community. Such a regime *causes* injury rather than protecting against it.

Mae West was wrong. Too much of a good thing is not always wonderful.

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Endnotes

1. *See* Frank Bourgin, The Great Challenge: The Myth of Laissez-Faire in the Early Republic 22–23 (1989); Kermit L. Hall & Peter Karsten, The Magic Mirror: Law in American History 40–45 (1989); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 Am. J. Legal. Hist. 464, 487–95 (1993). Frank Bourgin argues that "[t]he kind of government the Founding Fathers were trying to set up was the opposite of that obtaining under the Articles [of Confederation]. Congress under the Articles was synonymous with laissez-faire, with local popular sovereignty, lackadaisical government lacking in energy. Congress had no real powers, and for its purposes, needed none. But the Constitution involved an altogether different conception: a close-knit Union, endowed with larger comprehensive powers than its makers wanted to be used toward promoting national economic development." Bourgin, *supra*, at 50.
2. *See, e.g.*, 1 William Blackstone, Commentaries *154–59; Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 13–20 (1985).
3. McDonald, *supra* note 2, at 17–19.
4. *Id.* at 14–16; Paschal Larkin, Property in the Eighteenth Century 18 (1930).
5. *See, e.g.*, Hall & Karsten, *supra* note 1, at 25 ("Until about the 1740s, the single most important function of the incorporated town was to provide 'the commercial community[']...the service of trade and industry. It established and regulated the marketplace."); *id.* at 41 ("To ensure the success of their markets, town officials oversaw the quality and price of goods and services."); James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 17–22 (3d ed. 2008); Hall & Karsten, *supra* note 1, at 25, 41–50; George L. Haskins, Law and Authority in Early Massachusetts 66–84 (1960); McDonald, *supra* note 2, at 14–21; 2 William E. Nelson, The Common Law in Colonial America: The Middle Colonies and the Carolinas, 1660–1730, at 21–23, 56 (2013); William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 Hastings L.J. 1061, 1078–79 (1994); William B. Scott, In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century 11 (1977); Schultz, *supra* note 1, at 489; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 788–89 (1995); Gordon S. Wood, *The History of Rights in Early America*, *in* The Nature of Rights at the American Founding and Beyond 253 (Barry Alan Shain ed., 2007).
6. Lawrence M. Friedman, A History of American Law 38 (3d ed. 2005) ("The settlements depended on roads, ferries, bridges, and gristmills for transport, communication, and the basic food supply. These businesses were privately owned; but the public had a deep interest in how they were run; and there were rules and regulations that expressed colonial policy.... Government also regulated markets, road building, and the quality of essential commodities.").
7. *See id.* at 40 ("Colonial government made a constant effort, not always effective, to keep its staple crops under some kind of quality control.... Twentieth-century farm schemes were foreshadowed in old Maryland and Virginia: quality control, inspection laws, regulation of the size of containers, subsidies for planting preferred kinds of crop, public warehousing, export controls."); McDonald, *supra* note 2, at 102–03.
8. *See, e.g.*, Treanor, *supra* note 5, at 788–89 ("[F]ee schedules for ferries were imposed, peddlers had to obtain licenses and pay duties, and pork, beef, flour, tar, pitch, and turpentine were subject to inspection for compliance with statutory standards prior to sale or export. Taverns were licensed, based on need and a determination of whether the tavern would impair public morals, and licensing fees were charged. Bread prices were regulated. Various colonies experimented with sumptuary legislation, restricting expenditures on clothing and jewelry. Laws barred speculation in commodities, including such practices as forestalling (purchase of goods while in transit to the market), engrossing (purchase of large quantities of commodities for resale), and regrating (purchase of goods in a market for resale in the same market).") (footnotes omitted).
9. *See, e.g.*, Ely, *supra* note 5, at 20–22; Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition?, at xiii (2006); S. David Young, The Rule of Experts: Occupational Licensing in America 9–14 (1987); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 Calif. L. Rev. 487, 494 (1965); Simon Rottenberg, *The Economics of Occupational Licensing*, *in* Nat'l Bureau of Econ. Res., Aspects of Labor Economics 4 (1962).
10. *See* Young, *supra* note 9, at 9.
11. *See, e.g.*, Ely, *supra* note 5, at 20–22; Friedman, *supra* note 9, at 494–96. There were, however, no guilds, corporations, or exclusive professional associations.
12. *See* Kleiner, *supra* note 9, at 20; Friedman, *supra* note 9, at 494–501; Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1 (2017); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 212–13 (2016) (hereafter Larkin, *Occupational Licensing*).
13. *See* Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & Econ. 93, 103 (1961). By 1935, 12 additional occupations were licensed in more than half of the states. *Id.* (architects, barbers, beauticians, chiropractors, civil engineers, embalmers, registered nurses, optometrists, osteopaths, real estate brokers and sale personnel, surveyors, and veterinarians).
14. 129 U.S. 114 (1889).
15. *Id.* at 121–24 (citations omitted).
16. "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses." *Id.* at 122.

17. Reetz v. Michigan 188 U.S. 505 (1903); Webb v. United States, 249 U.S. 96, 99–100 (1919) (ruling that the government may prohibit a physician from prescribing morphine for an addict for maintenance purposes); Missouri *ex rel*. Hurwitz v. North, 271 U.S. 40, 43 (1926) (rejecting equal protection challenge to state law regulating the practice of medicine); N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973) (upholding state law requiring that a majority of stockholders in a corporation applying for a license to operate a pharmacy must be practicing pharmacists).
18. *See*, *e.g.*, Kotch v. Board of River Port Pilots Commissioners, 330 U.S. 552, 563–64 (1947) (upholding a state law river pilot apprenticeship requirement even though the law empowered licensed pilots to select only their relatives for apprenticeships); Larkin, *Occupational Licensing*, *supra* note 12, at 279–80. The Supreme Court upheld reasonable business or commercial regulations in the 19th century and later. *See*, *e.g.*, Middleton v. Texas Power & Light Co., 249 U.S. 152, 157–63 (1919) (upholding state workers' compensation statute); *id.* at 160–61 (collecting cases to that effect); N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 208 (1917) (upholding a no-fault state workers' compensation law); Second Employers' Liability Cases, 223 U.S. 1, 50–51 (1912) (upholding congressional repeal of the fellow-servant rule); St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295–96 (1908) (upholding a railroad safety requirement); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding over a due process challenge a state compulsory smallpox vaccination requirement); Booth v. Illinois, 184 U.S. 425, 428–29 (1902) (same, a state ban on futures contracts); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885) ("The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.").
19. *See*, *e.g.*, The White House, Occupational Licensing: A Framework for Policymakers 4 (2015) (hereafter WH Occupational Licensing Framework); Dick M. Carpenter II et al., Inst. for Justice, License to Work: A National Study of Burdens from Occupational Licensing 10–11 (2012) (table listing 102 occupations requiring a license); *id.* at 36–136 (listing the states and the District of Columbia and their licensing requirements); *id.* at 137–88 (listing each licensed occupation and the states requiring licensure); Morris M. Kleiner, The Hamilton Project, Reforming Occupational Licensing Policies 24 (2015); Adam B. Summers, Reason Found., Occupational Licensing: Ranking the States and Exploring Alternatives (2007); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 Brit. J. Indus. Rel. 676, 676–77 (2010); Larkin, *Occupational Licensing*, *supra* note 12, at 216–18.
20. Morris M. Kleiner, *A License for Protection*, 29 Regulation 17, 17 (2006).
21. WH Occupational Licensing Framework, *supra* note 19, at 7.
22. Leonard W. Levy, *Property as a Human Right*, 5 Const. Comment. 169, 171 (1988) (citation omitted).
23. Kleiner, *supra* note 9, at 98 (citation omitted).
24. Va. Code Ann. § 54.1-2903 (West 2017).