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Reconsidering Occupational Licensing in Virginia

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Abstract

Legislation recently introduced in Virginia could lead to the elimination of unnecessary licensing requirements that injure small businesses, entrepreneurs, and people in need of a job or additional income. Occupational licensing requirements that protect only the incumbent members of a cartel rather than the public health or safety should be eliminated. If the Commonwealth sees true reform, if needless licensing requirements are eliminated, Virginians of all stripes—but especially average people who need the opportunity to ply a trade that will not injure the public—will benefit from that reform.

Occupational licensing reform is on the agenda in the Old Dominion.¹ Scholars at The Heritage Foundation have been strong advocates for reform of state occupational licensing laws. The reason is that those laws disserve the public. Perhaps state legislators have been listening. Why? Because the Commonwealth of Virginia may be on the verge of changing its licensing laws. Senior elected officials in the commonwealth have announced a bipartisan approach to the subject that would analyze and recommend modification of current occupational licensing schemes. Perhaps we soon will see Virginia jettison an old and unjustified regulatory program.

The Ubiquity of Occupational Licensing Requirements

Historically, only a few professions, such as medicine, dentistry, law, and accounting, were subject to licensing requirements. Over time, however, the number of regulated professions has grown dramatically. Occupational licensing requirements are now so

KEY POINTS

- States have adopted licensing requirements for a host of occupations that do not credibly put the public health and safety at risk, such as auctioneer, barber, and locksmith.
- Occupational licensing requirements are now so ubiquitous in the American economy that they directly affect at least 25 percent of the workforce.
- Even though licensing laws are defended on the ground that they protect the public against a shoddy product or service, rival service providers find them to be valuable tools that they can use to protect themselves against competition.
- In addition to Heritage Foundation scholars, the Obama Administration, federal officials in the George W. Bush and Trump Administrations, Nobel Laureate Milton Friedman, other scholars, other public interest organizations, and other commentators have criticized the widespread use of occupational licensing requirements.

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ubiquitous in the American economy that they directly affect at least 25 percent of the workforce.²

In some fields—medicine is the best example—licensing requirements make sense. It is reasonable to demand that someone be well educated and trained before he can diagnose disease, prescribe medication, or perform surgery. But states have adopted licensing requirements for a host of occupations that do not credibly put the public health and safety at risk. As one commentator has noted, among the fields subject to licensing requirements are the following:

“animal breeders,” auctioneers, ballroom dance instructors, barbers, bartenders, cosmetologists, court clerks, door repair contractors, “fishers,” florists, funeral attendants, interior designers, landscape workers, manicurists and pedicurists, “milk samplers,” “packagers,” painting contractors, plumbers, “skin care specialists,” taxi drivers, taxidermists, tour or travel guides, tree trimmers, and upholsterers. Other observers have found additional occupations subject to licensing requirements, such as beekeepers, “burial societies,” cat groomers, chimney sweeps, elevator operators, fortune tellers, frog farmers, “home entertainment installers,” horseshoeing personnel, jai alai “participants,” junkyard dealers, locksmiths, lobster sellers, makeup artists, manure applicators, maple dealers, motion picture projectionists, mussels dealers, photographers, private detectives, real estate brokers and sales personnel, quilted clothing manufacturers, rainmakers, reptile catchers, shampooers, sheep dealers, stallion breeders, surveyors, ticket brokers, turtle farmers, and Whitewater rafting guides or operators.³

Clearly, any state code that imposes occupational licensing requirements on those lines of work is ripe for reform.

The Justification for Occupational Licensing

Occupational licensing is a form of economic regulation. Yet it has been accepted since the days of Adam Smith and Alfred Marshall, and has been proven since the collapse of the Soviet Marxist economy, that a free-market economy is preferable to regulation as a means of providing goods and services.

Under competition, companies that design the best mousetrap or supply the best extermination service will prosper, and consumers will receive the goods and services they desire at the lowest cost. In fact, it could be said that the market functions as an impersonal and impartial regulator by matching consumer desires with producers who can efficiently supply the widgets and services that consumers prefer.

Government-imposed regulation is reasonable only where the nature of the service makes it more efficient for one company alone to provide it (for example, railroads and power lines) because the business is a natural monopoly or when some other exception to or defect in the free market requires government intervention (for example, the government funds national defense through taxation). There are far more instances, however, in which society is far better off relying on competition rather than regulation to allocate goods and services.

Historically, occupational licensing has been justified on the ground that an exception exists for certain goods and services that must be regulated for the public’s health and safety to prosper. The argument is that there is what economists would call an “information asymmetry” between what a service provider knows and what a consumer knows. The average consumer does not know the difference between Michael DeBakey and Gregory House, so the government must guarantee that anyone who practices medicine is qualified to do so. Only by limiting who can ply a particular trade to people who satisfactorily complete a prescribed course of education and training and pass a qualifying examination, the argument goes, can the public be protected against flimflammers, bunko artists, and quacks fraudulently or unjustifiably claiming to be qualified, responsible tradesmen.⁴

The problem is that this justification is, generally speaking, just applesauce. Most of the time, a licensing scheme serves merely to create a cartel protected by law.⁵ Competition produces winners *and* losers, so instead of actually competing, risk-averse companies would prefer to enter into a conspiracy to limit competition. They would like to limit the number of competitors, to agree on the service to be supplied and the price to be charged, and to bar outsiders from entering the field to provide a better service at a lower price. In other words, even though licensing laws are defended on the ground that they protect the public against a shoddy product or

service, rival service providers find them to be valuable tools that they can use to protect themselves against competition.

Private parties cannot conspire among themselves to restrain trade—that has been a federal crime ever since Congress adopted the Sherman Antitrust Act in 1890⁶—but a state can impose such a restraint under state law. So, to avoid the toils of the law, businesses try to persuade the state to do the dirty work for them. In return for what economists call “economic rents” (supernormal profits obtained by operation of law, not the market), parties pay to politicians “political rents” in the form of votes, campaign contributions, and so forth.

The result is to enrich incumbents in a particular profession and their fellow-traveler politicians at the expense of the public and would-be entrants into that line of work: a relationship that would make Rick Blaine and Captain Louis Renault smile.⁷ As I have noted elsewhere:

Occupational licensing requirements have been criticized on several grounds. The most common has been that they hijack state power for the benefit of a few. They limit the number of service providers, thereby allowing the members of a given trade to avoid competition and raise prices, without supplying the corresponding service quality improvement promised to consumers. The risk that licensing will generate monopoly profits for industry members is aggravated when incumbent parties can define the conditions of entry by rivals. The effect of licensing is to create a cartel that supplies its members with economic rents on an ongoing basis because entry restrictions operate like a “hidden subsidy” to licensees. Industries particularly benefit from licensing when the consumer demand for the service is inelastic (for example, oncology), when there are few if any alternatives (for example, surgery), or when the industry can define qualifications (for example, hair-cutting). That expense can be considerable for individual consumers and the nation as a whole. Licensing requirements give licensees a “premium” of four to thirty-five percent above the competitive price.⁸

It is important to note that licensing requirements principally hurt what would be known as “the average person” or “little people,” not *Fortune* 500

CEOs. They raise the price that consumers must pay for a service, which amounts to a far larger percentage of the money available to a low-income worker than to a titan of industry. Licensing requirements also prevent out-of-work individuals from pursuing a new line of work, from supplementing the income sometimes needed by a one-parent or even a two-parent household, or from getting their first job. For those reasons, Heritage scholars have urged state lawmakers to reconsider their licensing codes.⁹

Heritage scholars are not alone in this. The Obama Administration,¹⁰ federal officials in the George W. Bush and Donald Trump Administrations,¹¹ Nobel Laureate Milton Friedman,¹² other scholars,¹³ other public interest organizations,¹⁴ and other commentators¹⁵ have also criticized the widespread use of occupational licensing requirements. Even states that have adopted such codes may be reconsidering them.¹⁶

Of course, occupational licensing requirements are sometimes reasonable. As noted, we can—and should—demand that people be licensed before they perform transplant surgery. But there is no public safety justification for requiring barbers to be licensed. Parents have been cutting their children’s hair as long as there have been parents, children, and something with which to cut. Other occupations also can and should be freed from the unnecessary burden of government regulation.

Occupational Licensing Reform in the Commonwealth of Virginia

As far as occupational licenses go, Virginia is one of the nation’s worst offenders. Consider their burdensomeness. A recent report by the Institute of Justice ranks Virginia as the seventh most burdensome state.¹⁷ Virginia is in the minority of states that license upholsterers, locksmiths, commercial floor sanding contractors, and commercial painters.¹⁸ The Virginia code also falls heavily on low-income occupations, such as contractors of various types.¹⁹ It demands an estimated 1,460 days of education and training to become an athletic trainer and 731 days of education and training to be licensed as a commercial or residential door repair contractor, drywall installation contractor, or landscape contractor.²⁰ By contrast, Virginia requires only eight hours of education and training to become a school bus driver and no prior education or training to be a pharmacy technician or a city bus driver.²¹ Some disparities between the requirements to work in

different positions also appear quite bizarre. It takes 63 days to become an emergency medical technician for example, but 350 days to become a cosmetologist.²²

Arbitrary requirements like these call out for reform. Fortunately, elected officials in Virginia appear to be listening.

On February 5, 2018, Virginia Governor Ralph Northam, a Democrat, and Speaker of the Virginia House of Delegates Kirk Cox, a Republican, announced bipartisan legislation that would reduce needless regulatory burdens on Virginians. The legislation would achieve that result by creating a three-year regulatory reduction pilot program to eliminate rules that hinder small businesses and entrepreneurs. The Virginia Department of Planning and Budget (DPB) would implement the program, which at least initially would focus on two state departments: the Department of Professional and Occupational Regulation and the Department of Criminal Justice Services.

The bill states that the goal of the program “shall be to reduce regulatory requirements, compliance costs, and regulatory burden across both agencies by 25 percent by July 1, 2021.” According to the bill’s sponsor, Delegate Michael Weibert (R–Fauquier), “This will make these agencies more efficient, reduce regulatory burdens, and give us a clear model to replicate across state government.”²³ The DPB’s responsibilities would also include determining whether and how state agencies comply with existing requirements and reviewing all of Virginia’s regulations every four years.

The Virginia Department of Professional and Occupational Regulation is a particularly important subject of the bill because it regulates a large number of different occupations.²⁴ Among them are accountants, architects, auctioneers, barbers, cemetery operators, cosmetologists, contractors, geologists, librarians, polygraph examiners, real estate appraisers, rental location agents, and waste management facility operators. It makes sense to require some of the professions within that department’s jurisdictions, such as opticians, to be subject to reasonable regulation. In the case of others, such as librarians, it does not. And it might make sense to regulate some of the activities of a third category of occupations, such as geologists, but that would depend on the particular function they perform.

The Virginia General Assembly should go forward with its plan to reform its occupational licensing laws. Of course, passing the proposed legislation does not guarantee that any licensing requirements will be lifted. The bill merely gives the Virginia DPB the responsibility to conduct an appraisal over three years, which is a lifetime for some public policy proposals. Sometimes, delaying action is as good as denying it. Only time will tell.

Nonetheless, perhaps some optimism is warranted. After all, hope springs eternal.²⁵ If the Commonwealth sees true reform, if needless licensing requirements are eliminated, Virginians of all stripes—but especially average people who need the opportunity to ply a trade that will not injure the public—will benefit from that reform.

Conclusion

Ask any policy analyst to define the term “satisfaction,” and he will tell you that satisfaction comes when a policymaker listens to a recommendation and acts on it to improve life for the public. Virginia’s lawmakers seem to be doing just that. Recently introduced legislation could lead to the elimination of unnecessary licensing requirements that injure small businesses, entrepreneurs, and people in need of a job or additional income. Occupational licensing requirements that protect only the incumbent members of a cartel rather than the public health or safety should be eliminated. If Virginians are lucky, the Old Dominion will endorse a new policy.

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Endnotes

1. See Press Release, Office of the Governor, Governor Northam and Speaker Cox Announce Bipartisan Agreement on Regulatory Reform (Feb. 5, 2018), <https://governor.virginia.gov/newsroom/newsarticle?articleId=25403>; Graham Moomaw, *Northam, Cox Announce Bipartisan Plan to Roll Back State Regulations*, RICHMOND TIMES-DISPATCH (Feb. 5, 2018), http://www.richmond.com/news/virginia/government-politics/general-assembly/northam-cox-announce-bipartisan-plan-to-roll-back-state-regulations/article_3ce8f05a-4eb8-524e-9a1c-0b75a87e1103.html.
2. See THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 17 (2015) (hereafter WH OCCUPATIONAL LICENSING FRAMEWORK); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 211 (2016).
3. Larkin, *supra* note 2, at 216-18 (footnotes omitted).
4. *Id.* at 222-25.
5. *Id.* at 225-44.
6. See the Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (2012)) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.').
7. *Casablanca* (Warner Bros. 1943), <https://www.youtube.com/watch?v=8vY-4zWKSJM>.
8. Larkin, *supra* note 2, at 235-37 (footnotes omitted).
9. See, e.g., Salim Furth, *Understanding the Data on Occupational Licensing*, HERITAGE FOUND., BACKGROUNDER No. 3159 (Sept. 28, 2016), file:///C:/Users/Larkin/AppData/Local/Temp/BG3159.pdf; Timothy Kilcullen & Salim Furth, *How Licensing Laws Protect Special Interests at the Expense of Everyone Else*, HERITAGE FOUND., COMMENTARY (Dec. 12, 2017), <https://www.heritage.org/jobs-and-labor/commentary/how-licensing-laws-protect-special-interests-the-expense-everyone-else>; Paul J. Larkin, Jr., *A Public Choice Analysis of Occupational Licensing*, HERITAGE FOUND., LEGAL MEMORANDUM No. 205 (May 30, 2017), <http://www.heritage.org/sites/default/files/2017-05/LM-205.pdf>; Paul J. Larkin, Jr., *A Brief History of Occupational Licensing*, HERITAGE FOUND., LEGAL MEMORANDUM No. 204 (May 23, 2017), <http://www.heritage.org/sites/default/files/2017-05/LM-204.pdf>; cf. Paul J. Larkin, Jr., *Occupational Licensing Reform: The ALLOW Act*, HERITAGE FOUND., LEGAL MEMORANDUM No. 212 (July 21, 2017), http://www.heritage.org/sites/default/files/2017-07/LM-212_0.pdf; David Rosenthal, *How Tennessee Criminalized Compassion for Animals*, DAILY SIGNAL (Mar. 1, 2017), <http://dailysignal.com/2017/03/01/how-tennessee-criminalized-compassion-for-animals/>; David Rosenthal, *How Arizona Is Using Licensure Laws to Punish Compassion*, HERITAGE FOUND., THE DAILY SIGNAL (Feb. 17, 2017), <http://dailysignal.com/2017/02/17/how-arizona-is-using-licensure-laws-to-punish-compassion/>; James Sherck, *Creating Opportunity in the Workplace*, HERITAGE FOUND., BACKGROUNDER No. 2962 (Dec. 16, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2962.pdf.
10. See WH OCCUPATIONAL LICENSING FRAMEWORK, *supra* note 2.
11. See, e.g., Alexander Acosta & Dennis Saugaard, *Making It Easier to Work Without a License*, WALL ST. J. (Jan. 8, 2017), <https://www.wsj.com/articles/make-it-easier-to-work-without-a-license-1515457813?mod=searchresults&page=1&pos=1> (Alex Acosta is the U.S. Secretary of Labor); William Blumenthal, Gen. Counsel, U.S. Fed. Trade Comm'n, A Primer on the Application of Antitrust Laws to the Professions in the United States (Sep. 29, 2006) (background materials accompanying remarks before the Canadian Bar Ass'n), available at http://www.ftc.gov/sites/default/files/documents/public_statements/primer-application-antitrust-law-professions-united-states/20060929cblumenthalmaterials_0.pdf [<http://perma.cc/GV9M-SASB>]; CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990), available at https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf [<http://perma.cc/M24D-T9QX>]; Prepared Statement of the Federal Trade Commission on Competition and the Potential Costs and Benefits of Professional Licensure Before the Committee on Small Business, U.S. House of Representatives (2014), available at http://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensureho_use.pdf [<http://perma.cc/N7Y8-8WV2>]; cf. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005) ("Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take.") (Muris was the Chairman of the Federal Trade Commission (FTC) from 2001-04).
12. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-160 (1962).
13. See, e.g., S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987); Clark M. Neily III, *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*, in ECONOMIC LIBERTY AND THE CONSTITUTION: AN INTRODUCTION, HERITAGE FOUND., SPECIAL REPORT No. 157 25, at 27-31 (Paul J. Larkin, Jr. ed., 2014), http://thf_media.s3.amazonaws.com/2014/pdf/SR157.pdf; Sidney L. Carroll & Robert J. Gaston, *Occupational Licensing and the Quality of Service*, 7 L. & HUMAN BEHAV. 139, 139-40 (1983); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1093 (2014); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976); Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191-92 (2000); Dick Carpenter & Lisa Knepper, Op-Ed., *Do Barbers Really Need a License?*, WALL ST. J. (May 10, 2012), <http://www.wsj.com/articles/SB10001424052702304451104577389691765508790> [<http://perma.cc/BH6V-WPLY>].

14. See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2d ed. 2018); ADAM B. SUMMERS, REASON FOUND., OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES (2007).
15. See, e.g., Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> [<http://perma.cc/Z25N-PA5D>]; George Will, *Supreme Court Has a Chance to Bring Liberty to Teeth Whitening*, WASH. POST (Oct. 10, 2014), http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html?hpid=z7 [<https://perma.cc/JE2T-GQ2Z>] (“Come [October 14, 2014], the national pastime will be the subject of oral arguments in a portentous Supreme Court case. This pastime is not baseball but rent-seeking—the unseemly yet uninhibited scramble of private interests to bend government power for their benefit... [F]actions enrich themselves through occupational licensure laws unrelated to public safety. Such laws are growth-inhibiting and job-limiting, injuring the economy while corrupting politics. They are residues of the mercantilist mentality, which was a residue of the feudal guild system, which was crony capitalism before there was capitalism. Then as now, commercial interests collaborated with governments that protected them against competition.”); cf. Timothy Sandefur, *State “Competitor’s Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL’Y 1009 (2015).
16. See OKLAHOMA DEP’T OF LABOR & OCCUPATIONAL LICENSING TASK FORCE, A STUDY OF OCCUPATIONAL LICENSING IN OKLAHOMA (Jan. 9, 2018); Acosta & Saugaard, *supra* note 11 (Dennis Saugaard is the Governor of South Dakota); *supra* note 1.
17. See CARPENTER II ET AL., *supra* note 14, at 136.
18. *Id.*
19. *Id.* at 136–37.
20. *Id.* The IJ study measures the education and training requirements in terms of “Calendar Days Lost.”
21. *Id.* at 136–37.
22. *Id.* at 137.
23. *Supra* note 1.
24. See VA CODE ANN. §§ 54.1-300 to 54.1-311 (2017).
25. See Alexander Pope, *An Essay on Man*, Epistle I (1733–34): “Hope springs eternal in the human breast; / Man never is, but always to be blessed: / The soul, uneasy and confined from home, / Rests and expatiates in a life to come.”