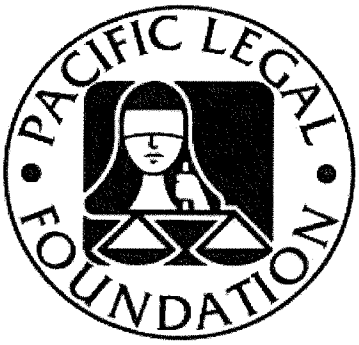

"Testimony to the U.S. House Committee on Small Business"

by Timothy Sandefur

March 26, 2014

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111

www.pacificlegal.org

Members of the Committee,

I appreciate the opportunity to contribute my testimony on occupational licensing and the burdens it imposes on the right to earn a living—a right that Supreme Court Justice William O. Douglas called "the most precious liberty that man possesses."[1]

Sadly, licensing restrictions have been abused for centuries by established businesses as a way to prohibit economic competition, enabling them to raise their prices while barring newcomers from the market. This harms consumers and restricts economic opportunity for precisely those who most need it. While these abuses generally take place at the state level, Congress has authority to protect economic freedom and secure the blessings of economic liberty for all.

In this statement, I will first discuss the constitutional and legal issues surrounding occupational licensure. I will then discuss the consequences of licensing laws for consumers and entrepreneurs, using as an example a lawsuit that Pacific Legal Foundation recently won in Kentucky, challenging that state's laws regulating the moving industry. I will conclude with a discussion of what Congress can do to protect the right to earn a living.

Economic liberty is deeply rooted in our constitutional tradition

The right to earn a living and to provide for oneself and one's family without unreasonable interference by the government is today the most neglected civil right in America. Yet this right has deep roots in our constitutional tradition. In fact, the right to earn a living was protected by English courts almost two centuries before the U.S. Constitution was written. In a series of decisions beginning in the early Seventeenth Century, English courts began striking down restrictions on economic opportunity that were imposed by the guild system—restrictions we would today call licensing laws.[2]

For example, in 1614, the Court of King's Bench struck down a law that required people to obtain a license before going into the upholstery trade. The licensed upholsterers claimed that the requirement was necessary to protect consumers against dangerous or incompetent practices, but Chief Justice Sir Edward Coke held that there was "no skill" required, "for [a person] might learn this in seven hours." If a person was bad at upholstery, "unskillfulness is sufficient punishment." Most importantly, a restriction on such a trade hurt the economy and limited people's ability to earn a living for themselves—not to protect the public, but to serve the private interests of licensees. "[B]y the...common law," declared Lord Coke, "it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful, and also very commendable, but yet by the common law, if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders."[3]

A year later, he repeated the point in another case. "[A]t the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil," he wrote, "and especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade."[4]

Lord Coke went on to author the English Statute of Monopolies, which prohibited the government from granting exclusive trade privileges to established businesses. And in his retirement he authored a legal textbook, the *Institutes*, which became the leading instructional book for such law students as Thomas Jefferson, John Adams, and John Marshall. "[I]f a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade," wrote Coke in the *Institutes*, "that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter (Magna Charta). Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."[5]

The American colonies never had a guild system, and the right to economic freedom took on a special importance here. When, in 1775, Thomas Jefferson wrote his *Summary View of the Rights of British America*—prefiguring the arguments he would later condense into the Declaration of Independence—he included British restrictions on economic liberty as one of the colonists' complaints. British laws "prohibit us from manufacturing for our own use the articles we raise on our own lands with our own labour," he wrote. Americans were prohibited from making hats from the fur of animals taken in America, for example, in order to serve the interests of British hatmakers who did not want competition. Another law prohibited Americans from making tools out of iron, and instead required them to ship iron to Britain and back to have tools made—and all this "for the purpose of supporting not men, but machines, in the island of Great Britain."[6] When he wrote the Declaration, Jefferson described the right to earn a living as the right to pursue happiness—borrowing the phrase from his friend George Mason, who had referred in the Virginia Declaration of Rights to "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

The right to "liberty" and to the "privileges and immunities" of citizenship protected by the U.S. Constitution include the right to put one's skills and knowledge to work in earning a living. In a famous 1823 case, Justice Bushrod Washington explained that the "privileges and immunities" protected by Article IV of the Constitution include "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise...to take, hold and dispose of property...and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned...."[7]

When, after the Civil War, Congress drafted the new Fourteenth Amendment, they included a new privileges or immunities clause, which again was intended to protect—among other rights—the right to earn a living without unreasonable and unjust interference by the government. States, particularly in the south, were enacting arbitrary restrictions barring former slaves and immigrants from engaging in a variety of occupations, and the new Amendment promised them substantial federal protections. Representative John Bingham, principal author of the Clause, said that it included "the liberty...to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[8] Another representative

echoed this: "has not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?"[9] Senator John Sherman explained that courts interpreting the privileges or immunities clause would "look first at the Constitution of the United States as the primary fountain of authority," but also to the Declaration of Independence, American and English history, and English common law, where "they will find the fountain and reservoir of the rights of American as well as English citizens,"[10] including, of course, the common law cases protecting the right to earn a living free from government-created monopolies. In fact, as one federal court put it, twelve years after the Amendment became law, "it seems quite impossible that any definition of these terms [privileges and immunities] could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence."[11]

Despite significant setbacks,[12] federal courts were fairly successful in using the Fourteenth Amendment to protect the right to earn a living against interference by states in the latter quarter of the nineteenth century. For example, in *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance that allowed city officials arbitrary and unlimited discretion to grant or withhold licenses to operate laundry businesses. "[T]he very idea that one man may be compelled to hold his life, or the means of living...at the mere will of another," declared the Court, "seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[13] The phrase "means of living" alludes to *Merchant of Venice*, when Shylock tells the Duke "You take my house when you do take the prop / That doth sustain my house; you take my life / When you do take the means whereby I live."[14] The Supreme Court quoted this line in *Adams v. Tanner*,[15] when it struck down a Washington law that outlawed employment agencies.

The first Supreme Court case to consider the constitutionality of a state occupational licensing law was *Dent v. West Virginia*,[16] when it declared that states could require medical doctors to prove their qualifications before going into practice, because this was a reasonable way to prevent harm to the public. But, the Court declared, there are limits to what the state can demand of a person seeking to go into business. While the state may impose licensing requirements that are "appropriate to the calling or profession, and attainable by reasonable study or application," it may not impose requirements that "have no relation to such calling or profession, or are unattainable by such reasonable study and application," because then such requirements would "operate to deprive one of his right to pursue a lawful vocation."[17]

The Supreme Court has never overruled the *Dent* decision, and in fact has cited it repeatedly through the years.[18] In the 1957 case of *Schware v. Board of Examiners*, for example, the Court declared that New Mexico could not prohibit a person from practicing law on the grounds that he was a member of the Communist Party. Licensing restrictions, the Court held, must be "any qualification must have a rational connection with the applicant's fitness or capacity to practice [the profession]."[19] To use licensing laws to block people from entering a trade or profession simply to protect established firms against competition—without regard to protecting the public health and safety—is to abuse government power for the benefit of those who exercise raw political power. Such laws are fundamentally arbitrary, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[20]

Why courts have abandoned protections for economic freedom

Sadly, courts today often fail to take economic liberty seriously. The reason for this is the advent of what lawyers call "rational basis scrutiny" in the 1934 decision, *Nebbia v. New York*.[21] That decision abandoned the test by which judges had previously evaluated the constitutionality of economic regulations and replaced it with the new, extremely lenient "rational basis" test which declares that a law is constitutional if it is "rationally related to a legitimate government interest."

Unfortunately, this test is so poorly defined, that no lawyer really knows what it means—except that it virtually always results in the law being upheld, even if that law is unjust and unreasonable.[22] There are, however, enough cases in which plaintiffs have succeeded in having such laws invalidated, that nobody can be quite sure what the rational basis test actually allows. For example, the Supreme Court has sometimes said that actual *evidence* is not relevant in rational basis cases, because if a judge can imagine that a legislator might have believed that a challenged law would be good for the public, then that law is constitutional.[23] On the other hand, the Court has also insisted that laws are unconstitutional if there is no "relation between the [means] adopted and the object to be attained," and may not be "drawn for the purpose of disadvantaging the group burdened by the law."[24]

This confusion means that courts are today divided over the most basic of questions: when the government restricts a person's right to earn a living, must that restriction relate in some way to the public interest? Or may the government restrict economic freedom for no other reason than that it wants to?

The Fifth, Sixth, and Ninth Circuit Courts of Appeal have declared that while the Constitution allows states extremely broad discretion to regulate businesses, they may not regulate business for the sole purpose of protecting established businesses against legitimate competition.[25] The Tenth Circuit, on the other hand, has declared that states may use licensing laws to bar people from entering a business simply to protect established firms against competition, without regard to public health or safety considerations—that is, that the state may use licensing laws to block people from earning a living *simply because it chooses to do so*.

One thing that is for certain is that courts now allow states to restrict economic liberty—the right of a person to run a business, to work for a living, to earn what he or she wants, to choose his or her own work hours—practically at will. At one time, the right to earn a living was considered one of the crucial rights in the history of the Anglo-American common law tradition. But thanks to the rise of rational basis scrutiny, courts today typically turn a blind eye to the importance of this right, and allow legislative majorities to restrict economic opportunity for virtually any reason that they choose.

How licensing laws harm entrepreneurs and consumers

One out of three jobs in America requires a government license.[26] Many of these licensing requirements are backed by heavy monetary fines and even potential jail time. And the occupations covered by these requirements are many and various. The California

Professional And Business License Handbook, which lists every business for which a license is required, is some 300 pages long.[27]

Licensing restrictions are what economists call "barriers to entry." They impose costs on a person who would like to enter into a market. Those costs range from the relatively minor, as with an ordinary business license that simply requires the payment of a fee, to extremely substantial, as when the law requires a person to have a doctoral degree to practice medicine or a law degree to practice law. In New York City, government permission to operate a single taxicab costs over $1 million.[28] By raising the requirements, established firms can basically prohibit new firms from opening up and competing against them.

As I've noted, licensing laws have been used for this purpose for centuries. Existing firms, however, typically do not admit that they are increasing barriers to entry in order to prohibit competition; they generally claim that imposing burdensome educational or training requirements on new businesses protects the general public in some way. Sometimes, there is good reason to accept this argument, but it is also often an excuse. As Milton and Rose Friedman observed, while "the *justification*" for licensing laws is "is always the same: to protect the consumer...the *reason* is demonstrated by observing who lobbies...for the imposition or strengthening of licensure. The lobbyists are invariably representatives of the occupation in question rather than of the customers.... [I]t is hard to regard altruistic concern for their customers as the primary motive behind their determined efforts to get legal power to decide who may be a plumber."[29] Or, as Lord Coke put it in the seventeenth century, businesses seeking licensure are frequently like a man rowing a boat: "they look one way, and row another: they pretend public profit, intend private."[30]

Consider, for example, California's licensing law for pest control workers. To run a pest control business in California, one must have a license called a Branch 2 license. To obtain such a license, a person must first undergo two years of training, learning how to use, store, and handle pesticides, and then must pass a 200 question multiple choice examination on the use, storage, and handling of pesticides—even if the person does not use pesticides. My client, Alan Merrifield, had been in the structural pest control business for years, installing spikes on buildings to keep pigeons away, or installing nets or screens to keep rats from invading homes. But he was ordered to get a Branch 2 license, which would have required him to spend two years learning skills for which he would have no use. In fact, not only did the licensing exam test a person's knowledge of pesticides and insects—which had no relationship to his business—but it contained no questions at all testing one's knowledge of pigeons or spike installation. More remarkably still, the law applied only if a person installed spikes to keep *pigeons* away. The law did not apply if the person installed spikes to keep any other kind of bird away. Asked to explain this, the state's expert witness testified under oath that the reason for this exemption was that the law had initially required a license for any person practicing pest control, but that when it was proposed to limit that requirement to people who actually used dangerous chemicals, those practitioners who already had licenses objected, and asked the legislature to divide up the market for pest control work, allowing only existing license holders to deal with pigeons, rats, and mice, since they are the most common household pests.[31] Fortunately, the Ninth Circuit Court of Appeals declared that it was unconstitutional for the law to "irrational[ly] singl[e] out of three types of vertebrate pests from all other vertebrate

animals...[just] to favor economically certain constituents at the expense of others...such as Merrifield."[32]

Merrifield was successful in his lawsuit, but many entrepreneurs do not have the wherewithal to bring a case challenging the constitutionality of a licensing law, and other courts have held that states may impose extremely burdensome education and testing requirements on entrepreneurs. Consider the case of Sandy Meadows, a Louisiana woman who was forced to give up her job as a florist because she did not have a license to practice floristry. Remarkable as it is, the Pelican state requires that a person obtain a special license to be a florist, and to get a license required significant training and both an hour-long written exam and a three-hour practical examination. On the practical exam, applicants were graded on such subjective criteria as the "harmony" and "effectiveness" of their flower arrangements.[33] When this ridiculous licensing requirement was challenged in court, the court upheld it, on the grounds that the licensing requirements protected public safety, because unlicensed florists might not know how to properly use the wire that florists use to hold their flower arrangements together, and customers could scratch their fingers.[34] Ms. Meadows, thrown out of her job, died in poverty shortly thereafter.[35]

Occupational licensing laws harm entrepreneurs because by imposing high start-up costs, they hit entrepreneurs where it hurts the most. Entrepreneurs—particularly in such entry-level jobs as floristry—normally lack the start-up capital or the education that is required to obtain a license. And these can be very substantial. Florida law, for example, requires that interior designers hold a college degree.[36] Even where the educational requirements are not so severe, testing can be an expensive undertaking. Aside from the fees required to take an exam, some exams are offered only once or twice a year, sometimes in only a few cities, so that applicants must pay for transportation and lodging to take the exam. For example, the Louisiana florist exam costs $150, and is administered quarterly in Baton Rouge, meaning that applicants from other cities must pay travel and lodging expenses. These and other expensive barriers to entry ensure that the poor and members of minority groups are disproportionately excluded from the opportunity to earn a living in ordinary trades like interior decorating or floristry. Because only 47 percent of black and Hispanic interior designers nationwide have a college degree, while 66 percent of the country's white interior designers do, licensing requirements block members of these minority groups from the trade.[37] People who might have learned on the job are deprived of that opportunity. The result is often to push members of these groups into the illegal, underground economy—where they consequently run a greater risk of being fined, or even charged with a crime, for illegally operating without a license. And because many states bar people from obtaining licenses if they have ever operated without a license, the result is to block them permanently from earning an honest living in the trade of their choice. In other cases, such as in New York, where permission to operate a taxicab is priced far beyond the range of most entrepreneurs, the result is to perpetuate socioeconomic class status and retard upward mobility.[38]

Of course, licensing requirements also harm consumers by raising costs and deterring innovation. Research by Morris Kleiner, one of the nation's leading authorities on occupational licensing, shows that, depending on the location and the service at issue, licensing raises prices by 4 to 35 percent.[39] For example, studies of licensing in the optometry profession by the

Federal Trade Commission and others find that it increases prices by about 20 to 25 percent.[40] Licensed occupations charge between 4 and 12 percent more for services than unlicensed occupations do.[41] Of course, such measurements are very hard to perform, because many factors that affect prices and because licensing laws affect services rather than goods. But studies have shown quite clearly that licensing reduces the number of practitioners in any given field.[42]

Licensing laws also retard innovation by defining the regulated trade so broadly that new firms are blocked from the chance to provide unusual or new services. For example, in a number of recent lawsuits, hair-braiders have challenged the licensing laws for hairdressers, on the grounds that it is irrational to require people who only braid hair to also take expensive and time consuming classes learning how to do other kinds of hairstyling that they don't do.[43] In the North Carolina Dental Board case now pending before the Supreme Court, the state agency charged with regulating dentistry tried to define teeth whitening—which a person can do in his own home with an over-the-counter kit—as the practice of dentistry. In Lauren Boice's case, the state of Arizona tried to force her to get a cosmetology license even though all she did was arrange appointments for licensed cosmetologists. In all these cases, new innovations allow entrepreneurs to provide a single service that the government has lumped in with other services in the "scope of practice" with a licensed trade. By requiring a person to become a full-fledged barber before she can braid hair, or to become a dentist before he can apply a teeth-whitening strip, the government deters innovation and creativity.

The harm caused by licensing laws is, of course, disproportionately felt by the poor and members of minority groups who are hit hardest in the pocketbooks. Economists refer to this as "the Cadillac effect." Licensing requirements essentially require consumers to buy a Cadillac if they want a car. And since many people cannot afford a Cadillac, they either go without, or resort to unlicensed, unsafe alternatives—whereas, if they could have bought a Ford or a Toyota instead, they would have had adequate service at a price they could afford.

The "Competitor's Veto"

Even where licensing laws do not impose educational or training requirements, they are often used to exclude people from ordinary trades solely for the purpose of protecting established businesses against legitimate competition. A prime example of this is in the household goods moving industry. Some 22 states[44] require household goods movers to obtain a "Certificate of Public Convenience and Necessity" before they may operate a moving business.

A Certificate of Public Convenience and Necessity typically requires an applicant for a license to first notify all of the existing companies in the industry of their intent to apply for a license. The existing firms are then allowed to file objections or protests against the applicant, whereupon the applicant is required to prove to a government agency that there is a "public need" for a new company in that industry. The standards for proving a "public need" are usually extremely vague, or even missing entirely from the statute. In short, these laws give existing firms the power to block their own competition—what I call the Competitor's Veto.

Certificate of Public Convenience and Necessity laws—also known as Certificate of Need or CON laws—were invented in the late nineteenth century to regulate railroads, streetcars, omnibuses, and so forth at a time when these industries were often funded by private investors operating under a franchise. The idea was that, because the government often imposed expensive regulatory burdens on these companies—requiring them, for example, to provide unprofitable service to out-of-the-way customers, or to limit what they charged to below market rates—the private investors faced a serious risk that other, more competitive businesses would take away their business. Government therefore created the CON restriction as a monopoly privilege, similar to a patent, to encourage private investment.[45]

But the industry changed radically with the invention of the automobile, and the laws never changed with them. Thus today, the moving industry is nothing like a public utility—it is a normally competitive market with relatively few start up costs, and it does not compete against any government-run industry. Yet the CON laws remained in place. The result is to block economic opportunity in an industry that would otherwise provide an excellent chance for entrepreneurship.

Consider the CON laws for movers in Kentucky and Missouri. Included in Appendix C to this testimony is my forthcoming article in the *George Mason University Civil Rights Journal* which explains how Missouri's recently repealed CON law for movers was exploited by existing moving firms to block competition from newcomers. In brief, between 2005 and 2010, 76 applicants sought CONs to operate moving companies in Missouri. Seventeen sought authority to operate statewide, and all were subjected to one or more objections by existing firms, for a total of 106 interventions. All of the objections were filed by existing moving companies that already had CONs, and all stated as the *sole* basis for intervention that allowing a new moving company would cause "diversion of traffic or revenue" from them. No objection was ever filed by a consumer, and none ever alleged any danger to public health, safety, or welfare, in the event that the application was granted. Nor did any provide the government with information relating to public health or safety. The other 59 applicants for moving licenses sought authority to operate either within a "commercial zone"—such as the cities of St. Louis or Kansas City—which were exempt from the objection rules, or requested permission to operate in a rural area where they would not compete against existing firms.

The mere filing of an objection meant that the applicant would face substantial extra costs. Whenever an objection was filed, the applicant was required to participate in a hearing to prove that a new moving company would serve the "public convenience and necessity" (a vague term not defined in the law). The law required that any applicant organized as a corporation was required to hire a lawyer—an owner was not allowed to represent the corporation—and the average wait time for a Certificate if an objection was filed was 154 days, with one applicant forced to wait 1,119 days—more than three years—before obtaining a CON.[46] As a result, in virtually every case, when an objection was filed, the applicant would withdraw the application and ask instead for permission to operate in a Commercial Zone or in a small area that would not compete against existing firms. Whenever this happened, existing firms would withdraw their objections. In only three cases did applicants refuse to do this—one later abandoned his application and sought instead permission to buy a CON from an existing mover, whereupon the existing firms withdrew their objections. In another, the

applicant was denied a CON in a written decision that held that although he was fully qualified, he would compete against existing firms, and was denied for that reason. In the third, the applicant was granted in a CON in a written decision that found that it was fully qualified, and that competition was a good thing.

Fortunately, Missouri repealed its CON law in 2012, in response to our lawsuit challenging its constitutionality. But Kentucky refused to do so, and in another lawsuit that we brought, the Federal District Court for the Eastern District of Kentucky just last month found that the Bluegrass State's CON law was unconstitutionally arbitrary and discriminatory.

Kentucky law provides a three-step process for obtaining a CON to operate a moving company. When a person applies for a CON, the state's Motor Carriers Division would first review the application to ensure that the applicant is "fit, willing and able to properly perform the service proposed"—that is, that the proposed business complies with public health, safety, and welfare considerations. Second, the applicant was required to prove that "existing transportation service is inadequate," and that a new moving company would serve the "present or future public convenience and necessity." No statute, regulation, case law, or other legal source defined these terms, nor is there any handbook or other standard guideline to which the Division could refer when applying these standards. Third, existing moving firms were invited to object to the issuing of any new CON, whereupon the applicant was required to attend a hearing and prove the "inadequacy" and "present or future public convenience and necessity" requirements.

Again, existing firms skilfully exploited these laws as a Competitor's Veto, to protect themselves against any new competition. Between 2007 and 2012, there were 39 applications for CONs. Of these, 19 were protested by one or more existing moving companies, for a total of 114 protests—all of which were filed by existing moving firms. None ever alleged, proved, or stated any concerns about the public health, safety, or welfare consequences if the application in question were granted; all protested on the grounds that a new moving firm would "directly compet[e] with . . . the[] protestant[] and . . . result in a diminution of protestant['s] revenues." No protest ever provided the Division with facts relating to an applicant's public safety record, experience, honesty, skills, or any other matter relating to public health, safety, or welfare, and the Division never rejected a CON application on the basis of public health or safety considerations; all rejections have been on the basis that existing services were not "inadequate." Unsurprisingly, of the 19 Protested applications since 2007, 15 chose to abandon or withdraw their applications rather than go through a hearing.

No applicant was ever granted a CON when an objection was filed. The Division has rejected every contested application on the grounds that existing services were not "inadequate." The Division never rejected an applicant on public health or safety grounds. Instead, existing firms always objected on the grounds that a new firm would compete economically against them. Thus the state would refuse licenses even to fully qualified applicants simply to protect established firms. For example, one applicant had been in the moving business for 35 years, working for his father's company, when he decided to apply for a CON in his own name. He suffered six protests by existing firms, none of which identified any public safety or welfare concerns; all complained that his company would be "directly competitive with" the their operations and "result in a diminution of [their] revenues." The

applicant participated in a hearing, at which no testimony or other evidence was introduced suggesting that he was unqualified—in fact, On the contrary, one moving company testified that he "believe[d] that [the] applicant...would be a great mover." Yet the Division rejected his application on the grounds that he had "not prove[n] that the existing household goods moving service in Louisville is inadequate and that his proposed service is needed." The only basis for this conclusion was that existing firms had objected. The applicant was denied a Certificate solely because he would compete against them. This was only one example of a repeated pattern.

Notably, when a new company sought permission to *buy a CON from an existing firm*, the rules were different. Although the same laws apply to these "transfer applications" as apply to applications for new CONs, transfer applications do not pose the same competitive threat to existing moving companies. As a result, no transfer application was ever protested, and none was ever denied. In at least three cases, applicants who initially applied for new CONS and suffered objections, and either had their applications denied or chose to withdraw their applications, later bought a CON from a company that had protested against its original application! For example, when Little Guys Movers applied for a new CON in March, 2012, eight existing companies protested, including Affordable Moving, Inc. Little Guys abandoned its application, but five months later, applied for permission to buy a CON. That request was approved a month later without protest, and the company that sold the CON to Little Guys was Affordable Moving, Inc.

Even applicants who were denied new CONs on the basis of illegal activity were allowed to buy existing CONs later and open up business. For example when Margaret's Movers applied for a new CON, its application was protested by eight firms, and in September, 2008, the Division denied the application in part because Margaret's had operated without a CON in the past, thus proving that it was not "fit, willing, and able," and also that existing moving services were "adequate." One of the firms protesting against Margaret's was J.D. Taylor. Only 17 months later, in November, 2009, Margaret's filed a new application, this time to buy an existing CON. This time, Margaret's application was not protested, and the Division—which had earlier found that Margaret's was not "fit, willing, and able"—now concluded that Margaret's was "fit, willing, and able," and astonishingly cited as grounds for that conclusion the fact that Margaret's "[had] been in the moving industry for over ten (10) years"! The company that sold Margaret's the Certificate was J.D. Taylor.

The justifications for CON laws are threefold. First, some argue that in certain markets, competition can be bad for the consumer. Although economists now almost universally agree that competition is good for consumers, some contend that in markets with high start-up costs and homogeneous goods or services, there can be "too many" firms, which can lead to higher prices. This is a purely theoretical model that has never been verified by any empirical research. But even if it were true, this model is not applicable to the moving industry or other normal, competitive industries. The moving industry has low start up costs—insurance, a truck, some labor—and heterogeneous services. There are movers who provide a wide variety of services, moving everything from bookcases to delicate scientific equipment, and providing different sorts of customer service.

Second, some argue that CON laws ensure that the government gets information about a market from the firms who are in that market, and know the industry better than bureaucrats would. This is the rationale, for instance, for staffing licensing agencies with existing practitioners in the field—an issue the Supreme Court will be taking up in its next term.[47] But this argument ignores the obvious conflict of interest involved when existing firms are able to impose significant administrative and transaction costs on their potential rivals. As the Missouri and Kentucky cases demonstrate, existing firms rarely contribute information to regulators that is unavailable elsewhere, or at least they do so far less often than they exploit their power to establish and maintain a cartel.

Finally, some argue that CON laws remedy "information asymmetry"—that is, that because customers lack the information necessary to make an informed choice about the goods or services they buy, the regulation ensures more transparency and protects consumers. While information asymmetry may be a valid reason for certain types of regulation, however, it has little connection to CON laws, which do not involve consumers in any meaningful way. Indeed, there are far more effective means of ensuring that customers get the information that they need, or to prevent fraud or improper practices. Customers can research a moving company on Angie's List or Yelp, or get information from the Better Business Bureau or other sources, before hiring a mover. And laws against fraud, or requiring regular inspections or reports, are far more effective at ensuring transparency.

In February, the Federal District Court for the Eastern District of Kentucky, concluded that that state's CON law for moving companies was unconstitutional. The law "provid[es] an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements," the court declared. "Existing moving companies that protest new applicants are not required to offer (and none has ever offered) information about an applicant's safety record," and "there is no indication that personal property is protected at all by allowing existing moving companies to keep potential competition from entering the market." Under Kentucky's CON law, "an existing moving company can essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs." The CON law was "an act of simple economic protectionism," which "offend[s] and violate[s] the Fourteenth Amendment."[48] Again, while this was a gratifying outcome, challenging such laws in court is expensive and time-consuming—and an uphill battle, as other courts have thrown out even strong challenges to CON laws.[49]

Recommendations for reform

Licensing laws are usually imposed by state or local governments, and the federal government lacks authority to impose its own regulations in many of these trades. But there are several ways in which Congress could act to protect entrepreneurs against unjust, arbitrary, and irrational violations of their right to earn a living.

• First, *new Civil Rights legislation is badly needed to protect the rights of entrepreneurs and business owners*. The first Civil Rights law, in 1866, was largely devoted to protecting the rights

of all Americans to make contracts and protect their private property rights. Sadly, these issues have gone ignored in recent decades, and courts have turned a cold shoulder to these matters. Section Five of the Fourteenth Amendment allows Congress to protect the civil rights of all Americans against interference by states, and, again, *no civil right is more frequently violated in this country than the right to earn a living.* New legislation that forbids states and local governments from using licensing laws in order to protect established firms from safe and qualified competitors, would not only be within Congress's power, but a welcome relief from the abuse of licensing laws. Or legislation modeled on RLUIPA, that requires certain types of regulations to satisfy a higher test than the largely meaningless "rational basis" requirement, would also help protect business owners.

• Second, the federal government can *use the spending power to require states and local governments to provide greater protections of economic liberty in exchange for receiving federal grants.* Congress already uses this power to apply greater protections for members of minority groups or to accomplish other goals; there is no reason the federal government could not require that local officials respect economic liberty if they are going to receive federal subsidies.

• Third, Congress should *revoke antitrust immunity for regulatory bodies that abuse government power for private ends.* This would help to prevent the anticompetitive nature of many licensing laws. There are many valid objections to antitrust laws, and the nation would be better off without them entirely.[50] But so long as they exist, there is no rational justification for the current immunity that state agencies and even private entities acting under color of state law enjoy. As Professors Edlin and Haw explain in the article attached as Appendix B, government entities—especially licensing and regulatory agencies comprised of existing business owners who have a vested interest in excluding competition—often abuse licensing laws in ways that hurt consumers and burden entrepreneurs. This is *per se* anticompetitive conduct—in fact, it is *exactly* the same conduct that the earliest anti-monopoly law, the Statute of Monopolies, was directed against. Yet under today's law, these entities are declared immune from the antitrust laws precisely when they engage in the most anticompetitive activity possible! As Chief Justice Warren Burger observed, the antitrust laws were "'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,'" so it is "absolutely arbitrary" to declare "that any similar harms [government] might unleash upon competitors or the economy are absolutely beyond the purview of federal law."[51] The Supreme Court will soon be taking up this matter, but there is no reason Congress could not act now to ensure that when the government creates a cartel, it is at least subject to the Federal Trade Commission's oversight.

• Also, Congress should *establish an office in the Civil Rights Division of the Justice Department charged exclusively with protecting economic liberty against unjust government interference.* Many intrusions on economic liberty already violate *existing* civil rights protections, but because citizens lack access to legal representation—and particularly because of the difficulty of winning such cases under existing precedent—they are unable to defend their rights in court. Although the Civil Rights Division effectively enforces civil rights protections in a wide variety

of areas, it does not focus much on protecting the rights of entrepreneurs against laws that systematically exclude the underprivileged.

• Most important of all: *raise awareness*. Sadly, although Americans generally recognize the importance of the right to earn a living, and are shocked when they learn of the ways that this right is routinely trampled upon, there is at present little focus on this aspect of our civil rights. Even many local government officials are under-informed about the consequences of their own anti-competitive policies. Exposing these injustices and raising awareness of their impact and frequency is absolutely crucial to reform.

Thank you.

Timothy Sandefur
Principal Attorney

Notes

[1] *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).
[2] *See* Timothy Sandefur, *The Right to Earn A Living* 18-25 (2010).
[3] *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614).
[4] *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (1615).
[5] 2 Edward Coke, *Institutes* *47.
[6] Merrill Peterson, ed., *Jefferson: Writings* 108-09 (1984).
[7] *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).
[8] *Congressional Globe*, 42d Cong., 1st Sess. App. p. 86 (1871).
[9] *Congressional Record*, vol. 1 p. 363 (1874).
[10] *Congressional Globe*, 42d Cong., 2d Sess. p. 844 (1872).
[11] *In re Parrott*, 1 F. 481, 506 (C.C.D. Cal. 1880).
[12] Most notably, the Supreme Court's practical nullification of the privileges or immunities clause of the Fourteenth Amendment in *The Slaughter-House Cases*, 83 (16 Wall.) 36 (1873).
[13] 118 U.S. 356, 370 (1886).
[14] Act IV sc. I ll. 371-74.
[15] 244 U.S. 590, 593 (1917).
[16] 129 U.S. 114 (1889).
[17] *Id.* at 122.
[18] *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 292 (1999);
[19] 353 U.S. 232, 239 (1957).
[20] *See generally* Timothy Sandefur, *The Conscience of The Constitution* 71-120 (2014).
[21] 291 U.S. 502 (1934).
[22] For one thing, the Court has never explained what "legitimate state interest" means. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.'").
[23] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-16 (1993).
[24] *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).
[25] *Craigmiles v. Giles*,312 F.3d 220 (6th Cir. 2004); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n. 15 (9th Cir.2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).
[26] Morris M. Kleiner and A.B. Krueger, *The Prevalence And Effects of Occupational Licensing*, 48 British J. Indust. Relations 676 (2010). *See also* Dick Carpenter, *et al., License to Work: A National Study of Burdens from Occupational Licensing* (2012), avail. at http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf.
[27] Avail. at http://www.ci.rialto.ca.us/redevelopment_749.php.
[28] Matt Flegenheimer, *$1 Million Medallions Stifling The Dreams of Cabdrivers*, N.Y. Times, Nov. 14, 2013, avail. at http://www.nytimes.com/2013/11/15/nyregion/1-million-medallions-stifling-the-dreams-of-cabdrivers.html?_r=0.
[29] *Free to Choose* 240 (rev. ed. 1980).
[30] Quoted in R.H. Coase, *The Firm, The Market, And The Law* 196 (1988) (spelling modernized).
[31] *See* Sandefur, *Right to Earn A Living* at 157-58.
[32] *Merrifield*, 547 F.3d at 991.
[33] *See* Sandefur, *Right to Earn A Living* at 133-34.
[34] *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006).
[35] *See* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381, 402-03 (2012).
[36] *See* Dick Carpenter, *Designing Cartels: How Industry Insiders Cut Out Competition* 7 (Institute for Justice, Nov. 2007), available at http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf.
[37] *See* David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power To Exclude Minorities & Burden Consumers* 9 (Feb. 2009), avail. at http://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.

[38] *See* Sandefur, *Insiders, Outsiders*, at 407-08.
[39] Kleiner, *Licensing Occupations* at 59.
[40] *Id.* at 60-61.
[41] *Id.* at 112.
[42] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* (U.C. Berkeley Public Law Research Paper No. 2384948) , at 17, avail at http://ssrn.com/abstract=2384948.
[43] *See, e.g., Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Ca. 1999).
[44] Alabama, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, Nevada, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, and West Virginia.
[45] *See* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426 (1979).
[46] Missouri Department of Transportation Motor Carrier Services Division, *2011 Division Tracker* at 6c(1), avail. avail. at http://www.modot.org/mcs/documents/January2012D-tracker.pdf .
[47] *North Carolina Board of Dental Examiners v. FTC*, No. 13-534.
[48] *Bruner v. Zawacki*, CIV.A. 3:12-57-DCR, 2014 WL 375601 (E.D. Ky. Feb. 3, 2014), included as Appendix D.
[49] For example, district courts have dismissed challenges to CON laws in several cases. *See, e.g., Underwood v. Mackay*, 2013 WL 3270564 (D. Nev. June 26, 2013); *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot on appeal*, 57 F.3d 921 (10th Cir. 1995); *Colon Health Centers of Am., LLC v. Hazel*, 1:12CV615, 2012 WL 4105063 (E.D. Va. Sept. 14, 2012), *aff'd in part, rev'd in part*, 733 F.3d 535 (4th Cir. 2013).
[50] *See generally* Dominick T. Armentano, *Antitrust And Monopoly: Anatomy of A Policy Failure* (2007); Edwin S. Rockefeller, *The Antitrust Religion* (2007).
[51] *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 419-20 (1978) (opinion of Burger, C.J.).