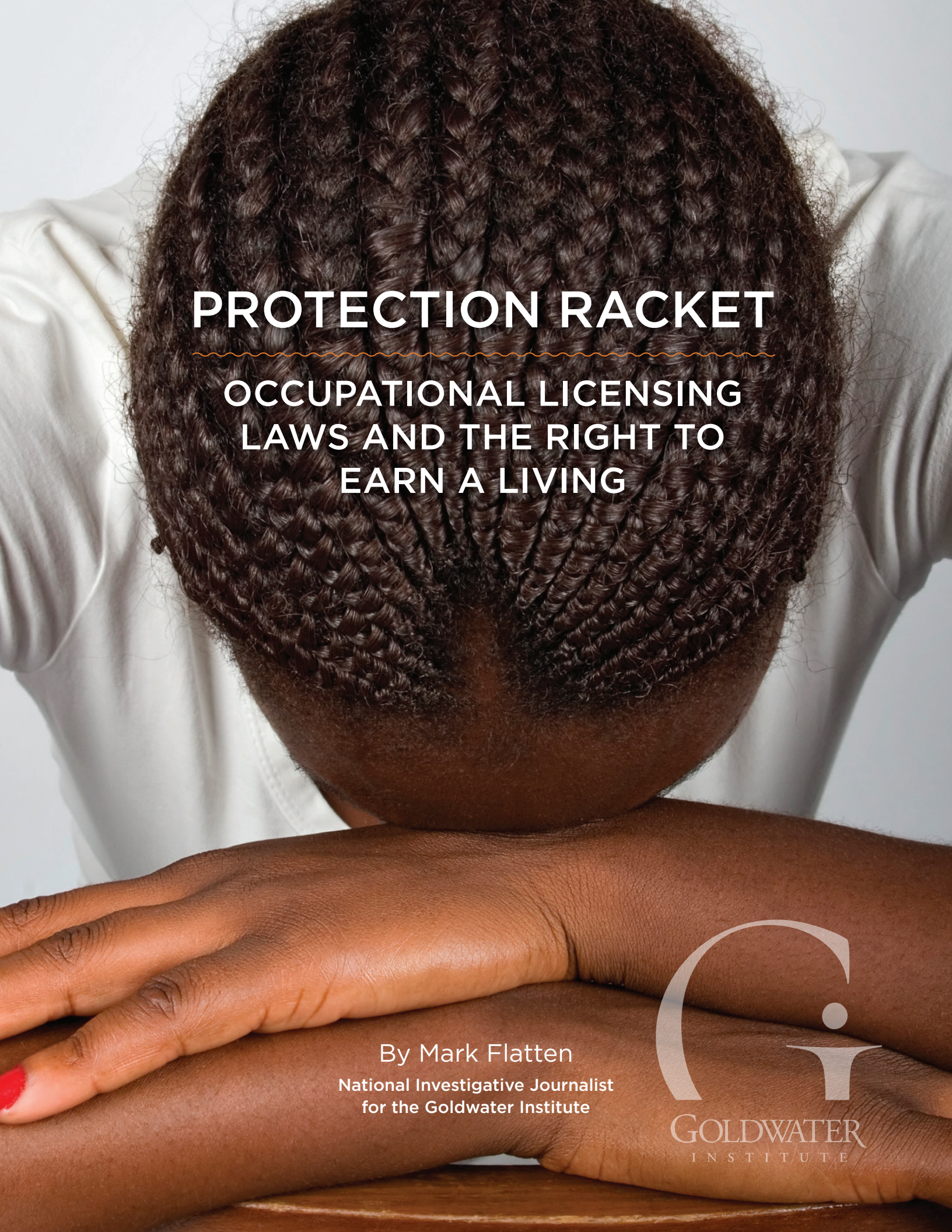


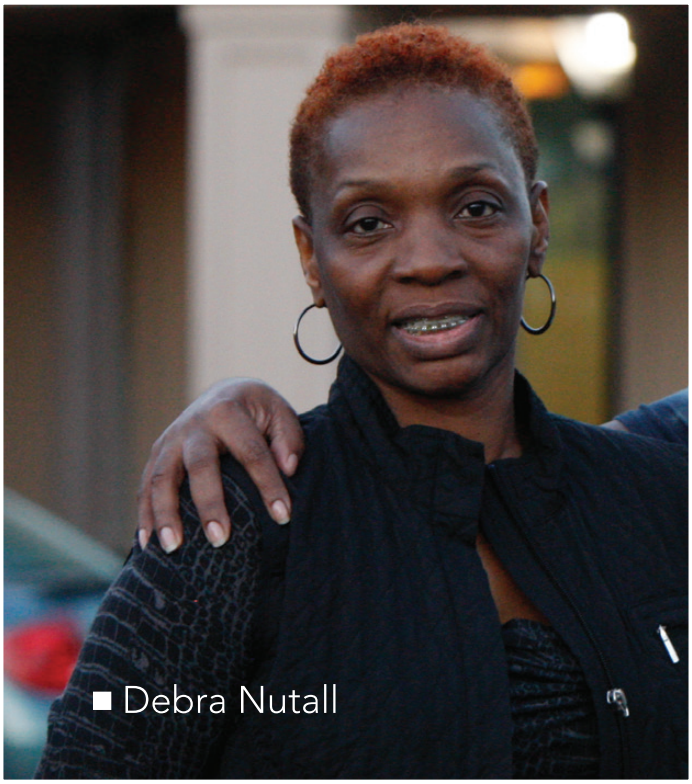
PROTECTION RACKET

OCCUPATIONAL LICENSING LAWS AND THE RIGHT TO EARN A LIVING

By Mark Flatten

National Investigative Journalist for the Goldwater Institute

GOLDWATER INSTITUTE



■ Debra Nutall

Debra Nutall lived the American dream, until the state of Tennessee took it away.

She started with nothing. Nutall was a single mother struggling to raise three children in a Memphis public housing project. She worked as a nursing assistant. But the job didn't pay much, and she survived on welfare and other public assistance.

It seemed there was little hope of getting out of the extreme poverty that surrounded her. Still, she was determined to build a better life, for her children and for herself.

"I did not want to raise my kids in public housing, but I didn't have a choice," Nutall said in a recent interview with the Goldwater Institute. "So I found a way to escape."

That way was braiding hair.

Nutall learned the skill of intricately twisting and locking down hair as a little girl, just as her mother and grandmother had done.

It was part of her history, her African American culture. The long braiding sessions on her front porch while she was growing up were also the center of the social structure in her neighborhood.

So she decided to turn it into a business.

Nutall did everything right, getting guidance and a tax license from the city to ensure she was complying with the law. For the first five years she braided hair in her home, coming up with new styles and techniques. They were so popular her customer base quickly grew beyond just friends and neighbors to include others who had seen her work and were clamoring for appointments.

Eventually, Nutall opened a storefront in Memphis, where she trained other low-income women in

her techniques, allowing them to work their way out of poverty.

"All of the techniques and styles that I have created, they come from my inner self," Nutall said of the profession she helped pioneer. "It's where beauty touches me.

"I never imagined it would take me as far as it did. I was able to buy my first home, my first car, and my children did not have to grow up in public housing, looking out at what's around us and not being able to escape . . . Moving into my first home—wow. I was able to buy it with my own earned money. That's something that came from me and I was very proud."

The Tennessee Board of Cosmetology put a stop to that.

Beginning about 1995, Nutall was barraged by threats from the board, which claimed braiding could be performed only by a licensed cosmetologist, even though the practice was not mentioned in the law and does not involve the use of any chemicals or sharp instruments. That meant that Nutall would have to spend about a year being schooled in haircutting and styling techniques she would never use, pass the state's cosmetology exam, and pay the board for a license.

Over the next 15 years, she tried to fight back, enlisting the aid of local state legislators and members of Congress as she struggled to keep her shop open despite the warnings from the board.

Finally, in 2010, Nutall gave up, "drained and exhausted."

"I'm so heartbroken because I started a business, and now it's nothing," Nutall said. "It leaves you no hope."

PROTECTION RACKET

Nutall and her business fell victim to occupational licensing laws. Usually passed by states, these laws require people to obtain a license to work in a given profession. The licenses often come at a steep price, requiring years of expensive schooling and hundreds of dollars in testing and application fees to qualify.

Licensing almost always comes at the behest of the regulated industries themselves rather than in response to consumer demands or some demonstrated need to protect the public, according to multiple academic studies and government reports.

The added regulation makes it tougher for newcomers like Nutall to enter the profession. By excluding competition, existing practitioners can charge about 15 percent more for their services, according to Morris Kleiner, a labor policy professor at the University of Minnesota who has authored several studies on the economic consequences of occupational licensing.

"If you're using government, you have a monopoly," Kleiner said in a recent interview with the Goldwater Institute. "So only individuals who meet these criteria are allowed to earn a living. Anyone else, if they try to get paid for performing those services, they are severely fined or could be sent to jail."

There is no clear health and safety benefit to licensing most of the occupations that are being regulated, according to critics ranging from conservative Republican governors to the Obama White House. Yet protecting the public from harm is the standard argument made by industry lobbyists seeking licensure.

Only about 30 professions are licensed in all 50 states. Most are licensed in only one state, according to a Goldwater Institute analysis of data compiled for the U.S. Department of Labor.

That shows licensing is unnecessary for most occupations, critics say. They argue if an occupation is licensed in only one state, and people in the other 49 do not suffer any negative consequences, then there is no reason to believe licensing is needed to protect consumers.

It's not just jobs most associated with clear health concerns, like doctors and nurses, that are licensed. Nor is licensing confined to trades that require a high degree of specialized training, like architects and engineers.

'SELF DEALING'

Cosmetology licenses are required to cut hair in all 50 states. Massage therapists, land surveyors, acupuncturists, and real estate agents also need a license in 40 or more states.

The law in Louisiana requires florists have a license. Other professions licensed in at least one state that lack an obvious health and safety component are interior designers, locksmiths, alarm installers, hypnotists, motion picture operators, parking valets, magicians, landscapers, horseshoers, and furniture upholsterers.

Enforcement of the licensing rules is typically done by state regulatory boards made up almost exclusively of those already working in the profession. The rationale is that the people most qualified to regulate a particular profession are those who already practice it.

Unlike trade associations, these boards can bring stiff fines and even jail time on anyone deemed to be in violation of the law or their own regulations. The reach of these boards extends beyond those who are licensed, and penalties can be assessed on workers whose jobs only tangentially relate to the regulated profession.

Giving state regulatory powers to boards controlled by active market participants poses a strong risk of "self-dealing," the U.S. Supreme Court wrote in a 2015 case that curbed the power of a dental board in North Carolina to shut down teeth-whitening services that were competing with licensed dentists.

"Even with occupations where some form of licensure can be justified, we have seen many examples of particular restrictions that are likely to impede competition and hamper entry into professional and other services markets, while offering few, if any, consumer protection benefits," Maureen Ohlhausen, commissioner of the U.S. Federal Trade Commission, said in an email interview with the Goldwater Institute. "Those types of restrictions may do more harm than good, leaving consumers with higher-priced, lower-quality, and less convenient services."

In short, occupational licensing has become a protection racket for politically powerful industries that are able to use the force of government to control monopolies, drive out competition, and punish upstarts in ways that would be illegal in other circumstances, according to detractors.

"Occupational licensing has grown not because consumers demanded it, but because lobbyists recognized a business opportunity where they could use government power to get rich at the public's expense," said Sen. Mike Lee, R-Utah, chairman of a Senate subcommittee that held a hearing on the burdens of occupational licensing in February. "Established professionals (who are almost always exempt from new licensing requirements) get state-sanctioned monopoly profits, lawmakers get campaign contributions from those licensed professionals, and lobbyists get a little taste from everyone involved. Everyone wins but the American public."

A similar—albeit less fiery—assessment was made by the White House in a report published in 2015 that warned occupational licensing is often unnecessary, creates a drag on the economy, and blocks people from getting good jobs.

"While licensing can bring benefits, current systems of licensure can also place burdens on workers, employers, and consumers, and too often are inconsistent, inefficient, and arbitrary," the White House study concluded. "The evidence in this report suggests that licensing restricts mobility across States, increases the cost of goods and services to consumers, and reduces access to jobs in licensed occupations. The employment barriers created by licensing may raise wages for those who are successful in gaining entry to a licensed occupation, but they also raise prices for consumers and limit opportunity for other workers in terms of both wages and employment."

ECONOMIC DAMAGE

Licensing comes at a high cost. Kleiner estimates about 2.8 million jobs are lost annually because of licensing. That's because the education, training, testing, and licensing requirements create a barrier to entry into a profession.

Without those requirements, more people would be able to work in those jobs. This would drive up competition and thereby drive down prices, Kleiner said.

Because competition is restricted, those already licensed in a profession can charge more for their services. That creates a wage premium of about 15 percent versus what they could charge if there was no licensing requirement, he said.

The result is a $203 billion drag on the economy annually as consumers are forced to pay more for the same service to licensed workers.

And the problem is getting worse.

In the 1950s, less than 5 percent of all workers in the United States were required to have a license to do their jobs. Today, between 25 percent and 30 percent of workers must have a license or some other form of permission from the government. While some of that growth can be attributed to changes in the workforce—more people doing jobs that have long been licensed—about two-thirds of the growth is because previously unlicensed professions have been added to the list of those being regulated, according to the White House report.

> "Occupational licensing has grown not because consumers demanded it, but because lobbyists recognized a business opportunity where they could use government power to get rich at the public's expense."
>
> **– Sen. Mike Lee, R-Utah**

Licensing is required for more than three-fourths of the jobs in the healthcare industry, more than two-thirds of the jobs in the legal profession, and more than half of the jobs in education, according to a study published in 2016 by the U.S. Bureau of Labor Statistics.

Occupational licensing now affects more workers than either the minimum wage or unions, Kleiner said.

The United States licenses a greater percentage of the workforce than the European Union, where the various nations license between 9 percent and 24 percent of their workers.

Even with the higher costs associated with licensing, there is no evidence it brings any better quality to most professions, Kleiner said.

Since poor and middle-class workers are least likely to afford the time and expense of extensive

training to get a license, even for a safe and simple trade, they are the ones who are hurt most by licensing laws, he said.

Sandy Meadows was one of those people.

'BEG FOR CHARITY'

Meadows was a high school dropout who moved to Baton Rouge in 2000 to start a new life shortly after the death of her husband. She was working as a floral clerk at a grocery store, and eventually was made the floral department's supervisor, responsible for ordering flowers, managing the budget, and overseeing day-to-day operations.

But Louisiana law required florists to have a license. Meadows could only work in the store's floral department if it also employed a licensed florist, an inspector from the Louisiana Horticulture Commission warned. Both she and the store faced stiff fines if Meadows continued to work without a license.

Meadows tried to qualify but failed the licensing exam. At the time, floral arrangers were required to pass both a written test and a subjective judging of their work. So even those who passed the written test could be denied a license because judges in the subjective portion—all licensed florists themselves—didn't like the arrangement for aesthetic reasons. Fewer than half of the people who took the test at the time passed.

The grocery store where Meadows worked was forced to hire a licensed florist. Since it did not need two people, she lost her job.

With the help of the Institute for Justice, Meadows and two other floral arrangers sued the state in 2003, arguing there were no legitimate grounds for requiring a license to arrange flowers.

They lost.

A federal judge ruled in 2005 that Louisiana had the power to license florists, even if it was the only state to do so, and regulation was done for no better reason than to enhance the reputation of the state's floral industry.

Meadows' lawyer, Clark Neily, describes going to her home to discuss the case one day in 2004, a few weeks after Meadows had gallbladder surgery. Meadows was unemployed and on the brink of being homeless. Unable to find another job, she had no money. Her electricity had been turned off because she could not afford to pay her electric bill. When Neily found her, she was lying in the corridor outside her apartment, physically distressed and being fanned by a neighbor.

"She died a few weeks later—alone, unemployed, and in poverty because the state of Louisiana had a corrupt licensing law on the books and a federal judge just determined he would turn a blind eye to the obvious corruption of the law and pretend as if the state might actually be trying to benefit consumers instead of the anticompetitive interests of the Louisiana State Florists' Association," Neily told the Goldwater Institute.

The judge's decision to uphold the law was appealed. But in August 2005, Hurricane Katrina hit, wreaking havoc on Louisiana.

One of the Institute for Justice's clients left the state and another retired.

With two plaintiffs gone and the third one dead, the 5th U.S. Circuit Court of Appeals dismissed the challenge to Louisiana's florist licensing law as moot.

The Institute for Justice did find new clients, and in 2010 Gov. Bobby Jindal signed a bill that eliminated the subjective portion of the state's florist licensing regime. A license is still required, and applicants must still pass the written test.

"You're essentially telling that person in many cases 'You can't work, so go collect welfare. Go beg for charity from your relatives or whatever. You are not permitted to be a productive member of society and participate in the economy,'" Neily said. "The real tragedy is we have a system that has evolved in such a way that the people with greater political influence who want to sandbag would-be competitors and entrepreneurs have essentially unfettered ability to do that."

CHIMNEYS TO HORSESHOES

There are almost 8,100 individual job titles that require a license in at least one state, according to the Goldwater Institute's analysis of data compiled by careeronestop.org for the U.S. Department of Labor. That represents about 1,000 distinct occupations.

The difference in those numbers is due to some professions having multiple levels of licensure in some states. For instance, in Iowa there is a single license to be a schoolteacher. In Delaware, there are about 80 different licenses for teachers, depending

on subject and grade level. Part of the Goldwater Institute's analysis was to standardize occupational titles for comparison between states. So in that analysis, "teacher" is listed as a single occupation in both Iowa and Delaware.

The numbers only represent licenses issued by states. Cities, counties, and the federal government also frequently license professions.

The data, which comes directly from states, does have its flaws.

Not all states report complete data, so some licenses do not show up. Louisiana does not list its florist license, for example.

To fill in some of the blanks, additional research was done using the websites of state regulatory agencies where omissions seemed obvious. For instance, every state except Mississippi listed "architect" as a profession requiring a license. Mississippi licenses them too, according to the state's website, even though it is not listed in the database.

There also is a degree of subjectivity that goes into combining multiple licenses into a single profession, as was done with the teachers in Delaware.

But despite those caveats, the database does provide some big-picture insights into the level of licensing in the various states.

Fewer than 30 occupations are licensed in all 50 states, according to the Goldwater Institute's analysis and follow-up research using the websites of regulatory boards and industry groups. Most of those are in the medical, dental, and mental health professions such as doctors, nurses, dentists, and therapists.

Other professions with licenses or similar requirements in all 50 states include accountants, architects, engineers, and attorneys.

But some of the jobs licensed in all or nearly all states have neither the obvious health concerns of doctors and nurses, nor the specialized training and expertise of architects and engineers.

Landscape architects, the people who use plants and other materials to design outdoor spaces, are licensed in every state.

Other professions licensed in 40 or more states include funeral directors and morticians, dieticians and nutritionists, acupuncturists, real estate and insurance agents, hearing aid fitters, and dental hygienists.

The results of the Goldwater Institute's analysis are similar to previous studies. The White House report cited research done by the Council of State Governments in the 1990s showing that of more than 1,100 professions licensed or regulated in at least one state, fewer than 60 were licensed in all states.

Even more telling than the number of professions licensed in most states is that more than half of the occupations listed in the database are licensed in only one state. That shows there is no legitimate public safety need to license an occupation in a single state, since consumers are not being harmed in the other 49, said Paul Avelar, an Institute for Justice lawyer.

"If other states have recognized that there's no need for a license, then that's a license we'd ought to think seriously about eliminating ourselves because it shows that the public health and safety will be just fine," he said.

Few professions are too mundane to regulate.

➔Chimney sweeps, the people who clean and maintain chimneys, are licensed in Vermont.

➔Parking valets are licensed in West Virginia.

➔People who sell, service, or install portable fire extinguishers are licensed in Arkansas and Tennessee.

➔Iowa has separate licenses for manure applicators and manure service representatives.

➔Minnesota licenses animal waste technicians, who also spread manure for a living. Minnesota also is the only state to license horse-teeth floaters, the people who file points off a horse's teeth, which become sharp over time.

➔Arkansas and New York license farriers, more commonly known as horseshoers.

➔California has eight separate licenses for furniture upholsters, suppliers, builders, and sellers.

➔Massachusetts licenses horseback riding instructors and motion picture operators.

➔Appliance installers need a license in South Dakota, and sign installers need one in California.

➔Illinois licenses wardrobe attendants and restaurant busing staff.

➔Grease processors are licensed in Wisconsin.

➔Kentucky, Mississippi, Wisconsin, and New Mexico license art therapists. Wisconsin also licenses dance therapists. North Dakota and Nevada license music therapists, and New Hampshire licenses recreational therapists.

➔Taxidermists are licensed in 16 states. Hunting and fishing guides and outfitters are licensed in 17.

➜Auctioneers are licensed in 21 states, beekeepers in two, and camp trip leaders in one.

➜New Jersey licenses movers and warehousemen. New Mexico licenses animal artificial insemination technicians, and New York licenses milk testers.

➜Arkansas has separate licenses for people who design, manufacture, install, and clean septic tanks.

Each of those job titles represents a niche cut out to protect a given industry, said Neily, the lawyer who represented Meadows when she tried to fight Louisiana's florist licensing law.

LAWS AND BURDENS

California licenses 213 different occupations, the most of any state. Mississippi licenses the fewest, 40.

But just looking at the list of licensed occupations can be deceiving because it does not necessarily reflect how burdensome or far-reaching a state's licensing requirements are. Fourteen states have separate licenses for hair braiders, according to the Institute for Justice. Most require between 300 and 600 hours of education, whereas the typical cosmetology curriculum is about 1,500 hours.

Among the other states, some do not require any license to braid hair. Others require a full cosmetology license. So the burden to braid hair may be more or less if a state does not separately license the occupation, depending on the scope of other laws and how the regulatory boards of other professions interpret the statute.

There also are differences in the level of regulation.

Licensing is the most restrictive. It requires anyone practicing the profession to first get permission from the government.

Certification allows others to practice the trade, but makes a license or certification available to those who meet minimum requirements. These are sometimes called "right to title" laws because they allow only workers who have obtained the state title to claim they are licensed or certified.

One example is interior designers: two states require a license to practice; another 26 states have titling laws but do not require a license.

Average qualifications for licensing and certification among all professions are similar.

About 22.4 percent of the working civilian population has a license to work, and about 3 percent has

a certification but no license, according to a report published by the U.S. Bureau of Labor Statistics in April 2016. Other academic studies put the percentage of licensed occupations closer to 30 percent.

Simply counting the number of licensed occupations can be deceiving. Iowa has the highest percentage of its workforce covered under licensing laws, about a third of all workers, according to the White House report. Yet in the Goldwater Institute's analysis, Iowa ranked 29th in terms of the number of occupations licensed.

South Carolina has the lowest percentage of its workforce licensed, about 12 percent. It ranked 24th in the number of occupations it regulates.

What all of this shows is that deciphering which states impose the heaviest licensing burden is complex, said Tim Keller of the Institute for Justice. What is most important in gauging the burden that licensure puts on an occupation is whether a license is required to practice, and the educational, experience, and testing requirements imposed.

WAGE PREMIUM

Pressure to license a trade almost always comes from those already in the industry, according to a variety of academic studies cited in the White House report. This is true whether industry groups are seeking new licensing requirements or, as is more common, to prevent existing restrictions from being weakened or repealed.

The industry benefits by stifling competition, thereby driving up wages.

The education, experience, and testing requirements of licensing create a barrier to entry, meaning fewer people can practice the occupation.

Since there is less competition, those already practicing the profession can charge more.

The wage premium that comes from creating this "closed shop" allows existing practitioners to charge about 15 percent more than they could if their occupations were unlicensed.

So for those already in the industry, concentrated benefits make it worthwhile to invest the time and money to lobby legislators to pass or maintain the restrictions.

The net result is consumers pay more for the regulated service. Estimates cited in the White House report say the limits on competition caused by licensing raises prices between 3 percent and 16 percent, costing consumers about $203 billion annually.

But those costs are spread across a large number of customers, so the price increase of each individual transaction is so small as not to be noticed. That means most people have little incentive to take time off work or away from their families to show up at a legislative hearing to testify against a licensing bill.

"Practitioners have a greater interest in licensing and may be better able to influence policy through their active professional associations," the White House report says. "Empirical work suggests that licensed professions' degree of political influence is one of the most important factors in determining whether States regulate an occupation."

What legislators see is lobbyists for an industry asking to be licensed, practitioners of the industry testifying in favor of regulation, and no organized opposition from consumers. In many cases, the money generated through licensing fees not only covers the state's cost of regulating the industry, but can actually generate a surplus for the state's general fund.

That makes it easy for legislators to pass or protect licensing laws, Kleiner said.

"It's really the perfect storm," Kleiner said. "You have a group that is very intense in their interests and you have the diffused public. They don't care. They're not lobbying you."

Equally problematic is that legislators, who lack expertise in a particular profession, typically let the industry's lobbyists write the language of the licensing bills. This results in overly broad laws that can sweep in jobs only marginally related to the regulated occupation itself, as was done by cosmetology boards deciding they should regulate hair braiders, said Timothy Sandefur, vice president for litigation at the Goldwater Institute.

Regulatory boards typically get to decide for themselves what constitutes the practice of their professions. That is especially problematic because the boards are controlled by people already working in the industry, since they are considered to be the ones with the expertise needed to oversee the profession.

"You've got the foxes guarding the henhouse," Sandefur said. "It's going to be in their interest always to expand the reach of the regulatory authority. And if they are industry practitioners, it is in

their financial best interests to block anything that might compete with them.

"It's allowing the industry to create its own monopoly by going to the legislature and saying 'You can trust us with this authority to regulate our own competition, to outlaw our own competition, and to do so literally with guns drawn in some cases.' Nobody can be trusted with that kind of power."

Industry advocates seeking or defending licensure typically argue it is needed to protect the public's health, safety, or welfare. In some professions it makes sense, even to most critics. There is an obvious health and safety benefit to licensing doctors, for instance.

For other professions the connection is not so clear.

Shampooing for example.

ILLEGAL SHAMPOOING

Tammy Pritchard of Memphis wants to shampoo hair. That's all.

She doesn't want to cut it.

She doesn't want to dye it.

She doesn't want to apply chemicals to it that are any harsher than over-the-counter suds available at drugstores.

But she can't because she does not have a shampooer's license in Tennessee.

Pritchard is Debra Nutall's sister. She worked for years shampooing customers' hair in Nutall's braiding salon before it closed.

Getting a specialty license to shampoo hair in Tennessee requires applicants to complete 300 hours of schooling and pass two tests. Short of that, anyone wishing to shampoo hair needs a full cosmetology license, which requires 1,500 hours of training and as much as $35,000 in tuition.

Anyone caught shampooing hair for a fee in Tennessee without a license faces criminal penalties of up to six months in jail and $500 in fines. Civil penalties can be as much as $1,000 for each violation.

No cosmetology school in Tennessee offers a shampooing curriculum.

As a result, there were only 36 licensed shampoo technicians in Tennessee, according to a May 2016 column in *Forbes* Magazine. The Memphis and Nashville metropolitan areas have the highest average wages for shampooers in the nation, according to data from the U.S. Bureau of Labor Statistics cited in the column.

Given the tiny income Pritchard could make from the trade, it would not make sense for her to invest the time and money to obtain the license, even if there was a school in the state that taught the course, said Braden Boucek, director of litigation for the Beacon Center of Tennessee, which is helping Pritchard challenge the state's licensing law for shampooers.

Pritchard, a police officer, just wants to shampoo hair on the side, partly to earn extra money and partly because of the social camaraderie that comes from working in a hair salon.

There is clearly no health or safety reason to require a license to shampoo hair, as five states do, Boucek said.

"I can teach you everything you need to know about washing hair in three sentences," Boucek said. "This is not a theoretical law. They are enforcing it. I've got a desk drawer full of cease and desist letters and people who have been fined and cited for this. For shampooing."

Of the 14 members of the Tennessee cosmetology board, all but two are required by law to be employed in the industry.

Boucek does not have much hope the Tennessee Legislature will change the law, because the cosmetology industry has the political muscle to prevent reforms.

"Everybody agrees that this is stupid at a certain level of generality," he said. "But when it actually comes time to addressing the law, this is going to be met with intense and determined, well financially heeled opposition in favor of the entrenched interests. So it remains to be seen as to whether or not they can actually buck that and repeal this law."

A spokesman for the Tennessee cosmetology board did not respond to a request for an interview.

BAD HAIRCUT

Myra Irizarry Reddy agrees that a full cosmetology license, or even a specialty license, should not be required to shampoo hair.

Reddy is the government affairs director for the Professional Beauty Association, the main industry trade group.

Tammy Pritchard could face jail time, fines and civil penalties if she shampoos hair without a license in Tennessee.

The shampooing licenses were created to fix overly restrictive state laws that made it difficult for students to wash hair while seeking a cosmetology license, Reddy said.

"It wasn't because we want a shampoo license," she said. "That would be silly to do that."

Asked about Pritchard's case, Reddy added, "That doesn't even make sense to me."

Regulation of hair braiders does warrant some minimal training and testing because there are legitimate health and safety concerns, she said.

The PBA's position is it should not require a full cosmetology license to do natural hair braiding, so long as no chemicals or cutting are involved. There should be a minimal amount of training in basic sanitation and a test to obtain a hair-braiding license. That could be 10 or 12 hours, not the 300 or more hours many states require, she said.

Avelar of the Institute for Justice said the PBA's position has changed recently because hair-braiding laws have been struck down in several states through lawsuits brought by his organization. Reddy's arguments that hair braiders need training, testing, and licensing to maintain sanitary standards are a ridiculous attempt by the industry to maintain its grip on the trade and stifle competition, he said.

"It takes all of 30 seconds to learn how to clean combs," Avelar said. "Knowing how to wash your hands is something that we learn in school, but we call it primary school."

Sixteen states require a cosmetology license to braid hair, according to the Institute for Justice. Another 14 states have separate braiding licenses. Eighteen states have no license requirements, and two states require registration only.

Reddy said that while there are minimal health and safety concerns for hair shampooers and braiders, there are real dangers involved in cosmetology.

Cosmetologists use harsh dyes and other chemicals, some of which are only available to licensed professionals, she said. They are trained to mix and apply them while watching for adverse reactions that can cause serious injuries or burns.

2,100 HOURS

Of education required to get a cosmetology license in Iowa, Nebraska, and South Dakota.

1,000 HOURS

Of education required to get a cosmetology license in Massachusetts and New York.

Manicurists and haircutters use sharp instruments and can draw blood or cause infections if improperly handled, Reddy said.

"You're not going to die from a bad haircut," she said. "You're not going to get an infection from a bad haircut. But diseases can be transferred in a salon setting that go beyond the haircut."

The PBA is supportive of some reforms, notably reducing the number of training hours a student needs to obtain a cosmetology degree, Reddy said. New York and Massachusetts require 1,000 hours of education to obtain a cosmetology degree. Other states require as many as 2,100 hours.

There is no significant difference in complaints against cosmetologists in states with the lower training requirements, so that is the standard that should be adopted, Reddy said.

"To me, if it's being done at a thousand hours, all states should be at a thousand hours," she said.

HEALTH AND SAFETY

The standard pitch for an industry seeking licensing is that it is necessary to protect the public. That is a better argument than asking for regulation as a means of economic protectionism.

Legislators and some judges routinely accept even the most ridiculous claims by industry lobbyists that consumers will be harmed without licensure, Avelar said.

"Their real interests are in creating a cartel," he said. "But they can't just come out and say 'We want to create a cartel,' because that's not allowed. So they are desperately trying to glom on to anything they can say is a health and safety risk."

In the Louisiana florist licensing case involving Sandy Meadows, a retail florist testified that licensed professionals are trained to recognize infected dirt and flowers, and to ensure there are no exposed sticks or wires that could be a danger to customers.

That was enough for the judge to side with the state. He was not concerned that Louisiana was the

only state to license florists, or that the law might have been passed for economic rather than safety reasons.

"Industry protectionism as a goal of such legislation does not invalidate it," the judge said in his ruling.

Gary Bullock, president of the Louisiana State Florists' Association, said in a recent interview that safety concerns about florists are minimal and that the law's primary purpose is to ensure quality of flower arrangements.

Infected dirt, exposed wires and the like are concerns, but those are things that can be remedied with basic sanitation and safety procedures, he said.

"You don't have to have a license for that," Bullock said. "When someone calls us, they know we are a licensed, qualified florist. Otherwise, in some parts of the country, anybody can just go poke flowers without a license."

Kleiner said lawmakers too often accept the arguments of industry lobbyists that licensing is needed to protect the public in some way. Every job arguably has some risk. What's important is balancing that risk against the consequences of lost jobs, lost opportunities, and higher costs that come with licensing.

"You can't drive safety down to zero," Kleiner said. "You don't get out of bed in the morning if you're afraid you're going to get run over by a car."

DANGEROUS DESIGNS

Another licensed profession that critics say lacks any public safety justification is interior designers.

The industry has spent decades lobbying for licensing laws using the health and safety argument.

Florida and Nevada both require a license to practice interior design, as do Washington, D.C., and Puerto Rico. Another 26 states have titling laws. That means a license is available for anyone wishing to call themselves a licensed interior designer. However, people can practice the profession without a license as long as they do not make that claim.

The laws only apply to designers of commercial space, not private homes.

Standard requirements are six years of combined education and experience, which typically means a four-year college degree in interior design plus two years of experience.

Designers do more than just pick out paint colors and fabric patterns, said Jim Brewer, vice president of government affairs for the American Society of Interior Designers (ASID). That's what interior decorators do, and they are not licensed in any state, he said.

The designer's job is to lay out interior spaces. They might reconfigure interior walls and must place furniture and decorations in a way that does not impede access to exits in case of a fire. They also ensure that building and fire codes are followed, and that other laws such as the Americans with Disabilities Act are complied with. Designers also select decorations, fixtures, furniture, and other materials that do not create a fire hazard or emit toxic chemicals if they do burn.

"There's a variety of things in terms of the public safety world that we are interacting with on a pretty significant basis to ensure that the space that we're designing, that ends up being constructed, is safe for public use," Brewer said.

The example that ASID has long cited to demonstrate the need to license interior designers is the 1980 MGM Grand Hotel and Casino fire in Las Vegas, which led to the deaths of 87 people, mostly through smoke inhalation on the upper floors.

There was plenty of blame for the disaster, according to a series of federal, state, and local investigations, as well as the lawsuits that followed. None of it was laid on interior designers.

The fire began with an electrical short in the delicatessen, which was closed at the time. It quickly spread through the casino, fueled by materials used in the building's construction, furniture, and decorations, according to a Clark County Fire Department report.

- The smoke billowed through stairwells, elevator shafts, air-conditioning ducts and seismic joints, some of which were improperly designed and built.
- There were no fire-suppression sprinklers in the deli or the casino because they were not required.
- Fire alarms did not sound because they had to be manually triggered, and nobody pulled the lever.
- Fire extinguishers were not available to those who initially discovered the blaze.
- Substandard ceiling tiles were affixed to the casino with flammable adhesives.
- Safety features were improperly installed.
- Even the carpet padding and water pipes emitted toxic smoke when they burned.

"For a moment in time, they may forget their illness. The activity of going through something like this was the highlight of their day."

– Lauren Boice

➔Subsequent investigations uncovered 83 building code violations.

Architects, engineers, plumbers, electricians, air-conditioning duct installers, suppliers, contractors, and even the Clark County fire inspector were assessed partial blame for the tragedy in the $138 million settlement that cleared more than 1,300 lawsuits filed against 118 defendants.

Only one of those defendants was identified as an interior decorator, and that claim was dismissed without penalty, according to court documents.

Neily said ASID's claim that deaths at the MGM fire could have been prevented by qualified interior designers has repeatedly been proven bogus.

"ASID's assertion that licensing interior designers would promote public safety and avoid tragedies like the MGM fire is empirically unfounded and factually false," he said. "More than a dozen state agencies have conducted exhaustive analyses of proposals to license interior designers and unanimously concluded there is no evidence that doing so would benefit the public in any way. Simply put, the whole public safety argument is a sham."

In its 2007 report Designing Cartels, the Institute for Justice found that about 95 percent of all complaints against interior designers had to do with whether they were properly licensed, not quality or safety issues.

SCOPE OF PRACTICE

The power to enforce licensing laws is typically vested in regulatory boards made up almost exclusively of industry insiders, with virtually no oversight from disinterested state officials. The thinking goes that no one understands how to regulate a profession better than the practitioners themselves.

That gives unprecedented power to the very industry that sought the state's power to regulate itself, said Sandefur of the Goldwater Institute. These boards have the power to set, or at least influence, the minimum requirements for entry into the profession. They can impose heavy fines and even jail time on those deemed to have fallen short of their standards of practice. No private organization has that much power, and the force used to control competition through licensure would be illegal outside of government, Sandefur said.

Regulatory boards run by industry insiders also have powers beyond their own profession. They can unilaterally decide that certain jobs fall under their pur-

view, and therefore are subject to their regulations.

That's what happened when Lauren Boice operated a service connecting cosmetologists with hospice patients who were unable to go to a beauty salon.

Boice was targeted by the Arizona State Board of Cosmetology even though she had never given a haircut or trimmed a fingernail of any of her clients. In fact, she doesn't even meet most of her customers face-to-face.

Through her business, Angels on Earth, Boice sets up appointments for state-licensed cosmetologists to go to customers who are homebound or in nursing facilities because of age or infirmities. The cosmetology board concluded this was the equivalent of running a beauty salon. That meant she needed to obtain a salon license, establish a physical location she would never use, and essentially turn over control of her business to a licensed cosmetologist.

Boice, herself a two-time cancer survivor, started the business while working as a certified nursing assistant at a hospice program in Kansas City, Mo. She realized how much a simple cosmetic makeover could improve the spirits of dying patients and ease the trauma of visiting families.

After moving to Arizona in 2008, Boice started the same business in the Tucson area, running the telephone referral service out of her home and using whatever money she earned to pay her contracted cosmetologists and to buy supplies.

"I do not make one dime out of this business," she said. "This is my community contribution because I know how many people need something like this."

Little things like a shampoo or manicure is emotionally uplifting to people who are confined to their homes or nursing facilities, Boice said.

"For a moment in time they may forget their illness," she said. "The activity of going through something like this was the highlight of their day, and it just absolutely blessed my heart to be able to help these people."

In 2011, the cosmetology board sent Boice a notice that she was breaking the law. Five of the board's seven members work in the industry.

Boice said she tried to comply with the ever-changing demands of the board. But each time she complied with one requirement, new ones were added.

Finally, Boice had enough. She contacted the Goldwater Institute, which filed a lawsuit in 2011 challenging the cosmetology board's authority to regulate her business.

The board's actions "exceed any rational and legitimate public health and safety concerns necessary to protect the public," the lawsuit said.

The board backed down 16 months later, agreeing in a settlement not to attempt to assert its jurisdiction over Boice or any similar service that dispatched cosmetologists to patients confined to their homes or care facilities.

'BECAUSE THEY COULD'

Christina Sandefur, the Goldwater Institute lawyer who represented Boice, said bureaucratic inertia rather than common sense seemed to drive the board's actions.

"Lauren spent years battling the board in and out of court just to arrive at the commonsense conclusion that a cosmetology board doesn't have the power to regulate a phone dispatch business," said Sandefur, now the Goldwater Institute's executive vice president. "I believe Lauren and her clients fell victim to the bureaucratic mindset . . . Government agencies often lose perspective. They lose sight of purpose. When approaching a new business their initial question is 'how do we regulate' without first considering 'should we regulate?'"

Boice also blamed the board's bureaucratic mindset, saying agency officials did not bother to understand her business, but instead found ways to regulate it.

"They did it because they could," Boice said. "I think they like to exert their power over the little guys.

"I wasn't taking business away from any salon, because these clients of mine can't get to a salon anyway."

Cosmetology boards have been particularly aggressive in going after services only tangentially related to the traditional beauty industry, such as hair braiders.

Other occupations that have fallen under an expanded scope of practice of licensing boards are casket sellers, which have been repeatedly targeted by funeral boards; and teeth whiteners, a frequent target of dental boards.

All of the most recent and relevant decisions from federal appeals courts on the issue of economic protectionism through licensing involve efforts by industry-controlled boards to expand their authority over occupations outside the traditional scope of their professions. Three of these cases involved people who made or sold caskets and other funeral-related merchandise, but did not handle bodies or perform funerals. Two involved teeth whiteners who were not licensed dentists. One involved a man who installed spikes and other barriers to keep rodents and other pests out of buildings, but did not use chemical pesticides.

Part of the problem is overly broad statutes. When a profession is licensed, the language is normally drafted with the help of industry representatives. It is in their interest to ensure the language in the law is as expansive as possible, which allows regulatory boards to go after jobs that may not even have existed when the laws were written.

EASING THE PAIN

With broad and undefined statutes, regulatory boards made up of industry practitioners have free rein to interpret the law in ways that best protect their profession, said Celeste Kelly of Tucson, who now finds herself entangled in Arizona's expansive veterinary licensing law.

Kelly spent her life around horses. While volunteering at a riding-horse stable, she saw how stiff and sore the animals got from their hard rides. She'd rub them down, but decided she wanted to learn more and discovered the practice of animal massage.

Beginning in 2003, Kelly took several education courses and obtained private certifications before starting her own business, which grew through referrals from both customers and local veterinarians.

Kelly massages horses. That's all she does. She does not diagnose any ailments. She does not administer medication or perform surgery.

Yet the Arizona veterinary board in 2012 issued a cease-and-desist order claiming Kelly was illegally practicing veterinary medicine without a license. Civil penalties were $1,000 per violation. Criminal charges could also be sought. Kelly faced the threat of six months in jail and an additional $2,500 in fines.

"It's a pain in the butt," Kelly told the Goldwater Institute. "If it wasn't such a ludicrous waste of state money it would be laughable."

Kelly sued the veterinary board in March 2014, arguing horse massage is not veterinary medicine.

Part of the problem is Arizona's law, which is similar to those in most other states, is so broad that just about anything done for an animal could be interpreted as practicing veterinary medicine, said Diana Simpson, a lawyer at the Institute for Justice who represents Kelly and two other animal massage therapists.

'TERRIFYING POWER'

While the Arizona statute makes no mention of animal massage, it does define the practice of veterinary medicine as administering any drug, treatment, operation, or manipulation meant to cure, correct, or ease "any animal condition, disease, deformity, defect, wound or injury for hire."

That could be anything, even recommending a different bit in the horse's bridle, Kelly said.

Getting a veterinary license requires a four-year veterinary degree that can cost more than $150,000, according to the lawsuit. No veterinary school in the United States is required to teach animal massage.

Licensed veterinarians are unlikely to perform animal massages because there is not much money in it, Simpson said. So if the board is successful, it would effectively prevent customers from legally hiring people to massage their horses.

> "It's a very terrifying power. It is rent seeking in its purest form."
> **– Diana Simpson, lawyer, Institute for Justice**

The board's position is that animal massage may constitute the practice of veterinary medicine, depending on the circumstances. That vague standard is dangerous, particularly given the board's makeup, Simpson said.

Of its nine members, five are licensed veterinarians by law. Other members specified in the statute are one certified veterinary technician, two public representatives, and one representative of the livestock industry.

"It's a very terrifying power," Simpson said. "It is rent-seeking in its purest form. It allows them to

“I have tried very hard to make sure that what I offer my clients is the best I can offer because these animals deserve it.”
– Celeste Kelly
Equine
Massage

“The bottom line is it was greed. It was a few high, influential owners of funeral homes.”
– Mark Coudrain

use regulation and the whims of their enforcement to make pretty significant policy. That's really scary because there is no limit on their ability to do that."

'THE KITCHEN SINK'

Victoria Whitmore, executive director of the Arizona veterinary board, defended its conclusion that individual circumstances will dictate whether an animal masseuse needs a veterinary license. Simply massaging a horse may not be veterinary medicine, she said. But if the individual masseuse does other things such as telling the owner what is wrong with the horse, that falls under diagnosing the animal.

The Arizona statute is broad and "kind of throws in the kitchen sink," Whitmore said. That means it can be interpreted to cover a broad range of services that are not specifically mentioned, including animal massage.

In the end, the board is just doing its job by enforcing the law, she said.

Kelly said she continues to ply her trade, despite the cease and desist orders from the board.

"I have tried very hard to make sure that what I offer my clients is the best I can offer because these animals deserve it," she said. "They did not ask to do what they're doing, and they don't deserve to do it in pain."

There are generally two reasons why regulatory boards will expand their scope of practice, said Keller of the Institute for Justice. The first is to reserve a service for the licensed industry and cut out any competitors. This was done in a recent case in which the Connecticut dental board concluded that the booming industry of teeth whitening constituted the practice of dentistry and could only be done by a licensed dentist. The federal appeals court upheld the board's action.

Other courts have stopped such attempts at occupational encroachment.

The other major reason boards expand their authority is to take control of occupations only marginally related to the licensed industry.

That is what the Arizona veterinary board is doing with Kelly.

That is what cosmetology boards around the country have done to hair braiders.

That is what the funeral industry has repeatedly done to casket makers and others who try to sell funeral-related merchandise without a license.

'RULEMAKERS' POCKETS'

For generations, the 38 Benedictine monks at St. Joseph Abbey in Louisiana raised money through timber sales to pay for their healthcare. But after Hurricane Katrina wiped out their timber stands, the monks turned to another tradition to raise funds, building caskets.

The monks had long constructed simple wooden boxes to bury their own dead. After Katrina, Mark Coudrain, a deacon in a nearby church and himself a former cabinetmaker, suggested the monks could turn their tradition into a business.

After investing about $200,000 in a wood shop, in 2007 the monks began offering two basic caskets to the public priced at $1,500 and $2,000, significantly less than what funeral homes charged.

This drew the attention of a local mortician, the chairman of the Louisiana Funeral Directors Association's legislative committee, who filed a complaint with the state Board of Funeral Directors and Embalmers.

The nine-member board had four licensed funeral directors, four embalmers, and only one member who was unaffiliated with the industry.

The board issued a cease and desist order, claiming that selling caskets amounted to providing funeral services, even though the monks never touched or even saw the body and did not hold funerals.

All the monks were doing was building, selling, and shipping the wooden caskets, which are not even required for burial under Louisiana law.

The board insisted the abbey would need to become a licensed funeral establishment. This required building a parlor for 30 people, a display room for six caskets, an arrangement room, and embalming facilities.

The abbey would also need to hire a licensed funeral director.

Unless the monks complied, they would be subject to fines and jail.

The monks challenged the board's action, claiming that selling caskets posed no health and safety

concerns and the case came down to economic protectionism. The 5th U.S. Circuit Court of Appeals agreed in a 2013 ruling, which held pure economic protectionism is not sufficient grounds to license an occupation.

The court ruled that licensing is not a valid state interest when it amounts to "the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets."

Coudrain said that while the case was stuck in court, the funeral industry tried repeatedly to get the monks to end their fight, offering to guarantee they would buy a certain number of the caskets themselves as long as the Abbey did not sell them directly to the public. The monks refused, despite the fear that losing would be financially devastating, Coudrain said.

"The bottom line is it was greed. It was a few high, influential owners of funeral homes," Coudrain told the Goldwater Institute.

"The thought process on the monastery side was that's not why we're doing this," he said. "We're doing this to be with people at a time of need. There's a whole ministry part to it besides the financial.

"It did get to the point that they did realize we're being taken advantage of here, and that's just not right, so we're going to fight it."

Officials at the Louisiana State Board of Embalmers and Funeral Directors referred questions to board members. The Goldwater Institute attempted to contact the current board members who were serving at the time the monks' case was in the courts. None would comment.

CONFUSED INTERESTS

Putting the power to regulate a profession in the hands of current practitioners carries the risk that they will put their own economic interests ahead of the public's, said Ohlhausen, the FTC commissioner. It may not be done consciously or maliciously. Rather board members with a financial stake in their own decisions risk "confusing their own interests with the State's policy goals," she said.

That is why the Supreme Court's decision in the North Carolina teeth-whitening case was so important. It required some independent state oversight of regulatory boards, which is supposed to ensure they are serving consumers and not their own industry, Ohlhausen said.

It was the FTC that brought the North Carolina case.

"Occupational regulation can be especially problematic when the state delegates regulatory authority to a nominally 'independent' board dominated by active market participants who are members of a single occupation—economically interested private actors," Ohlhausen said. "That is not just industry self-regulation, but regulation of commerce by organizations that can resemble professional trade associations as much as state agencies . . . Board members' financial incentives may lead a board to make regulatory choices that favor incumbents at the expense of competition and the public."

Heavy-handed decisions by regulatory boards also have harmful consequences. One stark example frequently cited by Ohlhausen involves impoverished schoolchildren in South Carolina.

Lawmakers were concerned that too many children, particularly those from low-income families, were not receiving basic preventative dental care. So in 1988 they changed the law to allow licensed dental hygienists to provide cleanings, fluoride applications, and sealing in a school setting as long as the children had seen a dentist within 45 days.

But the law proved ineffective, so it was changed in 2000 to remove the requirement for a dental visit. The change was an immediate success. Within six months, licensed hygienists had screened more than 19,000 schoolchildren while providing cleaning, sealing, and fluoride treatments to about 4,000, including about 3,000 from Medicaid-eligible families.

That raised the ire of the South Carolina State Board of Dentistry, a nine-member panel made up of seven dentists, one dental hygienist, and one public member.

The board passed an emergency regulation in July 2001 reinstating the requirement that a child be seen by a dentist before receiving treatment or screening from a hygienist, despite the change in the law.

The new regulation had immediate effect. In the last six months of 2001, after it took effect, about 13,000 fewer children were screened than in the previous six months.

"By reinstating the pre-exam requirement the legislature had eliminated only a year before, the

Board denied the very preventative dental care to children that the General Assembly had sought to provide," Susan Creighton, director of the FTC's Bureau of Competition said at the time. "The board's action was particularly egregious in that the harm it inflicted fell most heavily on the most vulnerable children—children whose only realistic access to dental care may well be through in-school preventative dental services."

The board's administrative rule lapsed in 2002, which effectively removed the requirement of a dental visit for the children to receive preventative treatment in schools. This allowed at least three companies to enter contracts with the state health department to provide the services. In the latter half of 2002, these companies treated about 10,700 school children, 6,000 more than during the same period the prior year while the restriction was still in effect.

The board continued to maintain a dental visit was required before a hygienist could provide services to schoolchildren. The Legislature again tried to settle the issue in May 2003, when it passed a new law expressly stating no dental exam was required before a hygienist could clean teeth, or apply fluoride and sealants, as long as it was done under the direction of the state health department.

The board continued to insist it had the power to require the dental visits. That drew the complaint from the FTC, and the board backed down in 2007 by agreeing to stop trying to undermine the law.

LEGAL LIMBO

Whether states can use licensing to limit competition purely to benefit existing industries is an unanswered legal question.

Challenges to protectionist licensing laws generally fall into two categories.

There are the cases brought by the FTC based on the notion that state boards controlled by industry insiders that use their powers to stifle competition run afoul of federal antitrust laws. The complication in those challenges is that states generally have immunity from those federal laws under the constitutional separation of powers. Since regulatory

boards are basically state agencies, normal antitrust rules do not apply as they would in private industry.

Other challenges are based on the U.S. Constitution's guarantees of equal protection and due process, and the right to earn a living free of unreasonable government restrictions. Requiring a license to protect one group of people at the expense of another is a breach of those protections, the argument goes.

Federal courts are split as to whether economic protectionism alone is sufficient grounds to require a license to practice a trade.

The six most recent and relevant cases dealing with protectionism all pit traditional licensed professions against upstarts who want to provide a service outside the bounds of traditional practice. Three of those cases involve casket sellers, and two involve teeth whiteners. The sixth involved a man who installed spikes and screens to keep rodents and other pests out of homes.

In every case, the regulatory boards were controlled almost exclusively by practitioners of the licensed profession.

The Supreme Court dodged the issue in the 2015 North Carolina case, when it largely ignored calls to decide whether pure economic protectionism is sufficient grounds for states to restrict entry into an occupation.

The case had its origins in the 1990s when teeth whitening became popular. Back then, only dentists performed the procedure. But by 2003, a cottage industry had sprung up in North Carolina in which non-dentists offered the service at a fraction of the cost. There were few complaints about quality. However, there were many complaints from dentists about the new competition and the low prices being charged, particularly at mall kiosks where the procedure could be done quickly and cheaply.

The North Carolina Dental Board in 2006 sent at least 47 cease and desist orders to non-dentists claiming that teeth whitening constituted the practice of dentistry, and therefore could only be performed by a licensed dentist. The board also sent letters to mall owners stating the kiosk whiteners were violating the state's Dental Practice Act, and warning them to close down the operators.

Potential criminal penalties were part of the threat.

The FTC filed a complaint against the board in 2010, charging its actions to exclude non-dentists from the teeth-whitening industry constituted anti-competitive practices in violation of federal antitrust laws.

Teeth whitening is not defined as dentistry in the North Carolina law. The threats from the board against non-dentists were motivated by its attempt to reserve the lucrative industry for licensed members of its profession.

Six of the eight members of the dental board were licensed dentists, most of whom offered whitening themselves, and one was a licensed dental hygienist by law.

POWER OF THE STATE

The Supreme Court sided with the FTC, sort of.

The principles of federalism which disburse powers between the federal and state government limit the reach of federal laws, such as the antitrust act, when applied to state agencies, the justices agreed, even when boards with police powers are dominated by the protected industry.

However, the court also held that some independent state oversight of these regulatory boards is required for an exemption to the antitrust act to apply.

> "When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest."
>
> **– U.S. Supreme Court**

"When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest," the court ruled.

In North Carolina's case, the board had broad authority to define what constituted the practice of

dentistry and to enforce its edicts independent of outside review by the state. Because there was no independent oversight, the North Carolina board could not claim state immunity from federal law.

"Limits on state-action immunity are most essential when a state seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy," the court ruled.

The Supreme Court did not resolve the more fundamental question of whether states have unlimited power to restrict a trade through licensure solely to prevent competition.

Three federal appeals courts have concluded economic protectionism is not sufficient grounds to impose a license. Two have concluded licensing solely for economic protectionism is legitimate.

The rest have not ruled on the issue.

DIVIDED DECISIONS

The most recent appeals court decision, also issued in 2015, is similar to the North Carolina case. It involved teeth whiteners in Connecticut.

As with the North Carolina case, the dental board in Connecticut issued a ruling in June 2011 that only licensed dentists could perform teeth whitening. The board sent a notice to a business called Sensational Smiles and other providers of teeth-whitening services that did not use licensed dentists, warning they were in violation of the law.

Sensational Smiles challenged the order, claiming it constituted rank economic protectionism of the licensed dental industry that controlled the board.

Unlike the North Carolina case, which was based on federal antitrust statutes, the Connecticut case hinged on constitutional grounds.

Witnesses for the dental board claimed that anyone other than a licensed dentist performing teeth whitening put the public's health and safety at risk, even though consumers can do it themselves with over-the-counter products sold in stores.

The 2nd U.S. Circuit Court of Appeals found that because there might be some negligible risk, licensure was appropriate.

Even if there was no evidence of danger to consumers, states have the power to restrict competition solely to protect existing industries, the judges wrote in the majority opinion.

"Much of what states do is to favor certain groups over others on economic grounds. We call this politics," the 2nd Circuit held.

The 10th U.S. Circuit of Appeals reached a similar conclusion in a 2004 case involving Oklahoma businesses that sold caskets and other funeral merchandise. Like the monks at the St. Joseph Abbey in Louisiana, the businesses did not handle bodies or provide funeral services. But Oklahoma law specified only licensed funeral directors could sell funeral-related merchandise.

The 10th Circuit court agreed.

"Economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest," the court ruled in upholding the Oklahoma law.

"We do not doubt that the (law) may exact a needless, wasteful requirement in many cases," the opinion states. "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the (law's) requirements."

ECONOMIC PROTECTIONISM

The decision in the Oklahoma case was the opposite of that reached by the 5th U.S. Circuit Court of Appeals in the St. Joseph Abbey decision in 2013, even though the circumstances are nearly identical. It also runs counter to another similar case in Tennessee decided by the 6th U.S. Circuit Court of Appeals in 2002.

Tennessee law prohibited anyone who was not a licensed funeral director from selling a casket. The plaintiff in that case owned a store where he sold caskets, urns, grave markers, and other merchandise, but did not engage in either embalming or funeral services. The board, again controlled by industry insiders, sent a cease and desist order threatening fines and jail for providing funeral services without a license.

The 6th Circuit concluded that amounted to unconstitutional economic protectionism for the same reasons the 5th Circuit cited in the St. Joseph Abbey case 11 years later.

"The licensure requirement imposes a significant barrier to competition in the casket market," the 6th Circuit wrote in the 2002 Tennessee case. "By protecting licensed funeral directors from competition on caskets, the (law) harms consumers in their pocketbooks . . . We invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers."

The final appellate case to examine the legitimacy of licensing purely to stifle competition was decided in 2008 by the 9th U.S. Circuit Court of Appeals, and is the only one that did not involve funerals or teeth whitening.

The plaintiff in that case, Alan Merrifield, made a living installing spikes, screens, and other mechanical barriers on buildings to keep out pests such as skunks, raccoons, squirrels, rats, and pigeons. He did not use any chemicals.

But California law required anyone providing services dealing with those pests to obtain a pest control license, the same license required for people applying poisonous insecticides.

Merrifield challenged the law in 2004, claiming there was no legitimate health, safety, or consumer-protection reason to require a license to install barriers, as opposed to applying chemicals. Therefore, the law was an unconstitutional restraint on his right to earn a living.

California law also had a quirk that led to its undoing. People like Merrifield who installed barriers but made no use of chemicals were not required to have a license if they were trying to prevent infestation from certain species such as mice, rats, or pigeons. Yet the law did require a license to perform the exact same service if the targeted pests were bats, raccoons, skunks, or squirrels. Merrifield argued that distinction made the law irrational.

The 9th Circuit agreed.

"We invalidate only the (board's) naked attempt to raise a fortress protecting one subsection of an industry at the expense of another," the court ruled in siding with Merrifield.

Timothy Sandefur of the Goldwater Institute represented Merrifield while working at the Pacific Legal Foundation. He said the two appeals courts that concluded economic protectionism is sufficient grounds to license an industry ignored constitutional due process protections and gave too much deference to state legislatures.

"The question here isn't about whether the government can draw a line," he said. "It's a question about whether the line has to be reasonable or not. What (the 2nd and 10th circuit courts) say is that the line can be whatever the government says it is, regardless of whether it protects the public. Our position is the due process clause of the Constitution requires that any limit on individual freedom must protect the public in some way, not the private benefit of people who exercise political power. That is a very modest proposition. And yet it's too much for the 10th Circuit Court of Appeals and the 2nd Circuit Court of Appeals.

"And that's a violation of the most basic proposition of all constitutional government, which is due process of law."

PROTECTING THEIR OWN

While regulatory boards are aggressive in going after anyone who might encroach on their turf, they are often not so diligent in going after their own to protect the public.

An Arizona Auditor General's report issued in 2014 slammed the state's dental board for its lax discipline of dentists who had long histories of violating professional standards and endangering patients.

Auditors reviewed cases in which disciplinary action was taken and found the common penalty for serious violations was to require additional training. In one case, a patient's death was attributed to improper sedation, according to the board's own investigation. The board substantiated the investigator's findings that the dentist's deviations from normal standards of care "constitutes a danger to the health, welfare or safety of the patient or the public."

Yet the dental board only required the dentist to take 16 hours of continuing education in sedation protocols, and suspended his sedation permit for six months.

Of the 474 complaints filed with the Arizona dental board in fiscal years 2012 and 2013, 53 resulted in disciplinary action, usually an added education requirement, the Auditor General found.

The rest were either dismissed entirely or resolved with non-disciplinary action.

Of those complaints that did result in discipline, only one led to a license revocation, even though several cases involved dentists who had long histories of substandard and dangerous care.

The board's enforcement approach "has not effectively protected the public," the Auditor General concluded.

Similar findings of lax enforcement by industry-dominated boards at the expense of public safety are common.

> "There hasn't been much evidence that licensing improves overall quality because you need to take into account the fact that a lot of people aren't getting the service because prices are higher." **– Morris Kleiner**

The Arizona Medical Board routinely failed to properly investigate the credentials, backgrounds, and criminal and disciplinary histories of doctors applying for a license, ignoring state laws meant to protect the public, the Arizona Ombudsman-Citizens' Aide concluded in an investigative report issued in October 2013.

Doctors were allowed to renew their licenses online without any investigation into prior disciplinary histories.

The medical board also did not properly verify the education, required post-graduate training, or citizenship status prior to issuing licenses, all in violation of the law, the ombudsman found.

The Arizona State Board of Nursing failed to resolve complaints against nurses in a timely manner, with more than half of its investigations taking over 180 days to complete, the Auditor General found in a 2011 report.

In one case, the board took more than a year to resolve a complaint against a nurse accused of using a patient's medication and removing a patient's emergency kit that contained narcotics.

In another, a nurse accused of making medication errors was able to continue working more than two years without restrictions while the complaint was under review. It was only after a second similar complaint was filed that a psychological examination was ordered and the nurse was found to have a mental impairment that affected her memory.

The Arizona State Board of Cosmetology was slammed in a 2013 Auditor General's report for failing to adequately investigate complaints. Half of the complaints reviewed by auditors were found to have been inadequately investigated or documented.

Salons were not inspected when they should have been. Investigations were incomplete. Salons with prior violations were not prioritized to ensure compliance.

Arizona is not unique. An investigation by Consumer Reports published earlier this year examined disciplinary actions taken by the California Medical Board. Of the 8,267 complaints filed against doctors in the state in the 2014 and 2015 fiscal years, 45 led to license revocations by the board. Another 136 doctors were placed on probation and allowed to keep practicing. The article described numerous examples of doctors who were placed on probation by the medical board and allowed to continue practicing despite substantiated charges against them involving botched surgeries, drug and alcohol abuse, substandard patient care, and sexual misconduct.

"What happens time and again when self-interested boards are given that power, they don't use it to go after their own cohort," Avelar said. "The board of dentistry doesn't really go after dentists for doing bad things. What they really do is go after people who are horning in on what they see as their turf and their competition."

QUALITY CONCERNS

Beyond the issue of regulatory boards protecting their own, there is little evidence that licensure improves the overall quality of most professions, said Kleiner, the University of Minnesota professor who has published several studies on the economic effects of occupational licensing.

The Institute for Justice demonstrated this when it gathered bouquets from licensed florists in Louisiana and unlicensed florists in Texas and had them judged independently. The judges found no difference in quality, though the cost of the floral arrangements in Louisiana was substantially higher than in Texas.

Licensing can actually reduce the overall quality that customers receive by blunting the beneficial effects on service that competition brings, or by raising the cost of a service so much that some customers cannot afford it, said Kleiner, who recently testified in front of Congress on the need to reform state licensure laws.

If a person cannot afford the higher prices charged by a licensed plumber, for instance, he might instead hire an unlicensed friend or handyman to do the work, Kleiner said.

Kleiner frequently cites the example of a man in Michigan who performed a dental root canal on himself because he could not afford a dentist.

"There hasn't been much evidence that licensing improves overall quality because you need to take into account the fact that a lot of people aren't getting the service because prices are higher," Kleiner told the Goldwater Institute.

Licensure also can create a shortage of services in fast-growing areas since the restrictive education, experience, and testing requirements make it difficult for practitioners to relocate quickly to areas of high demand, Kleiner said. This forces customers to pay more, go without, or travel long distances for the services they need.

The hardest hit are the poor.

Not only are they the least able to afford the higher prices that can be charged by licensed professionals, they also are least likely to be able to spend a year or more not working while they attend the required training they cannot afford in the first place, Kleiner said.

"If you're a low-income individual and you have to spend 15 to 18 thousand dollars to go to a beauty school and take a year out of your career to do that, you don't have the time and you don't have the money," Kleiner said. "So you continue washing dishes or doing something else that is lower paid."

HEAVY BURDEN

In its 2012 report License to Work, the Institute for Justice studied 102 low- and middle-income occupations that require a license in at least one state to gauge the barriers to entry, including minimum requirements for education and experience, as well as testing and fees.

It found that 35 of those jobs require more than a year of combined education and training. Another 32 require three to nine months. At least one exam was required for 79 of the occupations studied.

The most onerous licensing requirements were for interior designers, fully licensed by three states and Washington, D.C., at the time. Obtaining an interior designer's license required 2,190 days—six years—of combined education and experience in all four jurisdictions, according to the study. Testing and license fees ranged from $130 in Florida to $925 in Washington, D.C.

Cosmetology licenses also come with a heavy burden, according to the study. Licensed in all 50 states and the District of Columbia, cosmetologists are required to spend an average of 372 days in school or in training, pass two exams, and pay $142 in licensing fees. All states required at least one exam, and most required two or three.

The study calculated days out of the workforce based on required hours for education and training, using the assumption students would get six hours of instruction five days a week. That means it would take more than a year for a cosmetology student to complete school.

Only seven of the 102 occupations studied were licensed in all 50 states and Washington, D.C.

There is no correlation between state-imposed training requirements and jobs directly tied to public health and safety, according to data from the Institute for Justice and the Goldwater Institute's own research. For instance, the average amount of training required to be an emergency medical technician is about 33 days, according to the Institute for Justice's report. An EMT license is the 67th most burdensome to get out of the 102 occupations studied, ranking just ahead of locksmiths and animal trainers.

Jobs that have much tougher training and testing requirements include athletic trainers, security alarm installers, auctioneers, tree trimmers, and home entertainment installers.

Minimum requirements also vary by state.

It takes 140 days of education and experience to become an EMT in Alaska. In Nebraska, it takes four days.

Getting a cosmetology license requires 2,100 hours of education in Iowa, Nebraska, and South Dakota. It only requires 1,000 hours in Massachusetts and New York.

It takes 1,000 hours of education to qualify as a massage therapist in two states. Twenty-six states require 500 hours.

Some licensed jobs do not have minimum education requirements, but they do have other impediments such as that applicants must not have a criminal record, must be of "good moral character," and must be a certain age, typically 18 or 21 years old.

Louisiana licensed 71 of the low- and middle-income professions studied in License to Work, the most of any state. It was followed by Arizona at 64, California at 62, and Oregon with 59.

Wyoming licensed 24 of the occupations, the least of any state.

When education, training, and testing requirements were weighed, Hawaii was found to be the most burdensome state in which to obtain a license. Though it only licensed 43 of the professions, the average requirement for a license to work in Hawaii was 724 days of education and experience, two exams, and $367 in fees.

Pennsylvania was considered the least restrictive, with 44 licensed occupations that required an average of 113 days of training, one exam, and $176 in fees.

License to Work also ranked states based on their overall burden on the workforce, combining the number of professions licensed with the requirements to obtain that license. Arizona scored the worst followed by California, Oregon, and Nevada.

MILITARY STRUGGLES

As onerous as those licensing requirements are for anyone living in those states, they are even more of a burden for certain populations, according to the White House report on licensure issued in 2015. Hardest hit are military families, which tend to move frequently, forcing the nonmilitary spouse to obtain a new license in each state in order to practice their occupations.

Kiley Spicocchi has struggled for six years to build a career in her chosen profession, nursing, because of the complexities of being a military spouse. Spicocchi and her husband, Army Capt. Nicholas Spicocchi, have lived in five different states in the last six years.

In 2010, Spicocchi completed her bachelor's degree in nursing and was licensed to practice in Ohio. But within a few months, the Army transferred the family to Georgia, where she could not work on the Ohio license. That meant she had to fill out a new application and complete a background check.

She only stayed in Georgia for about six months until the family was transferred to North Carolina, forcing her to start the application process from scratch.

The family moved again in 2014, this time to the Washington, D.C, area. That created a new wrinkle: whether to get licensed in the district, Virginia, or Maryland. That would depend on where the family was able to find housing. Rather than go through that process, and with a five-week-old baby now in the family, Spicocchi did not get a license and did not work.

In late 2015, the family was transferred back to Georgia, where Spicocchi had let her previous license lapse.

That meant more paperwork and more fees.

Then in 2016, Spicocchi learned her husband was being transferred to Texas, and so she began the licensing process there. Texas also required a new round of application fees, a background and fingerprinting check, and completion of an online exam.

There is a national licensure compact among 25 states, which allows licensed nurses to work in one state under a license issued by another. But since Ohio, where she was originally licensed, was not a part of the compact, she needs a new license in each state.

As complicated as the whole process sounds, it is typical of what military families go through, Spicocchi said. Many of her friends, other military spouses, are in other licensed professions and tell similar stories.

"It is a pain every time we move, because every state has different requirements in regards to what is required for licensure," Spicocchi told the Goldwater Institute in an email interview. "I have a hard time keeping straight what I've already had to do for the four states I've been licensed in, and in only six years.

"I think what I feel the most is frustration and annoyance," Spicocchi said. "I know this sounds pessimistic, but with short assignments like that, there's almost no point to working."

EASING THE BURDEN

Some states have attempted to ease the burdens on military families by accepting licenses from other states, as was done with the Nurse Licensure Compact, said Katie Savant, who until recently was the government relations issues strategist for the National Military Family Association. But most states do not have such cooperative agreements for most professions, she said. Making matters more complex is the varied requirements among states. A person's education and experience may be enough to qualify for a license in one state, but not another, meaning a military spouse may be unemployable in a new posting despite having years of experience in a given field, Savant said.

"Military spouses are persistent," Savant said. "They want to work, and they usually will try to jump through those barriers and hoops because it's important to them to contribute financially to their family."

Savant's organization advocates for state-level reforms that would make it easier for frequently moving military families in a licensed profession to work from state to state. The best option is endorsement, whereby states recognize licenses issued in another state. Other less-favorable options are allowing military spouses to work on temporary licenses, or at least receive an expedited review of their applications.

Without those reforms, military spouses often chose to simply leave the professions they were trained for and take lower-paying jobs that do not require a license, Savant said.

"As the service member progresses, the spouse may find that it's just not worth it to keep on doing it, and look to do something different," she said. "So they might do something where they retrain or they may just be under employed, finding any type of job to help pay the bills or just exit the marketplace completely because it's just really challenging."

'BEST PRACTICES'

Concern about the burden on military families, poor workers, and consumers was the focus of the report issued in July 2015 by the Obama White House. About 35 percent of military spouses in the labor force work in licensed occupations, as compared to about a quarter of the workers in the general population, according to the White House report.

In some cases, requiring a license to practice a trade makes sense, particularly when the license is designed to protect the public from harm and qualifications are tightly structured to meet the requirements of the job, the report concludes. But too often, state lawmakers do not weigh the costs of licensing on the economy, job creation, and the burdens it puts on certain populations, most notably military families, immigrants, and those with prior criminal records.

The report outlines a series of "best practices" that it recommends states follow. These include:

- Limiting licensing to those that address legitimate health and safety concerns.
- Applying the results of comprehensive cost-benefit assessments to reduce the number of unnecessary and overly restrictive licenses.
- Harmonizing regulatory requirements between states to allow better mobility for licensed workers.

Similar standards for reform have been pushed by many state governors looking for ways to eliminate economic impediments. They have not been particularly successful.

When Gov. Rick Snyder of Michigan took office in 2011, he launched an initiative to study barriers to economic growth and remove obstacles to job creation and competition. The Republican created the Office of Regulatory Reinvention, which in 2012 issued a report recommending elimination of licensing requirements for 18 different professions.

Several bills were introduced over the next few years to implement some of the recommendations.

Opposition from regulated industries was immediate and effective, said Shelly Edgerton, director of the state Department of Licensing and Regulatory Affairs.

Dietitians and nutritionists in particular waged an intense lobbying campaign to protect their licensing requirement, Edgerton said. Ultimately, seven of the 18 professions targeted by the review committee were de-licensed: auctioneers, community planners, dieticians and nutritionists, immigration clerical assistants, interior designers, ocularists, and proprietary school solicitors.

Licenses for the rest were left intact.

"It reinforces the fact that this is tough work because every time you name a profession, every time there is a list and someone can put that list in the hands of the people in that profession that are affected by it, the troops rise."

Republican state Sen. Randy Head

"The fact that we were successful in seven was great," Edgerton said. "Obviously we have others that we'd like to do, but you also have to have an appetite for that in the legislature. I think you've seen somewhat of a cooling period for this effort." Snyder continues to press the issue, and in 2015 laid out his principles for reviewing any new licensing requirements he may be asked to sign.

There must be the risk of "a substantial harm or danger to the public health, safety or welfare" before any new profession will be licensed on his watch, Snyder said.

The profession must require highly specialized education or training, the cost of regulating to the state must be revenue neutral, and there must be no alternative to regulation, such as a third-party accrediting organization.

Snyder also said he will not give "serious consideration" to any proposal to add new licenses until the legislature has evaluated existing occupational regulations and repealed those that do not meet his criteria, are not critical to public safety and welfare, "and exist only to provide a commercial advantage to their advocates."

Massachusetts Gov. Charlie Baker, a Republican, issued an executive order in March directing that any new regulations issued by state licensing boards be independently reviewed to ensure they do not have anti-competitive consequences. Those that do must be necessary to meet an important state policy goal or they should not be implemented, Baker said.

INDUSTRY PUSHBACK

Attempts to eliminate licensing requirements in other states have touched off intense opposition from industry insiders, who are almost always able to kill reform bills.

That's what happened in Indiana, where Republican state Sen. Randy Head introduced a bill in 2013 that would have created regular reviews of licensing requirements for various professions. The way it would work is the laws requiring licenses for certain professions would expire every year unless they were reauthorized by the legislature. Each year would bring a new list of job titles up for review. That is basically a "sunset" process many states have that requires regulatory rules to be periodically reviewed and reauthorized.

That and other bills were part of an initiative by Republican Gov. Mike Pence to eliminate licenses that were not needed to protect the public, Head told the Goldwater Institute. The governor's concern was that job growth was being stifled by licensing laws that did not protect the public, but rather those already working in the industry from competition.

What proved to be the fatal flaw in Head's bill was it listed the occupations that would come up first for review: accountants, architects, acupuncturists, athletic trainers, auctioneers, and cosmetologists.

Industry opposition was immediate and intense, Head said. Most effective were the cosmetologists, who swarmed legislative hearings to make the case that their profession posed risks to the public and it would be dangerous not to require a license.

"We all began getting emails and statements of concern," Head said of the cosmetologists' reaction to his bill. "There was enough pushback that many legislators, both parties and both chambers, wanted cosmetologists removed from the bill and wanted that license to stay intact. And that's what happened.

"It reinforces the fact that this is tough work because every time you name a profession, every time there is a list and someone can put that list in the hands of the people in that profession that are affected by it, the troops rise. Several of these efforts were very well organized and very strategic and very effective."

Head's bill passed the Senate but died in the House.

Pence did get one morsel of success in 2015 when he signed a bill that clarified horse massage therapists did not need a veterinary license to practice.

In Missouri, Republican Rep. Andrew Koenig had a similar experience in 2013 when he introduced a bill to ease licensing requirements for barbers and cosmetologists. While not eliminating the licenses for those trades, the bill did allow people to practice without one so long as they did not claim to be licensed.

Koenig considered those professions to be the "lowest-hanging fruit" because there were no obvious public safety issues. Legislators were flooded with angry phone calls and emails from cosmetologists expressing opposition to Koenig's bill. When a House committee considered the bill, hundreds of cosmetologists and cosmetology students jammed the hearing room to demand the law not be changed.

The bill failed in the committee.

"Some of them get squeamish," Koenig said of his fellow legislators. "It was just sheer numbers. I think the other side didn't necessarily put up a strong argument. It was just the fact that there were so many people there testifying against it.

"These people are in business, and they want to protect their turf. You don't necessarily see them in the hallways. But when there's a hint of anything happening, they pop up and they get organized and start making the phone calls and emails. They were very effective."

Reddy of the Professional Beauty Association makes no apologies for the intense lobbying to preserve cosmetology licenses. The grassroots campaign in Indiana was so effective that the association got calls from the state asking that it stop because the legislature's telephone switchboards were overloaded, she said.

REFORMS RARE

Successful attempts to eliminate licensing requirements are rare, according to a 2015 report published by the U.S. Bureau of Labor Statistics.

The study found only eight occupations that were completely de-licensed in 40 years. In some instances, states did deregulate trades but later succumbed to political pressure from practitioners and reinstituted the licensing rules.

"Clearly, these results reflect the lobbying power of the occupations in question and their professional associations," the report says.

Even states that have sunset rules requiring periodic reviews of licenses and boards have had little success at deregulating occupations, the BLS study found. It cited numerous examples in several states in which auditors performing sunset reviews had recommended elimination of licensing requirements, only to have legislators overrule the recommendations and continue the regulations.

"These examples of failed sunset reviews are further evidence of the lobbying power and legislative influence that many licensed groups possess through their licensing boards or their professional associations," the report says.

Reformers did have some success in 2016, most notably in Arizona.

Republican Gov. Doug Ducey set the tone in his State of the State speech that opened the 2016 legislative session in January, calling for elimination of licenses that stifle entrepreneurship with little or no public benefit.

"Arizona requires licenses for too many jobs—resulting in a maze of bureaucracy for small business people looking to earn an honest living," Ducey told lawmakers. "The elites and special interests will tell you that these licenses are necessary. But often they have been designed to kill competition or keep out the little guy. So let's eliminate them."

Ducey later signed bills that eliminated licensing of several professions, including assayers, fruit and vegetable packers, private employment agents, and driving and yoga instructors.

THE RIGHT TO EARN A LIVING

One bill that did not make it to Ducey was the Right to Earn a Living Act, an initiative backed by the Goldwater Institute. The proposal embodies many of the principles laid out by the White House, Snyder, Baker, Pence, and Ducey—that licensing should be limited to those professions for which there is a valid need to protect the public. But rather than the piecemeal approach of de-licensing professions one by one, the act would put the onus on the state to justify its regulations.

To require a license, the state, city, or county would have to show it is needed to "fulfill legitimate public health, safety and welfare objectives."

All occupational regulations would have to be reviewed within one year to ensure compliance, and any rules that did not meet the health and safety requirement would need to be repealed under the bill, sponsored by Rep. Warren Petersen, R-Gilbert.

The proposal would also change the way licensing laws are judged if challenged in court. Now, it's up to the person challenging the law to prove it is an unreasonable infringement on a person's ability to make a living. Under the Right to Earn a Living Act, the government would have to show that licensing addresses a valid health, safety, or welfare objective, and that the restrictions are tightly written to achieve one of those objectives.

That changes everything, said Jonathan Riches, director of national litigation and general counsel for the Goldwater Institute.

"The legislation reverses that burden and is based on a real simple premise," Riches said. "If the government's going to try and restrict free enterprise, freedom to get a job, then the burden should be on the government to demonstrate that its regulation is necessary and appropriately tailored."

The Right to Earn a Living Act also would make it harder for industries to seek licensure as a means of limiting competition, Riches said.

"The law clarifies that purely protectionist measures do not serve a legitimate government interest. If the intent of the law or regulation is pure economic protectionism, it is invalid."

The Right to Earn a Living Act passed the Arizona House in February but died in the Senate after heavily regulated industries like utilities and liquor distributors raised concerns about how they would be affected.

LOST HOPE

Debra Nutall, the Tennessee hair braider, finally gave up on the state where she clawed her way out of poverty, built a successful business, and raised her children. Tennessee now requires a braiding license and 300 hours of education to practice the trade that Nutall learned from her mother and grandmother, then pioneered into a commercial enterprise.

Nutall moved across the state line into Mississippi, where a license is not required. She did not try to rebuild her business there. Instead, she is writing a book about hair braiding, hoping to pass her techniques on to a new generation of people who, like she once was, are struggling to find a trade that will take them out of housing projects and off of welfare.

The experience left Nutall disappointed in Tennessee, its regulators, and its lawmakers, who she says were more interested in protecting the politically well-connected cosmetology industry than allowing her to succeed.

"I expected you to do better as the state than what you did," Nutall said. "You railroaded me and you left me out there to drown. Are you really looking for people to be self-sufficient? Or are you really looking for them to be in poverty? I'm not out here trying to live off welfare. Been there, done that."

"The burden should be on the government to demonstrate that it's regulation is necessary and appropriately tailored."

– Jonathan Riches, director of national litigation for the Goldwater Institute

500 EAST CORONADO ROAD • PHOENIX, AZ 85004 • (602) 462-5000
GOLDWATERINSTITUTE.ORG