

Mackinac Center for Public Policy

Issues and Ideas Forum

“Is This Working? The Effects of Occupational Licensing on the Workforce”

Speakers:

**Rebecca Haw Allensworth,
Professor,
Vanderbilt Law School**

**Stephen Slivinski,
Senior Research Fellow, Center for the Study of Economic Liberty,
Arizona State University**

**Edward Timmons,
Associate Professor of Economics and Director, Knee Center for the Study of
Occupational Regulation, Saint Francis University**

Introduction and Moderator:

**Jarrett Skorup,
Policy Analyst,
Mackinac Center for Public Policy**

Location: Radisson at the Capitol, Lansing, Michigan

Time: 12:00 p.m. EST

Date: Wednesday, January 24, 2018

JARRETT SKORUP: Good afternoon. Thanks for – thanks for coming to the event today. We appreciate seeing everybody. Enjoy your lunch while we – while we continue on. Maybe pay attention a little bit while you eat, but thanks for coming.

So today we're pleased to have an event at the Mackinac Center we've entitled "Is This Working? The Effects of Occupational Licensing on the Workforce." Working a job, any job, is connected to lower poverty, better income mobility, lower crime rates, fewer children born out of wedlock, and a host of other positive results. But today, the right to earn a living is becoming increasingly difficult, particularly in the area of licensing. In 1950, only about 5 percent of workers needed an occupational license to work. Today, more than one out of every five workers in Michigan needs one – this type of special government permission to work.

This typically includes mandated educational degrees, hours of training, upfront fees, testing, continuing education, and limits on people with criminal backgrounds. But there might be some hope. The Obama and Trump administrations have both focused on licensing rules, working to encourage states to lessen the burden. And research from scholars across the political spectrum are in agreement that these regulations tend to stifle innovation, raise prices, reduce the number of jobs, encourage income inequality, and even raise prison rates.

Today's event we'll talk from three scholars who will talk about their research on occupational licensing, kind of in three different areas. So each of our scholars kind of covers a few different things.

First up, we're going to have Ed Timmons. Dr. Ed Timmons is a professor of economics and the director of the Kline Center for the Study of Occupational Regulation at Saint Francis University in Pennsylvania. His research on the effects of occupational licensing has been published in *The Journal of Law and Economics*, *the Journal of Labor Research*, *the British Journal of Industrial Relations*, *Health Policy*, *Monthly Review*, and *the Eastern Economic Journal*. Ed's going to focus on the economic effects of licensing rules.

Dr. Steve Slivinski is a senior research fellow at the Center for the Study of Economic Liberty at Arizona State University. His work focuses on the effects of occupational licensing on criminal recidivism rates.

And Rebecca Allensworth is a professor of law at Vanderbilt. She studies the antitrust implications of occupational licensing, and explores the theoretical basis of the rule of reason and its application to self-regulation.

So we'll let our panel take it away. We'll let them each talk for a little bit, and then we'll – I'll moderate some questions. If you have questions, we have comment cards out on your table. So please fill those out as you think of them. And then we'll hand them in and take care of that at the end. So, go ahead, Dr. Timmons.

EDWARD TIMMONS: Well, Jarrett, thank you so much for inviting me to this event. It's wonderful to be here in Michigan. And I'm not a Penn State fan, so don't hold my geography against me as I'm speaking here.

So what I'm going to talk about is I'm going to talk about the various areas that we're working at, at the Knee Center. I'm going to touch upon our website and one of our primary objectives at the Knee Center. I'm also going to spend some time talking a little bit about some of the research I've done on the removal of these laws. Jarrett did a nice job of summarizing what we understand and what – there's bipartisan consensus of what the effects of licensing laws, in fact, are. I'm also going to touch upon non-physician scope of practice, and then finally talk about some research I've done on tying together licensing and economic mobility.

So this here is a screen capture. I'm pretty proud of myself for pulling this off. I'm not the most technologically adept person. But here's a screen capture of our website, csorsfu.com. And what you can find here on this website is a catalogue or directory, if you will, of what licensing statutes look like on a state-by-state basis. We're focused right now on health care professions. We do intend to have this be all-encompassing, to include all occupations. What I've pulled up here are the licensing requirements for perfusionists in Pennsylvania. Michigan does not license perfusionists. But what perfusionists do, these are the folks in the health care area that operate heart and lung machines. So we're working on documenting what these requirements look like. And we're right now doing a review for Pennsylvania cataloguing what licensing requirements look like for the state.

With respect to the removal of licensing laws, this is a very rare occurrence. Michigan has been a bit of a leader with respect to the changes that they've made delicensing a handful of occupations. But I take look at a couple of specific cases. Number one, Alabama, for the period of 1983 to 2013, did not license barbers. So what I do is try and understand, number one, what was the effect of removing this licensing law.

And what I find is very much consistent with what we might expect. Once licensing was removed, barber wages do, in fact, fall. And I have a new paper that will be coming out from the Mackinac Center very soon, taking a look at the effects of reintroducing barber licensing in the state of Alabama. And what I find there is that the receipts of shops do in fact increase what licensing is reintroduced. And secondly, the growth in the shops – there's fewer shops once it becomes harder – once it goes from there being no requirement to be a barber in the state of Alabama to requiring a thousand hours of education.

I also did a paper for the Mercatus Center looking at the effects of removing hair braiding licensing. This is an issue that has received considerable press. And using Virginia, in this case, as case study, since they removed hair braiding regulation in 2012. And what I find is that there's an increase in the number of smaller shops. I find a very similar percentage, 7 to 8 percent, pending if I'm comparing bordering states or focusing on the bordering counties. So either one of those yields results that are very much in line with what we would expect, namely that requiring hair braiders to get a license is preventing individuals from entering that field.

I'm also very interested in just tracking delicensing efforts going back to a paper that I did for the Bureau of Labor Statistic. And Michigan, as I said, is very much at the forefront of removing licensing legislation. Prior to Michigan, going back 30 years, I was only able to find eight cases of licensing legislation being removed. So it's not a very common occurrence. It's much more common for new occupations to be licensed. You know, we might expect this given – you know, we've gone from 5 percent of the workforce being directly affected by these laws in the 1950s to anywhere from 22 to 29 percent, depending upon the report that you're looking at.

This here is a map of what the practice environment looks like for nurse practitioners. I am very interested in understanding what scope of practice looks like for non-physicians. I think it has important ramifications for the health care that gets delivered to individuals. Yes, it does – it is important to understand hair braider licensing and barber licensing, but with such a high percentage of workers directly affected by these laws, I think it's also important to look at the health care sector as well.

For instance, you can see Michigan there is red in a sea of yellow there. Michigan does have one of the more restrictive scope of practice laws with respect to nurse practitioners. Nurse practitioners much – in order to prescribe controlled substances, they must be supervised or have some form of delegation with physicians. Those states in yellow, so, for instance, Pennsylvania, physicians and nurse practitioners can enter into a collaborative practice agreement. And this allows nurse practitioners to operate a little bit more autonomously. All those states that are green – Iowa, Maryland – in those states nurse practitioners are free to practice without any oversight by a physician. So they're free to practice to the full extent of their training. They're not doing surgery, but they're able to do more traditional primary care types of roles with patients without physician oversight.

Another non-physician provider I've done some research on is physical therapists. In Michigan, physical therapists are only permitted to see a patient without a physician referral for 21 days or 10 visits, whichever comes first. So, you know, if I'm a patient, why go see a physical therapist if I know in three weeks I'm going to have to go see a physician anyway? In a variety of other states – Maryland, Iowa – there's no such restriction. I can see a physical therapist for as long as it takes for me to get treated. So this is another area of interest to me. And there's important differences across states, particularly for Michigan.

Then lastly, I'm doing some research right now trying to look at the relationship between licensing and economic mobility. Does licensing prevent individuals from achieving the American dream. You know, does licensing prevent individuals from climbing the economic ladder? And what we do seem to be finding – this is a paper that will be coming out from the Archbridge Institute within the next couple of months – is that licensing, growth more specifically – growth in the number of licensed occupations – we created a new data set looking at the snapshot of what licensing looked like in 1993, matching that to the pioneering, wondering work at the Institute for Justice with the snapshot of 2012. And we find that those states that have had more occupations licensed over that period, there does appear to be less opportunity for economic mobility. So I'm going to turn things over to Rebecca.

STEPHEN SLIVINSKI: Actually, I think I'm going second.

MR. TIMMONS: Oh, I'm sorry. That's right.

MR. SLIVINSKI: That's all right. That's OK. I'm going to stand up here, if that's all right.

Thanks all for coming. My name's Steve Slivinski at the Center for the Study of Economic Liberty at Arizona State University. And we'll have some slides up in a minute. But what I'm going to talk about today is about the actual impacts, the employment impacts on people that are resulting from these occupational licensing laws. If you need a permission slip to work by the government, you can see how this could be a big problem if you're a certain kind of person who may not be eligible for those types of permission slips, if you will. And it's going to have a very real impact on your ability to move up the income ladder, as Ed just talked about. Income mobility and opportunity are hindered by burdensome licensing restrictions.

And so I wanted to talk a bit about two specific areas in which you see this most dramatically. And Ed did talk a little bit about scope of practice, nurses, things of this sort. Those might be considered high-end professions, right? Doctors seem to make a little more money than, you know, most other people. I like to look at the low-income professions, mainly because there's a lot of good data that are coming out now about this specific group of people, but also because this is where you hear a lot of the press stories about occupational licensing – the barbers, the landscape workers, you know, the childcare workers. These are folks who are being burdened in differential ways across different states. Depending upon what state you live in, it might be harder to get a barber's license than in another state. And that's going to have a very real impact on your employment prospects and your ability to move up in the income ladder.

I'll just do a little briefly – and the slides aren't really going to be necessary until probably the very end. Let me just give you some broader ideas of what I'm talking about here. If you think about low-income entrepreneurs, we think about folks who are basically in the bottom two quintiles of income in any specific state. And you look at what they look like. For the most part, they tend to be predominantly male. They also tend to be predominantly Hispanic and Latino and immigrant. But they also have lower levels of education. Well, what I mean by that is over half of them, roughly, tend to be only achieving a high school diploma and then nothing else beyond that, maybe even – you know, maybe even just high school classes. You know, not an actual even – a diploma in those cases.

And this is a problem for – in some states, because there are some occupations in some states that require you to have a high school degree to even carry the license. In fact, you might have heard a story recently in the state of Tennessee. There was a gentleman who was actually arrested, or at least shaken down, by the licensing board in Tennessee for being a barber because he did actually not have a high school diploma, which is patently ridiculous. But these are the kinds of restrictions that government is kind of perpetrating on the marketplace. And of course, it's having all of these downstream effects. And not just ruining the lives of people who might want to practice in this field, but also their customers. You know, prices are going to be higher if

you restrict the number of people that can get into the occupation or the industry. And that's roughly what you see when it comes to occupational licensing.

Let me kind of skip forward here to – this is just an indication that low-income entrepreneurship is important and a really good way of kind of creating income mobility, as Ed had already discussed. And I'm happy to give you the citations later. Here's the demographic profile I talked about. As you can see if you look on the right, low-income entrepreneurs, 67 percent male, much higher than their normal representation in the general population. Predominantly Hispanic and Latino – 90 percent, general population 24 percent – among low-income entrepreneurs, and then largely immigrant. So, again, if we're interested in thinking about how do you reintegrate – or integrate immigrants into the economic and how do we get people mobilized and moving up the income spectrum, putting barriers in their path to prosperity are going to have a real impact.

And, well, here's what happens with the data. This is what they call a scatterplot. I promise this won't hurt. Basically, what you do is you can look at the relationship between, in this case, the percentage of the low-income occupations that are licensed. I mean, that's a zero one, it's like do you license it or do not license it? Look at that across all 50 states, in the Institute for Justice data. And you look at the – excuse me – the vertical axis. That's the entrepreneurship, right? That's the number of people basically as a percentage of the whole who are self-employed entrepreneurs in all of the industries that are being licensed.

And you see this downward trend. In this chart, you want to be on the top left. You want to have the lowest percentage of occupations licensed and the highest rate. And so, as you see, the further down you go, the more stringent you get, the more burdensome you get. You get less entrepreneurship. So and that's true even after you adjust for factors that might explain that difference – demographic factors, economic conditions like the overall health of the economy. And yet, you still see this significant negative impact on low-income entrepreneurs.

Now, there's also a criminal justice component here. It's what we call the collateral consequences of occupational licensing. If you're thinking about a group of people who have similar demographic attributes, they might generally tend to be lower levels of schooling, you know, lower levels of educational attainment. Those are folks coming out of prison. This is a real problem for reentry into the workforce, is that a lot of these folks don't have sometimes the requisite job skills, and certainly not the degrees to hold licenses in a lot of these occupations. And yet, we see time and time again, for decades worth of studies, that gainful employment is a vitally important means to keep ex-prisoners out of prison.

In economics, we have something called opportunity cost. It basically means what's your best other option when you're compared with a choice. If you're being locked out of the workforce because the government is – has licensing restrictions that keep you out of the workforce, you might turn back to crime. You might be more likely to recidivate, as they say. And education programs in prison, and continuing education out of prison, they can increase the probability of employment once you get out of jail.

But here's the real big problem: In many states these occupational licensing barriers are harder to overcome. Even if you had the skill level you would need to get a licensing degree, many states have what they call good character provisions. That basically means that we don't really care how skilled you are or how much knowledge you have of this field. If you have a criminal record, you can't even apply for a license. Or, if you do, you're going to be rejected automatically. Some states have blanket bans on people with records applying. Other states are a little more esoteric.

But for the most part, what you see is – and the American Bar Association has gone through over 11,000 state statutes in all 50 states and gauged and measured the severity of those good character provisions. Some states will even say, regardless of what your – basically, regardless of your criminal status, meaning whether you're in prison or not, sometimes a misdemeanor arrest can trigger a red flag in an application for an occupational license. Sometimes a nonviolent misdemeanor can invalidate your ability to get a license. And, of course, again, this is going to lock these folks out of the workforce. And so this is a real big problem. And so there's an obvious nexus point here with criminal justice reform.

You do the similar type of analysis here that I did – here we go. Actually – there we go. So if you look at the states that have the heaviest burdens – and by that I mean not just the heaviest licensing burdens, meaning it takes the longest to get the license, it's the highest fees – it's also the states that have the most stringent good character provisions – blanket bans, for instance, on folks with a criminal record being able to apply for a license. And you look at what their recidivism rate looks like. In this case, we looked at between 1997 and 2007.

And those high burden states actually had an increase of over 9 percent in the re-offense or, as they say, the recidivism. And this is actually what they call the three-year recidivism rate. And this isn't even just technical violations, like failure to pass a drug test or your miss a meeting with your probation officer. This is brand-new crimes that are being committed as a result of being locked out of the workforce. And you see a 9 percent increase in those high-burden states.

The national average, you still saw an increase – 2 ½ percent. Not huge, but that's over a 10-year period. Not too bad. That was seen to be under control. But, yet, the low-burden states, the states that did not have these good character provisions, or very minor, weak versions of them, and they also had the lowest barriers to entry for people even without a criminal record, they actually saw a recidivism rate drop in that 10-year period, which is pretty remarkable considering the nation as a whole tended to see increases during that period.

Here, again, is that scatterplot I talked about. Same thing. In this case, you don't want to be in the top left, right? In that case, that's where you have the highest growth in the recidivism and the worst occupational licensing score. In this case, you want a high score at the bottom. The lightest burden is the closer to 1 and the reductions in the recidivism rate are below that middle line there. And, again, you see a downward trend here. So what does this all mean? Well, again, if you do the analysis in the same way, you adjust for the factors that might explain this difference, you discover that there's still a significant effect on the state's ability to decrease their recidivism rate.

Now, in terms of trying to employ – this’ll be the lack slide and we’ll let Rebecca talk about the broader legal issues here – but for the most part, if you’re thinking about ways of reintegrating folks into the – folks coming out of prison into the employment market, into the labor market, giving them a new chance on life, other opportunities or other policy ideas that people have put forward – there’s something called ban the box, which you might have seen. Basically, means that if you’re applying for a job and you have a criminal record, in some states or cities it is illegal to actually ask people about their criminal status.

The only problem there is that an employer is not sure about an applicant, and they can’t screen for criminal record, they might actually just not call that person back. And some of the more recent studies on this have indicated that, because these bans are relatively new, that it actually has sort of increased the rate of discrimination in the job market. So, part of that reason is because they just can’t screen for it and they don’t quite know what to expect. But the worst – and this maybe even worse by the fact that in most places you can’t even apply for a job unless you have a license. And if you can’t get a license because you have a criminal record, you don’t even get to the ban the box stage.

So I would argue that the occupational licensing burdens that we’re imposing on people coming out of prison, hindering their reentry into society, this is, I think, going to have the bigger impact on their livelihood and their ability to pick themselves up by their bootstraps. And so I would argue that criminal justice reform and occupational licensing reform are jointly concerned. They should be thought about in the aggregate as a whole. And I think it would help, not just the individuals themselves, but I think society as a whole, generally, with lower crime rates, greater opportunity, and more prosperity for the state as a whole.

So, thanks very much. And I’ll turn it over to Rebecca.

REBECCA HAW ALLENSWORTH: Hi. I just wanted to also thank you for being here. Thanks for inviting me to speak about my research. My co-panelists – oh, I’m Rebecca Allensworth from Vanderbilt Law School. You may have – I guess I got a little sign here, but.

So my colleagues have done a great job of kind of summing up the substance of this regulation and how it can have some pretty negative effects both on the market for the services and also on the people who would be wanting to provide the services. I try to study how this regulation gets made, so in some ways how the sausage is made. I study the legal and regulatory infrastructure that is behind some of this regulation that ends up having a bad effect on folks.

So who is responsible for excessive occupational licensing? The blame is shared between state legislatures and the boards to which they delegate the regulations. Let me talk about boards first. I studied all the boards. I found all the boards in the U.S. There’s about 1,800 of them. Each state has an average of about 35. Some have fewer, some have more. And I found that about 85 percent of them were required by statute to be dominated by currently licensed working professionals in the profession that the board regulates. That means that this is almost an entirely self-regulatory system, to the extent that the boards are making the regulations

and enforcing them. And that, I think, is a big part of how we get to this set of rules that end up costing consumers, costing workers, at the expense of the incumbent professionals.

State legislatures are also to blame. So first of all, states sometimes – they sometimes license occupations that shouldn't be licensed at all. I know Michigan has done some good work rolling back a few of these. There's also a lot of actual entry and practice rules that are created by statute. So in Michigan, for example, the number of hours that a barber must go to school before becoming a barber is set by statute. So sometimes the rules are set by legislatures. But sometimes they are set by boards. Another thing that legislatures do that I think is really important is that they hand over the reins of competition to these boards, which are basically almost industry groups. In Michigan, the state constitution requires that these boards be two-thirds practitioners. And that's consistent with the rest of my research showing that most boards in the U.S. are that way as well.

OK, so given that there's this shared blame and the shared responsibility for regulation, what can be done? I think state governments need to take more responsibility for their occupational regulation. It should be like the rest of regulation. It should be done by at least nominally disinterested people. It should be exposed to political pressures. You know, occupational licensing is becoming less and less popular. If you look in Vox and Slate and The New York Times, Wall Street Journal, it seems like every week there's a new week about how this has gone too far. Let's expose occupational regulation to that kind of – that kind of changing opinion. Right now when it's done by the boards, it's rather insulated from that.

And it should also be done with the things that only government has, which is expertise and resources to gather the kind of data that my colleagues have put a lot of effort into creating, in order to decide whether or not – in order to tradeoff these potentially health and safety benefits to the costs to the consumer and to the worker. And as it is right now, a lot of occupational licensing is not done by something that I recognize as government. It's done by these boards.

So why should states do this? Well, it's the right thing to do. But there's another reason now why states should do this and take more responsibility for the regulation rather than handing it over to a dominated board. And that's a little thing called antitrust law. And that's how I got into this. I'm an antitrust law professor. And in 2015, the U.S. Supreme Court decided that a state licensing board made up of mostly practitioners could be liable under antitrust laws. So in other words, you could sue in federal court under the Sherman Act a board for creating an anticompetitive regulation. Anticompetitive is the world that antitrust people use for unfair, inefficient, onerous.

And the board members would be personally, treble – which is another fancy word for triple – liable for the damages. So in antitrust lawsuits, you get three times your actual damages. Well, this was not something that boards wanted. And what the – what the court held was that those lawsuits could go forward if the state did not actively supervise those boards. So the real question that all the states had after this case, and that was really the focus was, what does this mean, active supervision? And everyone was trying to actively supervise their boards so that they would get that immunity from the antitrust laws again.

So here's the question: What constitutes active supervision? To me, this question is actually two questions. First, there's the question of what the Supreme Court thinks is active supervision. And unfortunately, we really don't know what that is. The court has decided a few cases about it. It's never been very clear. The most interesting and, I think, important question is, what is this – what should the state do to really rein in these licensing boards? What is required? And I think that that actually answers the first question too, because what states need to do, is they need to hold themselves accountable. They need to involve decisionmakers. They need to harness the expertise and resources – all the things that I just said.

And we know that the Supreme Court really cares about the same stuff that I'm talking about. The Supreme Court really cares that this is self-regulation and that it seems to have gone too far. And so in my opinion, if the states do the right thing, if the states take more transparent responsibility for their regulation, they will kill two birds with one stone. First, they will get some of their licensing problems under control. And second, they'll get the federal antitrust laws off their back.

I think there's an organization in Michigan, LARA, and a lot of the occupational regulation rules go through them. I think that's a natural supervisor. I think that's a real potential to create the kind of active supervision that the court requires and that, in my opinion, the substance requires. I'm not sure LARA is there yet, but I think that there's ways in which it could be endowed with stronger supervisory stories over these dominated boards.

So just a little background on what other states have done. So eight states have created statutes purporting to create active supervision. About eight states have introduced them and failed. And there's about three states that have pending legislation creating active supervision. Michigan's not one of these. I think actually because maybe there's a belief that LARA is doing the supervising. I like some of these models better than others. I'm happy to go into this in the Q&A. It's a little bit, like, in the weeds. But I think that, long story short, you need to have an executive agency with the kind of staff and resources to really look at these rules and regulations and say: This is something that's good for the state of Michigan. It can't just be a rubber stamp.

There's also a little bit of federal involvement here, which is interesting. There is a bill pending in the House of Representatives introduced by Darrell Issa that would give states a new route to immunities – this thing they're all afraid of, these antitrust lawsuits. The feds are saying: Look, you'll be immune if you do this other set of things. And that other set of things is basically creating a policy of only using licensing when it's efficient, and then either supervising those boards to ensure compliance with that policy or creating a private right of action that workers can use to sue over those potentially inefficient and unfair licensing laws.

So in closing – and that's another thing that I would be happy to talk about more in the questions. That federal bill I think is really interesting. I think it has a lot of promise. It's in early stages. And in my opinion it's not quite there yet. But I do think it's something that should, in revised form, be passed. So I have two thoughts in closing. First, I'd like to say that state legislatures sharing the blame is bad news on the one hand, but it's also good news because it means that the state legislature can do something about it.

And the last thought I want to offer is, it's not enough to deregulate. It's easy to focus on the hair braiders and the florists, but there are occupations that are best regulated through entry restrictions, educational requirements, and professional discipline. In other words, there are a lot of professions, and a lot of a percentage of the workforce – such as in health care – that should be regulated through licensing. So what are we going to do about the nurses and doctors? They are subject to all the same pathologies of self-regulation. And so it's important for states to rein in those boards too.

MR. SKORUP: All right. Please thank our – thank our panel. (Applause.)

If you have a question, please write it down on a comment card, and then we'll have – one of my colleagues will go pick them up. But I'll have a couple – I have a couple to get us started here. So I'll do one for – one for each of you. So I usually say for Q&A, nobody ever left a Q&A saying, man, I wish that guy had answered that question a lot longer. So as brief as you – as you can, while getting the information out there.

So, Dr. Timmons, you mentioned that one of the effects on once an industry gets licensed you see higher wages for the people in that industry, which that sounds pretty good to me, if those people are getting higher wages. Why is that not something we would want?

MR. TIMMONS: So if barbers are, in fact, receiving higher wages, what that means is that all of are paying more for haircuts. So from those that aren't in the industry, what licensing translates into – it's basic supply and demand. You know, we might all have maybe not so good recollections of our economics classes, but, you know, if supply goes down, and that's what licensing does, it makes it harder to enter a profession, what we expect to see happen is that we do expect to see prices rise. Also, those that aren't necessarily able to meet the requirements for entry, they might find themselves facing the situation where they get blocked out of the labor market. And it affects disadvantaged groups – for instance, those with criminal backgrounds, as Steve talked about – they might not necessarily have a pathway to reenter the workforce.

MR. SKORUP: So in a – in a sense you're redistributing income from consumers, or from other people potentially in the occupation to a group that's able to go through and get the license.

MR. TIMMONS: That's right.

MR. SKORUP: Steve, why don't we want – why do we want criminals working in our homes in these occupations?

MR. SLIVINSKI: Well, they don't have to be working in homes. But having a job is an important aspect of this. And part of the reason why I think there's such a problem with how the occupational licensing works in practice is a lot of these statutes are really arbitrary. No one's talking about giving Bernie Madoff a financial advisor's license, right? If he wants to do that, no state will give him that license. However, if he wants to build houses, not so sure the state has a compelling interest to be able to keep him out of doing that if he wants to do that. And so a lot

of this comes down to just a very overbroad application of criminal statutes, and overbroad application of this category of good moral character or some kind of offense.

You know, nonviolent drug offenders might have done something stupid in their youth, but it shouldn't be marking them for their entire adult lives while they're in the labor market. And that's really what these laws do, is they try to impact the person's future based on something they've done in the past, and that might be completely unrelated to the job and license they're applying for. So I think having more kind of surgical impacts or surgical approaches to how these things are defined in state law is going to be important, because any amount of criminal justice reform you do at the state level by keeping people out of prison, rehabilitation programs and all that sort of thing, that will fall apart if you're not able to give them an opportunity once they're out of those types of programs. And doing that, by allowing you to get those licensing provisions scaled back for those sensitive populations, I think is an important part in all of that.

MR. SKORUP: Rebecca, you talked a little bit about the legal and the high end, at the Constitutional level. Can you talk a little bit more about – it seems like we're seeing more cases more along the lines of – and, you know, a lot of them haven't gone very far – but along the lines of, I suppose in layman's term, as a non-attorney – that people saying: I have the right to earn a living and the government should not restrict it unless they have a really good reason. In legal terms, can you explain – are there cases about that? Can you talk about those at all?

MS. ALLENSWORTH: Absolutely. So this is really interesting. Institute for Justice would be one of the main organization that brings these lawsuits. These are constitutional federal – typically federal constitutional challenges against the licensing, saying that they burden the right to earn a living. Now, right to earn a living you may not think of as existing on the same footing as free speech, and you would be right. So even though there is a bit of a movement afoot, it is still mostly true that when a – when a court evaluates whether or not somebody has a right to not be restricted in this way, they do it with something called the rational basis test.

Let me tell you the things that have passed the rational basis test. We need to license florists, because an unlicensed florist may place a wire incorrectly in the flower arrangement, that when you go to grab it you could prick yourself. And so we need to have – we need to outlaw the unlicensed practice of floral arranging. That passed the rational basis test. That's a pretty extreme example. But really, you don't have to make much of an argument. So what I would say is some of these lawsuits have actually had some success. There's been some success in terms of shampooing. I know they're going to challenge that high school diploma for barbers under the same terms. But it's really at the margins. It's really at the outsides. And unfortunately, the constitutional tool is rather weak.

MR. SKORUP: So we had a couple of questions there. I'll try to combine them as best I can. Kind of on the health and safety side. That's the key argument. And this is for any of you or all of you. So isn't licensing set up to protect the health and safety of the public? Does it do a good job of that? And if we're going to get rid of licensing, how do we do so while ensuring that we're protecting health and safety?

MR. TIMMONS: So, yeah, I'll take that. The Obama White House in the summer of 2015, they did a summary of studies that have tried to estimate the effect of licensing on the quality of services delivered to consumers. And what they found is that just two of the 12 studies found any evidence – and it was not very strong evidence – that licensing does in fact enhance quality. I think it's important to note that when we talk about the possibility of removing licensing, we're not necessarily saying there's not going to be any regulation in place. It's not a binary choice between no regulation whatsoever and the very onerous regulation of licensing.

There are a number of other regulations. And the Institute for Justice has an inverted pyramid that shows the other avenues for regulating – for instance, certification. You can require individuals, if they're going to use a specific title, that they meet a bare minimum requirement. And you don't impose the same barriers to entry as you do with licensing. There's bonding, there's all sorts of other – there's inspections. There's all sorts of other regulations that can be used. And it's important to consider which one of those is going to do the least harm and still achieve the objective of making sure that individuals do, in fact, receive the best quality of service and that the public health is not being jeopardized.

MR. SLIVINSKI: And I also want to add onto the health and safety aspects of it, as Jarrett already mentioned, these laws were designed – or, at least, I should say, passed – with the impetus and the intent of protecting the health and safety. But these were passed decades ago. Technologically, we've advanced so far. In fact, in terms of health and safety – especially in terms of reputation, you know, bad haircuts and things of this sort that doesn't really have a compelling health and safety component to them – we can figure it out pretty quickly, because we have these wonderful devices in our pockets, these pocket computers, that basically have the power – that are in excess of what the space program had in the 1960s.

So we have ways of finding out these things. And so licensing laws are a very kludgy, overbroad way of trying to protect the public in ways that – what was only being – I should say, the law was the only way to do that in some point in the past. But I think it's no longer true. And so revisiting these laws, even just in the context of the world in which we live, is going to automatically by definition, I think, make it more likely that these types of things will get scaled back.

MS. ALLENSWORTH: And just to put my perspective on this too, it's really about – to me, it's about the who, not necessarily the what. So when you ask a florist, is there a public health and safety, you know, aspect to what you do, guess what the answer is? Yes.

MR. SKORUP: Yeah. The Michigan legislators four years ago tried to tack back the mandated hours for barbers in the state of Michigan from 2,000 back to 1,800. They initially were talking about going further than that. And I recall one of the barber school – the guy that ran the barber school saying that barbers weren't quite doctors, but they're as close as you could get in the state of Michigan. It was very hazardous. Not a barbershop I'd been in, I guess.

So if the state delicensures or drops these good character clauses, how is a state going to screen out people who do pose a danger of public – or a threat to public health and safety.

MR. SLIVINSKI: Sure. So one way of doing this is to basically take a look at the offense for which they have a record, and if it's related to the specifics. So, I mean, drunk drivers getting a taxi cab driver's license, I can see how you would want to try to keep those folks – you know, that sort of thing – the recurrence of that sort of thing is more common than other types of offenses.

But I also do think that a lot of it comes down to what the comfort level of the employer is, right? It's not the state's job to say you should or should not be able to apply for a job in this field. It should say, OK, if you meet these requirements that we've set, we will give you this license. And then it's up to the employer to decide if you are a risk or an insurance threat, and whether they will hire you. And employers have their own screening processes.

In fact, one of the – one of the scholars we work with, Dr. Morris Kleiner from University of Minnesota, right? And he's actually done some work with Uber. And what they've done, which is fascinating, is they've got 50 states worth of data and lots of data points. They actually did a – what they called a blind test. Basically, they had – and Uber has been very diligent about hiring folks with criminal records, coming out of prison, getting reintegrated into the workforce, to let them drive Uber cars.

The thing is though, when you get into an Uber car, you don't know if your driver is an ex-con or not. For most passengers it doesn't matter, as long – again, as long as they weren't in jail for drunk driving or something. If it was a nonviolent drug offense or something. And maybe there's no reason to wonder why their driving ability would be less than others. And so you look at the quality ratings, right? Because whenever you get out of an Uber and your phone dings, and you can rate the driver. Of course, they rate you too, but you can rate the driver.

And you look at that data, and you discover that the satisfaction rankings for people who had criminal records versus those that didn't were not at all different. There was no statistically significance difference between the two. So from an employer's perspective, there may not be any real reason to keep people with criminal records from – who have served their time and rehabilitated – from working for their company. So you have to leave that up to the employer. And right now, the licensing boards, by definitely, effectively sort of substitute the employer's judgment for the government's judgement about whether someone should be able to work or not. And it really should be left up to the market, or the private sector, really, and the employers, and not so much the licensing boards.

MR. SKORUP: Yeah. I mean, I'd add too what Ed mentioned during his – and, you know, when you're talking about – think of people – if you were growing up in the 1960s or 1970s, you had very few occupations license. You know, 5 percent or so. So if you didn't feel more in danger then than now, then it's probably not as much of an issue.

So looking a little bit at the issue of how – the practical reality of how this is regulated. For whoever wants to speak on it, are these – are agencies taking power to do these regulations? How does a regulation work in practice? So, in terms of, well, we have these people out there running around. Do we want them doing a good or bad job? Are they – are the state very

overbearing on regulating those people, or are they doing barely anything at all? Or whoever wants to talk about the practical side.

MS. ALLENSWORTH: I think I can take that one. So I think that by and large states don't take enough of a role. It's very passive. So a state will pass a statute saying there shall be a board of auctioneers. It shall be seven auctioneers, two elderly members and one member of the public. They shall hold meetings quarterly. And they shall regulate the entry and practice of auctioneering. Sometimes a little bit more specific than that. Sometimes, as I said, number of hours of education will end up in the statute. But it can be extremely vague.

At that point, the board is then authorized to make rules, to write the exams, often to grade the exams, decide how many people pass, and then has carte blanche, essentially, in discipline. Sometimes there's some requirements that what the board does goes with the state's Administrative Procedure Act. But those procedures are kind of more about taking minutes and having a quorum, and things like that. It's not kind of – it's not very much substance. So there's not a lot of state involvement. Some states are different. And I think Michigan may be more involved than others. Colorado is another one, where there is an agency sitting above the boards that takes a bit of a look, and the question is how much, at what the boards are doing.

The state that I like to think about is the dental case that ended up in front of the Supreme Court. In that case, the Board of Dental Examiners decided that teeth whiteners, that were not dentists, were competing with them. And they sent out cease and desist letters to all the teeth whiteners saying: You are practicing dentistry and you are in violation of North Carolina law. What I ask myself in anything is, is your regulatory scheme set up so that a board couldn't do that without passing it by somebody who's not in the cartel? That's the question I always want to ask. And I'm not sure that that's true in very many instances.

MR. SKORUP: Yeah. I know a similar example in the state of Michigan. The Cosmetology Board considers not hair braiding but hair washing to fall under cosmetology, which is 1,500 hours, or in other words –

MS. ALLENSWORTH: More than law school. Oh, I'm sorry. (Laughs.)

MR. SKORUP: Which is more than – yeah, more than to be an attorney, so. So, Rebecca, you are not qualified to wash hair. (Laughter.)

MS ALLENSWORTH: Except I do it every day.

MR. SKORUP: Yes. It's amazing. (Laughter.)

All right, so kind of on the – so what should we do? What should the state do? I mean, should legislators look at these one at a time? How do we get at what you're talking about? You can take that from each of your areas. What should – if it's a room full of LEG As – we have a couple here – what should they do on this issue?

MS. ALLENSWORTH: I like the sunset and sunrise things, where every year – there's a commission of – an independent commission that's not the board. Looks at 20 percent of the professions, 20 percent of the regulation, makes some recommendations, and then that goes up in front of – so I like the sunset – that's called sunset review, because it's sort of, like, well, we're going to take a look at what's on the books, because there's this stickiness to everything. Things get passed, and then they stick. So I like that. And I just also like the idea of resisting when the – you know, the profession comes to you, the interior designers want to be licensed in the state of Tennessee, the answer is no. So it's both about rolling back what we have, and also about slowing the growth. And about all the supervision stuff that I talked about.

MR. SLIVINSKI: Something else that occurs to me too. And I agree with Rebecca. I think the sunset process is extremely important, because it does put the default assumption and the burden of proof, frankly, on people who want to keep the current laws, right? Right now, if you don't have a sunset process, the burden of proof is on people who want to change the laws. And so flipping that burden of proof is going to be essential to reforming these things. And I think included in any sunset process has to be a discussion about the alternatives and what the real point of the law is in the first place.

So the alternative we've talked a little bit about, certification. The thing about certification that I like is it's not a government-centered thing. It doesn't give incumbent business owners a veto power over their competition. They can't say, we want to keep these people out. It just says, hey, you've certified. You've shown that you can pass this test, or whatever metric you want to use, and then you're allowed to practice in this field. And the government – or, more specifically, incumbent business owners can't keep you out. But having that alternatives discussion needs to be part of this – the sunset process.

And then another part of the process needs to be discussing whether licensing – and Ed mentioned this a little bit – whether licensing laws are actually the best way to get at health and safety outcomes. In fact, one of the things Jarrett reminded me of, and I forgot about this, you know, we certainly don't license cooks and bus staff at a – or waiters and waitresses at restaurants. And yet, cooks especially, I mean, there is a definite health and safety issue here, right? I mean, you've got health concerns all over the place. And yet, we don't license cooks.

Doesn't mean we should license them, but it just shows you that we've handled the health and safety concerns about restaurants in a different way. We've gone through the health department. We've gone through, you know, random checks of cleanliness and such. That's the way to deal with the health and safety issue for a lot of these professions, not keeping out competition. So that sunset process should also be required to discuss those kinds of alternatives as well.

MR. TIMMONS: Yeah, I mean, I would just say that there is a near bipartisan consensus that licensing is in need of reform. And we know what the costs associated with licensing are. We don't have a lot of evidence that there are, in fact, benefits. When you're reading statements from the Obama White House report and comparing them from statements from individuals like Labor Secretary Acosta from the Trump administration, it's hard to distinguish who's speaking. So this should not be an issue that is a partisan one. This is an issue that potentially negatively

impacts those are at the bottom of the income distribution. This is an issue that is very, very much in need of reform.

MR. SKORUP: All right. So we – I know our panel will have some time to stay afterwards, if you have other individual questions. But for now, please thank our participants. (Applause.)

So that concludes the panel today. But don't get too upset about it. We'll be back here next Thursday with another event – next Thursday, February 1st, on do Michigan charter schools get more bang for the buck? So if you are in town, please come join us then for another lunch and good conversation. But we appreciate you being here. And thank you to our panelists, with all the information and the research, as we work on these important policy issues. Thank you.

(END)