

RIGHT TO EARN A LIVING ACT

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GOLDWATER
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EXECUTIVE SUMMARY

OF all the rights that Americans cherish, freedom of enterprise receives the least protection under our law. Indeed, it's far easier for the government to take away the opportunity to open a business or pursue a livelihood than it is to take away an entitlement to a welfare check.

Local, state, and federal governments use licensing laws, government-conferred monopolies, certificate of need requirements, and other regulations to make it difficult for entrepreneurs to start new businesses. Such restrictions often inflict their greatest burdens on people with little wealth or political clout, thereby cutting off the bottom rungs of the economic ladder.

The burden of proving that such restrictions are excessive should not be placed on those who want to earn an honest living; instead, governments should bear the burden of justifying the restrictions. States should enact a **Right to Earn a Living Act** to protect freedom of enterprise. By doing so they will ensure that economic opportunity is not merely a promise but a reality.

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THE NATURE AND EXTENT OF THE PROBLEM

A hallmark of American freedom is the right to pursue one's chosen profession to provide for oneself and family. This right was deeply entrenched in the British common law that formed the foundation for American liberty. After slavery was abolished, this fundamental right was expressly protected as a basic right of citizenship in the Civil Rights Act of 1866, and was among the "privileges or immunities" of citizens protected in the 14th Amendment to the U.S. Constitution.

Pursuant to their police power to protect public health and safety, the states always have had the authority to regulate businesses and professions, so long as they did not regulate so excessively or arbitrarily as to extinguish freedom of enterprise. Unfortunately, shortly after the 14th Amendment was adopted, the U.S. Supreme Court nullified the privileges or immunities guarantee in the *Slaughterhouse Cases*,¹ which upheld a state slaughterhouse monopoly that destroyed the livelihoods of scores of butchers. Since then, U.S. Supreme Court decisions have virtually abandoned protection of economic liberty, subjecting economic regulations to so-called "rational basis" scrutiny, in which regulators are given free rein to limit competition and restrict entry into businesses and professions.²

The results are predictable. A recent report by the Obama administration found that occupational licensing controls entry into roughly one-quarter of all jobs in the workforce. Many licensed professions do not seem to present significant health

and safety concerns, yet individuals who would like to join the profession must first fulfill costly and burdensome requirements. Such laws reduce employment opportunities, especially for those who lack education or language skills, and add to the cost of goods and services. Often the licensing rules are established and enforced by governmental bodies dominated by members of the regulated professions.³

Similarly, local governments often limit competition through monopolies for public services, such as trash collection. Certificate of need laws, typically enacted at the state level, require new entrants in businesses such as outpatient surgery centers, ambulance services, and taxicabs, to demonstrate that existing companies cannot meet demand. Still other state laws forbid sales of certain goods, such as automobiles, contact lenses, and wine, directly to consumers. Disruptive technologies such as Uber and Airbnb are shoe-horned into outmoded regulatory systems or banned altogether.

Such restrictions often greatly exceed legitimate public health and safety regulations. Complete bans of entire businesses, for instance, are sustained even when less-onerous regulations would suffice to protect the public. Excessive and costly training and regulations can unnecessarily limit competition and entry without commensurate benefits to the public.





Fortunately, in recent years, a number of federal court decisions have struck down restrictions on freedom of enterprise in industries such as African hair braiding and casket sales.⁴ Additionally, state constitutions can provide protections above and beyond those recognized under the federal Constitution. In 2015, the Texas Supreme Court invoked the state constitution to invalidate a requirement of 750 hours of training for eyebrow threaders, most of which were unrelated to the occupation, on the grounds that the regulations exceeded the scope of the government's legitimate public health and safety objectives.⁵

But court decisions striking down excessive economic regulations are vastly outnumbered by new restrictions on competition and entry, often adopted at the behest of the regulated industries, seeking not to protect the public but to limit competition. When they exceed valid public purposes, such laws harm both producers and consumers.

In a nation doctrinally committed to freedom of enterprise, aspiring professionals and entrepreneurs should not have to prove

to the government's satisfaction that they deserve to pursue their chosen livelihoods. Rather, the burden of proof should rest with those who want to restrict entry into a profession. That is exactly what the Right to Earn a Living Act would accomplish.

THE RIGHT TO EARN A LIVING ACT

States can take a major step toward restoring the freedom of enterprise that is every American's birthright by enacting model legislation called the **Right to Earn a Living Act**. The proposed law recognizes that the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right. The act provides

substantive protection for those rights while at the same time preserving the ability of state regulatory agencies and local governments to protect the public through legitimate and proportionate health and safety regulations.

The act would require that any ordinance or rule that limits entry or competition in a business or profession “shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.” That language contains three essential components: legitimate, necessary, and tailored. “Legitimate” refers to traditional police powers such as the protection of health and safety. By contrast, economic protectionism — favoring some businesses over others — is not a legitimate object of government. “Necessary” and “tailored” refer to proportionality. Is a ban or monopoly necessary, or would free or regulated competition suffice? Is a particular rule properly applied to a specific profession, or is it largely unrelated to the products or services that are provided?

A classic example of excessive regulation is taxicab licensing. A local government might logically require minimum taxicab safety standards and insurance. But an arbitrary limit on the number of licenses issued serves only to reduce competition and consumer choices, increase prices, and restrict newcomers into the business for the benefit of existing companies. Likewise, is it necessary to subject African hairbraiders — who twist, braid, and weave African hair without the use of chemicals — to an entire cosmetology curriculum that focuses on white hair and the extensive use of chemicals? Both taxicab and African hairbraiding businesses can provide entry-level entrepreneurial and professional opportunities, but only if the regulations governing them are legitimate, necessary, and tailored. That is what the Right to Earn a Living Act would require.

After the law is enacted, agencies and local governments would have one year to review their regulations and bring them into compliance with the law. Anyone may petition a governmental entity to repeal or modify specific regulations, to which the entity must respond within 90 days.

Where the entity decides not to grant the petition, the individual who requested the agency action may challenge it in court. The court is instructed to rule in favor of the challengers if it makes two findings “by a preponderance of evidence.” First, that the challenged regulation “on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation.” Second, that “the challenged entry regulation is not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives” or that “such objectives can be effectively served by regulations less burdensome to economic opportunity.” If the court makes those two findings, it is directed to enjoin the regulations and award reasonable attorney fees.

☛ **The Right to Earn a Living Act** restores the proper balance between freedom of enterprise and legitimate government regulation. It allows agencies and local governments in the first instance to review their rules to eliminate economic protectionism and to tailor them to legitimate public purposes. It does so in the second instance as well, giving governmental entities the opportunity to respond to requests to repeal or modify their rules. Only where the governmental entity chooses not to take corrective action is an aggrieved individual permitted to go to court. There both parties will find a level playing field in which each has the opportunity to prove that the rules are either excessive or appropriate.

☛ **The Right to Earn a Living Act** has been approved as model legislation by the American Legislative Exchange Council. It would bring back to the center of gravity a policy pendulum that has swung far too much in favor of government regulation and economic favoritism and against freedom of enterprise.

All public officials have a duty to ensure that the rules of the game are fair and that equal opportunities are available to all to pursue the American Dream. To fulfill that duty requires significant and effective corrective action. The Right to Earn a Living Act will insure that all Americans have a right to rise. ●



CLINT BOLICK

Clint Bolick serves as vice president for litigation and director of the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute. The Goldwater Institute's Center for Constitutional Litigation is the first of its kind and a new avenue for free-market organizations to advance freedom in the states.

A legal pioneer in a number of areas, Mr. Bolick is perhaps best known for his leadership in defending state-based school choice programs.

He has argued and won significant cases in both state and federal courts, winning school choice victories in the Supreme Courts of Wisconsin, Ohio, and Arizona, as well as in *Zelman v. Simmons-Harris* before the Supreme Court of the United States.

Before joining the Goldwater Institute, Mr. Bolick was a co-founder and former vice president of the Institute for Justice and former president and general counsel of the Alliance for School Choice.

During the 1980s and 1990s, Mr. Bolick helped lead the effort to increase judicial scrutiny of racial classifications in areas such as public employment and interracial adoptions. He also designed a legal strategy to restore judicial recognition of economic liberty which resulted in several landmark rulings invalidating regulatory barriers to enterprise.

Mr. Bolick is the author of several books, most recently *Immigration Wars: Forging an American Solution* (2013) with Governor Jeb Bush, *Two-Fer: Electing a President and a Supreme Court* (2012), *Death Grip: Loosening the Law's Stranglehold Over Economic Liberty* (2011), and *David's Hammer: The Case for An Activist Judiciary* (2007).

The recipient of many honors, Mr. Bolick was named one of three Lawyers of the Year in 2003 by American Lawyer. In 2006, Bolick was the recipient of a 2006 Bradley Prize for excellence in "strengthening American democratic capitalism." His book, *David's Hammer*, was chosen for the June 2007 Lysander Spooner Award for Advancing the Literature of Liberty. In 2008 he received the Champion of Law and Liberty award from the Legal Times, which honored him for upholding the legal profession's core values and fighting to expand liberties and protect civil rights. ●

ENDNOTES

Section 1. This Act may be referred to as the “Right to Earn a Living Act.”

Section 2. {Statement of Findings and Purposes.}

- (A) The legislature hereby finds and declares that:
 - (1) The right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right.
 - (2) The freedom to earn an honest living traditionally has provided the surest means for economic mobility.
 - (3) In recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition.
 - (4) The burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed.
 - (5) It is in the public interest:
 - (a) To ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition;
 - (b) To provide the means for the vindication of this right; and
 - (c) To ensure that regulations of entry into businesses and professions are demonstrably necessary and carefully tailored to legitimate health, safety, and welfare objectives.

Section 3. {Definitions.}

- (A) “Agency” shall be broadly construed to include the state, all units of state government, any county, city, town, or political subdivision of this state, and any branch, department, division, office, or agency of state or local government.
- (B) “Entry regulations” shall include any law, ordinance, regulation, rule, policy, fee, condition, test, permit, administrative practice, or other provision relating in a market, or the opportunity to engage in any occupation or profession.

- (C) “Public service restrictions” shall include any law, ordinance, regulation, rule, policy, fee, condition, test, permit, or other administrative practice, with or without the support of public subsidy and/or user fees.
- (D) “Welfare” shall be narrowly construed to encompass protection of members of the public against fraud or harm. This term shall not encompass the protection of existing businesses or agencies, whether publicly or privately owned, against competition.
- (E) “Subsidy” shall include taxes, grants, user fees or any other funds received by or on behalf of an agency.

Section 4. {Limitation on Entry Regulations.}

All entry regulations with respect to businesses and professions shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.

Section 5. {Limitation on Public Service Restrictions.}

All public service restrictions shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.

Section 6. {Elimination of Entry Regulations.}

- (A) Within one year following enactment, every agency shall conduct a comprehensive review of all entry regulations within their jurisdictions, and for each such entry regulation it shall:
 - (1) Articulate with specificity the public health, safety, or welfare objective(s) served by the regulation, and
 - (2) Articulate the reason(s) why the regulation is necessary to serve the specified objective(s).
- (B) To the extent the agency finds any regulation that does not satisfy the standard set forth in Section 4, it shall:
 - (1) Repeal the entry regulation or modify the entry regulation to conform with the standard of Section 4 if such action is not within the agency’s authority to do so; or

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- (2) Recommend to the legislature actions necessary to repeal or modify the entry regulation to conform to the standard of Section 4 if such action is not within the agency's authority.
- (C) Within 15 months following enactment, each agency shall report to the legislature on all actions taken to conform with this section.

Section 7. {Administrative proceedings}.

- (A) Any person may petition any agency to repeal or modify any entry regulation into a business or profession within its jurisdiction.
- (B) Within 90 days of a petition filed under (A) above, the agency shall either repeal the entry regulation, modify the regulation to achieve the standard set forth in Section 4, or state the basis on which it concludes the regulation conforms with the standard set forth in Section 4.
- (C) Any person may petition any agency to repeal or modify a public service restriction within its jurisdiction.
- (D) Within 90 days of a petition filed under (C) above, the agency shall state the basis on which it concludes the public service restriction conforms with the standard set forth in Section 5.

Section 8. {Enforcement.}

- (A) Any time after 90 days following a petition filed pursuant to Section 6 that has not been favorably acted upon by the agency, the person(s) filing a petition challenging an entry regulation or public service restriction may file an action in a Court of general jurisdiction.
- (B) With respect to the challenge of an entry regulation, the plaintiff(s) shall prevail if the Court finds by a preponderance of evidence that the challenged entry regulation on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation; and either

- (1) That the challenged entry regulation is not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives; or
- (2) Where the challenged entry regulation is necessary to the legitimate public health, safety, or welfare objectives, such objectives can be effectively served by regulations less burdensome to economic opportunity.
- (C) With respect to the challenge of a public service restriction, the plaintiff(s) shall prevail if the court finds by a preponderance of the evidence that on its face or in its effect either:
 - (1) That the challenged public service restriction is not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives; or
 - (2) Where the challenged public service restriction is necessary to fulfill legitimate public health, safety or welfare objectives, such objectives can be effectively served by restrictions that allow greater private participation.
- (D) Upon a finding for the plaintiff(s), the Court shall enjoin further enforcement of the challenged entry regulation or public service restriction, and shall award reasonable attorney's fees and costs to the plaintiff(s).

Section 9. {State preemption of inconsistent local laws}

- (A) The right of individuals to pursue a chosen business or profession is a matter of statewide concern and is not subject to further inconsistent regulation by a county, city, town or other political subdivision of this state. This article preempts all inconsistent rules, regulations, codes, ordinances and other laws adopted by a county, city, town or other political subdivision of this state regarding the right of individuals to pursue a chosen business or profession.