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ARTICLE

Occupational Liberty and Licensing before the US Civil War

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Abstract

Prior to the Civil War, the US and state governments required the modern licensing of only three occupations, doctors, lawyers, and ship pilots. Most other references to licensing in the 15,000 surveyed antebellum statutes referred to licensing in general terms. Those that referred to the "licensing" of occupations clearly referenced a type of tax or regulation of occupations thought sinful or diplomatically sensitive, like Indian trading and privateering. In other words, the presumption of occupational freedom that developed in medieval and early modern Britain transferred to the colonies and the United States. Only with the rise of Progressivism did modern occupational licensing become common, thus adding weight to economic critiques of the current system.

Keywords: Occupational licensing; Progressivism; occupational tax; occupational regulation

Many policy analysts argue that modern occupational licensing, which mandates specific educational, experiential, or testing requirements before individuals may lawfully engage in a growing range of occupations, harms consumers and potential practitioners by creating barriers to entry that increase service prices without guaranteeing quality.[1] Supporters of occupational licensing claim that modern quality assurance licensing is a well-established precedent with many social benefits.[2]

This article argues that most antebellum occupational licenses were simply taxes and that only three occupations, attorneys, internal medicine doctors, and ship pilots, were licensed for quality, and then only unevenly because most Americans believed that market forces provided better quality assurance than government bureaucrats or interested experts could.[3] Until the late nineteenth century, modern government-mandated occupational licensing premised on the achievement of minimum standards of experience, expertise, or education was extremely limited and not uniformly considered economically necessary or justified.

Moreover, modern occupational licensing runs counter to the much longer and more established precedent of occupational liberty. For the last millennia, Anglo American government policies have defaulted to allowing free individuals broad discretion in their occupational choices. Governments directly or indirectly regulated, taxed, or banned occupations thought pernicious, but individuals could try to engage in lawful occupation(s) of their own choosing without prior experience or test.

Occupational Liberty in Britain

After about 1000 AD, slavery, serfdom, and other forms of unfree labor in the British Isles gave way to employment and proprietorship aided by the common law adoption of the Germanic concept of *stadtluft macht frei*, or free air makes you free.[4] As jurist Matthew Hale explained, even in the reign of King William I (1066–1087) there was already a strong sense that the laws "taste not of Bondage or Servitude; for that derogates from the Dignity of the Kingdom, and from the Liberties of the People thereof."[5] Free status did not mean that Britons enjoyed license to do absolutely as they wished, legally or culturally, but rather that liberty was presumed.[6]

Medieval and early modern British policy makers did not fear what people might do to make a living but rather that they would not work at all.[7] Eighteenth-century political economist Sir James Steuart captured the economics behind that fear when he noted that "every thing which employs inhabitants usefully promotes consumption; and this again is an advantage to the state, as it draws money from the treasures of the rich into the hands of the industrious."[8] Lord Coke similarly argued that no man could be prohibited from engaging in any lawful occupation under the common law, for it abhorred idleness.[9]

Most guilds were not monopolies,[10] as sometimes claimed,[11] but rather localized cartels, with some of the mutualism of fraternals,[12] designed to keep up wages, prices, and product quality through entry restrictions.[13] By the late medieval period, they were intricately intertwined with municipal government rule.[14] Although their geographical boundaries were fairly clear, the dividing lines between their products often remained murky, which created physical spaces and market niches open to competition.[15] Moreover, guild members regularly engaged in nonguild occupations on the side.[16] The importance of guilds decreased over time, especially following the English Civil War and Glorious Revolution,[17] when many policy makers understood, as Steuart later put it, that "the allurement of gain will soon engage every one to pursue that branch of industry which succeeds best in his hands."[18] Nevertheless, as Adam Smith lamented, municipalities often managed to restrain "the competition in some employments to a smaller number than might otherwise be disposed to enter into them." Such restrictions were placed on the number of apprentices a master could employ rather than licensing per se because it was recognized that "the patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property."[19]

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Britain's occupational liberty enabled its early industrialization. Economic historian Martin Hutchinson asserts that by 1700, if not 1600, Britons were "free to work in any occupation they chose and to make any arrangement they could negotiate with their employer."[20] Once contractually bound, they became the legal servants of their masters, a term that included apprentices, indentured servants, and employees, for the day, week, month, season, or year. None, however, lost their rights as freemen.[21]

Steuart also asserted that "our lowest classes are absolutely free; they belong to themselves,"[22] a claim supported in treatises like Matthew Hale's *The History and Analysis of the Common Law of England* (1713). Hale explained that the utter disarray of English law created a flexible, workable system of jurisprudence because what mattered most were not the words written on dusty parchments, some long lost, but the common law, which "does determine what of those Customs are good and reasonable, and what are unreasonable and void." Relatively recent statutes duly passed by King and Parliament were binding, but only those older laws that people still regularly followed had to be obeyed.[23] Imbued with concepts like *stadtluft macht frei* and the presumption of liberty,[24] the common law allowed for the evolution of a vigorous market economy subject to regulation and taxation but not constrained by outdated strictures. As Edmund Burke put it, the governments of free nations had to constrain some economic activities but their goal ought to be "to find out by cautious experiments, and rational, cool endeavours, with how little, not how much of this restraint, the community can subsist. For liberty is a good to be improved, and not an evil to be lessened."[25]

The wage premium of masons and carpenters over day laborers was indeed much lower in Britain than in autocratic or caste-based countries with significant de facto or de jure barriers to entry into skilled trades.[26] Evidence of occupational liberty also abounds in qualitative works like Daniel Defoe's *A Tour through the Whole Island of Great Britain*, which provides a "thick description" of the island's socioeconomic conditions in the early eighteenth century. Its overall thrust was that Britain's economy developed because people were free to pursue whatever occupation(s) best suited them.[27]

Carryover to the American Colonies

Britain's mainland North American colonies were similarly free and economically dynamic. Colonial Pennsylvania, for example, was called "the best poor man's country in the world"[28] because incomes were relatively high, taxes relatively light, opportunities relatively ample, and restrictions on economic activity relatively few.[29] The colony's founder, William Penn, wrote in 1679 (more than a decade before John Locke's *Two Treatises*), that "the First of these Three Fundamentals is Property, that is, Right and Title to your own Lives, Liberties and Estates: In this, every Man is a Sort of Little Soveraign to himself."[30] The notion of contractual servants like apprentices, indentured servants, and long-term contract laborers also migrated to America and persisted throughout its colonial period. For example, Rhode Island imposed a fine on any worker who broke a contract to do bespoke (custom) work or to serve "to Work for any certain time."[31]

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As in Britain, many colonists of both sexes engaged in multiple occupations; few were wholly farmers or wholly artisans or shopkeepers.[32] By midcentury, the tax rolls of small market towns like Lancaster, Reading, and York (Pennsylvania) were home to inhabitants listing three score different primary and secondary occupations, a number that grew along with population and economic development.[33] Towns that wanted an artisan of a particular type often advertised for one and sometimes even offered a subsidy of cash, land, or a house to induce migration.[34]

Most immigrants to colonial mainland British North America were neither wealthy nor impoverished.[35] Although some immigrants were too poor to afford their own passage and thus bound themselves as servants for a term of years, most were skilled workers from the middling strata of wealth in Britain and Scotland, France, and what would become Germany, Sweden, and Finland.[36] They came to improve their material lot but also to exercise economic, religious, and even cultural freedom.[37]

None of this is to say that colonial and early national governments did not involve themselves in the economy, just that they were more apt to try to *encourage* beneficial activities through corporate and trade association charters, patents, subsidies, tariffs, trademarks, transportation improvements, and inducements for skilled workers to immigrate from abroad than they were to try to *prevent* people from engaging in specific economic activities.[38] Economic restrictions smacked of tyranny and portended rebellion.[39]

Liberty did not mean licentiousness. Duly approved taxes were to be paid, and restrictions followed on activities believed to create significant negative externalities, like alcohol consumption, gambling, and prostitution. The right to establish a proprietorship or to contract with an employer, though, met little legal restriction.[40]

A New Nation Forged in Economic Freedom

The colonists declared independence from Mother England for a variety of reasons that were usually stated in political terms but clearly rooted in economic ones. Specifically, they rebelled against British control of the colonies' fiscal and monetary policies, which under the specie standard of the day included restrictions on trade and colonial manufacturing.[41] Although to some extent the struggle was over "who was to rule at home," heavy-handed but ineffective wartime domestic economic policies, like legal tender and price-fixing laws, convinced many Americans that market forces were fairer and more effective regulators than legislators were. As Adam Smith put it in 1776, the year that Americans declared independence,

> [e]very man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man or order of men. The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and

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> for the proper performance of which no human wisdom or knowledge could ever be sufficient: the duty of superintending the industry of private people.[42]

After independence was won, the creation of a federal system of governance and a national government with limited powers kept most economic regulation at the local level.[43] Even the most-activist early federal policy maker, Alexander Hamilton, thought in terms of "beneficially" *stimulating* the economy "by prudent aids and encouragements" rather than in *restricting* enterprises or workers.[44] Consistent with negative liberty, the prevailing notion that all citizens were equally protected from state interference,[45] the only type of occupational licensing explicitly mentioned in the US Constitution was the granting of letters of marque for privateers,[46] which made it legal for licensed US citizens to seize and sell the commercial shipping of the nation's declared enemies.[47] The license, as the New York legislature explicitly called it, legally distinguished privateers from pirates but set no quality barriers to entry.[48]

In addition, the Seventh Amendment of the Constitution incorporated into US jurisprudence the English common law, including two legal maxims, *salus populi supreme lex est* ("the welfare of the people is the supreme law") and *sic utere tuo* ("so use your right that you injure not the rights of others"), that helped to maintain notions of rational, limited government at all levels.[49] As Edmund Burke put it, the common law above all protected liberty, which meant a condition in which "no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society."[50]

The Founders and Framers usually waxed eloquent but general about the blessings of liberty and the need to protect it, and life, and property. Sometimes, though, they specifically referenced occupational choice in a way that left no ambiguity. James Madison, for example, asserted in 1792 that each American enjoys the "free use of his faculties and free choice of the objects on which to employ them." Later in the same document, he asserted "that is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies[51] deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word but are the means of acquiring property strictly so called."[52]

"A wise and frugal Government, which shall restrain men from injuring one another," Thomas Jefferson explained in his first inaugural address, "shall leave them otherwise free to regulate their own pursuits of industry and improvement and shall not take from the mouth of labor the bread it has earned." Later in that same speech, in a long list of "principles" that "form the bright constellation which has gone before us," he reiterated that "labor" should be "lightly burthened."[53]

Alexander Hamilton also made clear that "in matters of industry, human enterprise ought doubtless to be left free in the main, not fettered by too much regulation."[54] As political economist Tench Coxe, one of Hamilton's underlings at Treasury, noted, "there is no branch of commerce foreign or domestic, in which every district, city, port, and individual, is not equally entitled to be interested."[55]

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The Founders' and Framers' policy sentiments aligned with economic realities. States and municipalities, especially the larger cities, competed against each other to attract people and businesses, so they generally erred on the side of regulating too little rather than too much.[56] Throughout the nation, not just in boom towns like Rochester, New York, geographical and occupational mobility was taken for granted, even if social mobility was not.[57] The fact that nineteenth-century economic development closely followed the patterns described by contemporary German economic geographer Johann von Thünen strongly suggests that early US governments were not major factors in producing economic outcomes.[58]

Wages in the early national and antebellum periods were generally higher than in Europe, so the incentive for members of various occupations to try to restrict entry was relatively slight.[59] If wages dropped in one area or occupation, people would naturally seek to discover trades and locations where they could earn more. Geographical and occupational mobility ensured fair wages for all. As the master carpenters of Philadelphia put it in 1791,

> [t]he wages of all artificers must be regulated by the number of persons wanting employment; high wages induce masters to increase the numbers of apprentices, and journeymen to come from other places: low wages produce the contrary effect. It is not, therefore, in the power of any set of them in a free country to keep the price of labor much below, or raise it far above, a certain medium, for any great length of time together.[60]

If burdened by taxes or regulation, workers could always move west, if not to a frontier farm, then to a growing western city,[61] due to positive law and common law rules allowing the free movement of US citizens between states, territories, and even foreign countries as they saw fit.[62] Already by the 1820s, so-called intelligence offices linked eastern workers with western job openings and employment agents scoured the nation's urban and rural landscapes in search of workers.[63] Not coincidentally, that was the era during which indentured servitude ended because poorer immigrants from Europe, due to a complex array of factors including cheaper passage, no longer needed to contract for a term of years to finance their trans-Atlantic passage.[64]

To prevent people from working "in what manner he thinks proper," as Smith stated, "is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him."[65] In short, governments were in no position to impose significant entry barriers in most fields and employers also would have fought them had they tried.

High wages and high levels of geographical mobility gave American workers the market leverage that they needed to shed the vestiges of the contract controls that emerged in Britain during its medieval and early modern transition away from slavery and serfdom. Although the law of master and servant still held during the nation's first half-century or so[66] and free workers who broke contracts and absconded could technically be captured in another state, freemen who fled west were rarely pursued.[67] Workers themselves argued, as New York

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sailmakers did in 1836, that their labor was their property and that they had "the inherent right to dispose of it in such parcels as any other species of property."[68]

By 1850, Americans characterized employment in terms completely familiar today. In the eyes of the law, both employer and employees were freemen, or "citizens having equal rights," as Henry Williams put it in 1853.[69] They could enter into employment agreements as they saw fit, subject only to the possibility of forfeiting back wages if they left without sufficient notice per custom or contract.[70]

Constraints on Occupational Choice

The general presumption in the United States in its founding period, then, was that individuals should be able to decide if, when, where, and in what trade or economic sector they could try to toil.[71] Unsurprisingly, an unenumerated Ninth Amendment right to "choose and follow a profession" was long upheld by the courts.[72] However, geographical and occupational mobility did not mean that American workers, be they employees or proprietors, possessed a positive right to work at any given occupation.[73] Rather, they were subject to natural, economic, and, in some cases, legal constraints.

Natural constraints on occupation included having sufficient physical or intellectual capacity to fulfill the duties inherent in different types of work. Nobody was interested in hiring an innumerate and illiterate clerk or a limbless gunner or runner. Most cases were not so clear cut, so employers and consumers developed techniques for ascertaining occupational capacity. For example, the US federal government began to require examinations for army and navy surgeons and West Point cadets in the Jeffersonian era. To reduce the number of patronage positions and to improve efficiency by employing professional staff, Jacksonians extended the examination system to include clerks in the executive departments like the General Land Office and the Post Office. Such were the beginnings of the Civil Service system.[74]

Note, though, that nobody thought of mandating that private institutions examine clerks or other employees because private incentives made such intrusions wholly unnecessary. As Smith put it, "to judge whether he is fit to be employed, may surely be trusted to the discretion of the employers whose interest it so much concerns. The affected anxiety of the law-giver lest they should employ an improper person, is evidently as impertinent as it is oppressive."[75] In fact, aside from some government jobs, employees as a general rule were not required to be formally licensed, only independent contractors and sole proprietors were. To protect their revenue base and avoid giving generally larger companies an artificial competitive advantage over generally smaller proprietors, several states mandated that employers were responsible for paying the fees of any of their employees who carried on licensed occupations. For example, Michigan ordered railroads to pay the license fees of their employed draymen.[76]

Economic constraints on occupational choice included access to sufficient capital, credit, and business acumen. Early American governments typically encouraged educational and financial system development rather than restricting access to them.[77]

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Legal constraints on occupational choice included outright exclusions, general barriers to entry, and racial restrictions. The first included outright bans against gambling, prostitution, and alcohol manufacture or retail sale. A law passed in Massachusetts in 1831, for example, banned the cutting of timber on public lands without permission because such "depredations" had "already been committed to a great extent" and would continue "with increased vigor, unless measures are promptly taken for the purpose of discouraging" them.[78]

A second type of legal constraint included laws that licensed businesses rather than individuals including laws mandating permission before a corporation could engage in some important activity, like banking,[79] selling insurance,[80] or collecting passage[81] or tolls[82] or other business activities that required corporate powers like limitations on liability, entity shielding, or perpetual succession.[83] The costs associated with acquiring a corporate charter, however, were seldom heavy and decreased dramatically over the course of the nineteenth century.[84] Sometimes business assets, like tobacco warehouses,[85] ships,[86] or stud horses,[87] were licensed for revenue purposes, as were "carriages of pleasure and burthen."[88] Many early licensing laws were unclear about whether they sought to license the business itself, some underlying business asset, or the proprietor because the sole goal was revenue, not restrictions on entry.

A third type of legal constraint was clearly directed at individuals, typically free people of color or slaves. Such constraints were designed to limit the ability of individuals to free themselves from bondage physically or financially. Many southern states, for example, enacted Negro seamen acts designed to limit interaction between free Black sailors and local enslaved people.[89] Basically the same set of states also passed laws restricting slaves' use of navigable inland waterways.[90] Similarly, any slave guilty of misconduct or thought to be of bad character could be denied a license "to work out" as a day laborer in Newbern or Wilmington, North Carolina.[91] Mississippi even passed a law to sell free Blacks into servitude for five years unless they left the state or obtained a license to stay.[92] Florida fined slaveholders who suffered one of their slaves "to go at large and trade as a free person."[93] And Delaware made it illegal for free Blacks to possess "any Gun, Pistol, Sword or any warlike instruments whatsoever" without a 25-cent license,[94] to be issued only if five or more respectable neighbors vouched for him as "a person of fair character, and that the circumstances of his case justify his keeping and using a gun."[95] Mississippi repealed a similar law in 1852.[96] Even after the Civil War, many southern states continued to try to restrict the geographical and occupational freedom of freed persons, necessitating passage of the Fourteenth Amendment.[97] Southern states also impinged on traditional fishing, foraging, hunting, and trapping rights, not to conserve wildlife as under the later North American Wildlife Conservation Model[98] but to cajole freed persons to join the formal labor force.[99]

Legal Justifications for Occupational Licensing

A fourth and final type of legal constraint was the licensing of specific occupations. In 1878, leading jurist Thomas M. Cooley held that "a free state has no

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power to compel the taking out of a license as a condition precent to the following of the ordinary pursuits of life ... unless for the purpose of taxation." Licenses also could be required for those who wished to engage in unusual occupations or those affected with a "public interest," which economists today recognize as occupations that impose relatively high negative externalities on others or professions where sellers can mask the quality of the services they provide. In other words, government occupational licensing was justified only to raise revenue,[100] to regulate activities that caused harm to others, or to ensure that clients or patients received competent professional service.[101] With a few, minor exceptions, all occupational licensing in the United States prior to passage of the Fourteenth Amendment fell into one of Cooley's categories. By 1870, only five occupations were licensed in the modern sense of the term—that is, the law made it unlawful to engage in the occupation without a state license, which was granted only to those with sufficient experience, education, training, or examination results.[102]

As Cooley noted, most occupations were rightfully left unlicensed. Antebellum Americans recognized that occupational licensing could be abused. Governments might attempt to hide revenue incentives under the guise of quality licensing and could be enticed by high-quality producers to limit supply (and thus raise consumer prices) even when the necessity of quality licensing remained empirically dubious. Antebellum Americans also knew that government licensure was not the only mechanism for reducing asymmetric information or solving the quality-of-service issue.

Occupational licensing also remained the exception rather than the rule because of the long-standing presumption that competition created more public benefits than monopolies, oligopolies, or cartels did.[103] US governments regulated monopolies, sometimes quite heavily, until the New Deal.[104]

Occupational licensing also remained exceptional because most Americans distrusted the ability of the government to improve economic matters. "The highest legislative wisdom," a railroad company executive argued in 1838, "can never equal the sagacity of private individuals in devising plans and methods of conducting business."[105] Federal ordnance inspectors did not even know how artisans forged the army's cannon, and artisans were not about to tell them.[106] Such skepticism of the government's ability to effectively regulate business declined over the second half of the nineteenth century, but skepticism regarding the government's motivation to regulate effectively increased, in large part due to rise of businesses big enough to influence legislators and regulators.[107]

Use of the Term "Licensing" in Antebellum State Statutes

The author used the full-text search feature of Hein's online database to review over 15,000 state session laws passed between 1788 and 1868 containing the words "licence" or "license" and their cognates. He discovered that most of America's occupational licensing laws were merely taxes because they specified fees and penalties for not paying the fees but did not contain any quality

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assurance features. He was able to review such a large number of laws because they were much shorter than today's statutes, often just a paragraph or two, and most references to "licenses" referred to the licensing of dogs,[108] controlled burns,[109] fishers,[110] hunters and blackberry pickers,[111] oyster harvesters,[112] public land lumberjacks,[113] public beach and island gravel or sand harvesting,[114] marriages,[115] and so forth, not to occupational licenses. Other statutes referenced the term license in general terms, as in "permission" or "consent," like in a South Carolina law making it illegal to trade with a slave without the master's "license or consent."[116] Many other mentions were private laws wherein legislators consented to individuals performing acts that were not clearly legal. Other times, the word was used to allow corporations to begin operations after having shown that they had met the requirements stated in their corporate charters.

Moreover, many of the laws that referred to occupational licensing were perfunctory ones directing how the licenses were to be printed or written out, who was to do so, and what their fees should be. Others tweaked details, like the amount of the tax or the fine or other penalty for engaging in the occupation without paying for a license. Others were special or private laws exempting specific individuals from licensing fees. In 1825, for example, Tennessee exempted Robert McKudy of Jackson County from the local retailer license because he was "a revolutionary soldier, who has lost one of his legs."[117] That same state that same year also exempted James C. Ferguson from the entertainment license, presumably because it saw scientific merit in his exhibit of ancient and modern human shapes.[118]

Many other laws mentioning licensing delegated the authority to license specific occupations to courts, professional societies, or, most commonly, municipal governments. That was necessary because municipalities were then considered to be, as legal scholars put it in 1832, "quasi" corporations "with limited powers, co-extensive with the duties imposed upon them by statute, or usage."[119]

Licensing for Revenue and Regulatory Purposes

Most early licensing laws related to work were primarily about raising revenue for the colonial, state, or local government. That typically required introducing regulations to ensure that businesses paid their license fees or suffered fines. Lawmakers pinned some license fees so high that they served as regulations that either soft-banned certain unwanted activities, like selling lottery tickets, or that ensured that only the largest, and thus ostensibly the most reliable, firms could engage in the business. Louisiana, for example, taxed lottery offices $50,000 per year, a very large sum at that time.[120] Sometimes, high licensing fees unintentionally prevented certain types of businesses, like insurance agents, from lawfully operating in smaller counties.[121] Alcohol sales, gambling, prostitution, and other vices were also taxed, if only to offset the negative externalities they created.

That the goal of most early licensing laws was fiscal and not about quality assurance was obvious because the licenses were embedded in revenue laws or stipulated that the issuing clerk or court "shall issue" the license without

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restriction upon receipt of payment. For example, when Mississippi imposed a $500-per-year license fee on lottery brokers, the statute stated that "the Treasurer shall, and is hereby authorized to grant."[122] Virginia statutes speak of "a tax on licenses to merchants and others."[123] A Tennessee law characterized its $50 license on grocers as "being the State tax."[124] A Maryland law used license and tax synonymously in an act compelling "the inspectors of salted fish in said city to pay a license of seventy-five dollars each."[125] In Alabama, licensing records were kept by the Comptroller for Public Accounts and included $15 "licenses," not to become a full-time slave trader but to trade a single slave.[126] The governor of Massachusetts argued that the "duty upon licenses to retailers of spiritous liquors" should be increased because it "would operate, indirectly, as a tax upon the consumer."[127] A Louisiana law in 1856 stipulated "that all taxes, commonly known as licenses ... on professions, callings, and other business, and on carriages, hacks, drays, and other vehicles" were payable in January of each year "and if any tax, commonly known as a license" remained unpaid, a tax lien would be placed on the business.[128]

In 1824, Louisiana even began to "farm" (sell to the highest bidder) its hawker/peddler license revenue and its law explicitly stated that the tax farmer had "to grant to any applicant such license as may be demanded from him. (sic) (on payment being made at the rate herein specified)."[129] California eventually instituted a licensing requirement and tax on all "trades, professions, and business not prohibited by law."[130] Virginia ended up in much the same place but in a different way by exempting license holders from real estate taxation but taxing "all the capital invested or used in any manufacturing business, or invested or employed in any trade or business (except agriculture) for which no license is required."[131] In other words, all nonfarm businesses had to pay for a license or pay a capital tax. Virginia discovered that California's law was a more powerful way to regulate when it threatened to revoke the licenses of any person who paid out in bank notes of a less denomination than five dollars but could not find a similar lever to use against its nonlicensed businesses.[132]

Once a government had a fiscal interest in the sale of licenses, it began to crack down on those who failed to obtain a license—that is, to pay the tax. Rhode Island, for example, considered those who flouted licensing laws as having "defrauded" the state of "its revenue."[133] Heavily fining unlicensed competitors helped licensed incumbents, but increasing the market power of incumbents did not appear to be the major goal.[134] People wishing to avoid the licensing fee had incentives to claim that they engaged in other, unlicensed occupations. For example, alcohol retailers would call themselves grocers or tavernkeepers would claim to be innkeepers. Some governments responded by licensing the adjacent businesses for revenue as well, whereas others created licenses with stipulations or qualifications meant to differentiate those truly interested in running an inn from those merely interested in running a tavern or those truly selling groceries from those maintaining a mere tippling house or grog shop. And governments learned to limit licenses to a single name or location lest people share them, as highly taxed lottery brokers in Maryland tried to do.[135]

Municipal governments could regulate businesses directly as part of their "police powers." For example, retailers who extended too much credit for

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alcohol purchases could be denied access to the courts for debt enforcement.[136] However, officials found that restricting access to licensing constituted a powerful inducement to enforce the law. Many license laws stipulated that certain activities, like allowing gambling or drunkenness or selling alcohol to minors or slaves without proper permission, could lead to license revocation, which entailed a loss of the license fee as well as a stiff fine if the business continued to operate.[137]

Licensing laws that gave individuals discretion on whether to issue the license or not invited corrupt side payments (bribes). Therefore, Vermont explicitly made it illegal for "the board of civil authority, or any member thereof ... to receive any fees or gratuity whatever for granting ... licenses."[138] Most other states simply licensed anyone who paid the fee, which often explicitly included a small payment to the processing clerk.

In 1813, as a wartime tax measure, the federal government required "every person who shall deal in the selling of any goods, wares, or merchandise" to buy a license. In 1814, over 46,000 people did so. Revenues from the licensing topped $81 million in 1816, but the law was repealed at the end of 1817.[139]

Between 1795 and 1822, the US federal government also licensed western fur traders.[140] It was not a revenue measure because its monopoly proved a wash financially, requiring annual appropriations for operating expenses that exceeded the profits on the $200,000, and later $300,000, working capital that Congress provided. Rather, licensing was justified as a diplomatic or wartime policy, an Indian pacification measure premised on the belief that private traders were too few and too venal to provide Indians with good prices for their furs. Private traders were also likely to sell Indians alcohol and firearms instead of blankets, skinning knives, and other innocuous manufactured wares.[141]

State governments also licensed Indian traders. Florida, for example, claimed that "the safety, welfare and tranquility of the Territory of Florida, do in a great measure depend on the maintaining a good correspondence between the citizens of this Territory and the Indians in amity with the good people of the same, and whereas many inconveniences have arisen from private persons trading with them without license." So, it made it illegal to barter or exchange any rum or other strong liquors, clothing, arms, ammunition, or anything else except "at stores or houses licensed for that purpose" on penalty of a $500 fine for each offense.[142] Like the national government, the state governments that tried to license Indian traders eventually discovered that competition and private incentives led to better traders than cloistered cartels did.[143]

Bona Fide Professional Quality Licensing Attempts

Licenses meant primarily to reduce asymmetric information between sellers (professionals) and buyers (clients) sometimes did not require any payment, except perhaps a nominal fee for the clerk processing the licensing paperwork. Even when imposed, professional license rates were never set as high as the taxes on auctioneers, brokers, and gamblers. Most importantly, unlike revenue licenses, they invariably were issued at some expert's discretion based on a controlling state statute stipulating the minimum qualifications needed for

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licensure, which could include formal education, work experience, examination, and/or attestation of competence by experts.

Attorneys/judges, doctors and other health care professionals, and ship pilots constituted the three most widespread examples of modern occupational licensure prior to the Civil War. Each is detailed below. A few other licensing statutes reference quality criteria but in ways that are difficult to give much credence to. For example, many municipalities licensed chimney sweeps and butchers for revenue purposes, but a few indicated that only "suitable" or "proper" persons were to be licensed for such occupations without giving any details about how suitability was to be proven or tested.[144] Claims that members of other occupations, like barbers[145] and childcare providers,[146] also faced quality screening turn out to be false because no licensing statutes referencing them could be found or they stipulated fees but no quality assurance mechanisms.

Attorneys

Early Americans developed a love–hate relationship with members of the legal profession, sundry attorneys, barristers, and counselors at law as well as judges, justices of the peace, and other local and federal magistrates. Americans revered jurists' ability to mediate between different classes, political, and socioeconomic interests while also fearing the ability of incompetent or venal ones to destroy lives through imprisonment for debt. Americans were therefore willing to impose restrictions on their occupational freedom to decrease the probability of encountering a bad one.[147]

In colonial British North America, anyone could dispense legal advice[148] but specific courts licensed attorneys to practice "at the bar" of the court to save judges from having to listen to the legal ramblings of "mere charlatans" and pettifoggers.[149] In colonial New Jersey and New York, the governor licensed applicants who could provide sufficient recommendation. Between 1709 and 1776, 136 attorneys were admitted to the New York bar.[150] In some colonies, like Massachusetts, attorneys had to serve for three years before they could apply to be called a "barrister," or "counsellor" as in New Jersey, after passing an examination by the court.[151] In North Carolina, the governor could license a lawyer to practice in all the inferior courts first before being admitted to the bar of the superior courts.[152] At first, formal legal education or even apprenticeship was unnecessary, but connections helped. For example, George Wythe refused to sign Patrick Henry's license, but two friendlier judges voted to admit him to the Virginia bar despite a lackluster performance on his exam.[153]

Later, starting with the New England states, some formal educational and/or apprenticeship/clerkship requirements were added and successful courtroom practice at the county level mandated before application for examination to the state bar could be obtained.[154] Every state eventually required that trial attorneys be licensed after gaining sufficient education or experience to pass an examination "at the bar," but they continued to allow individuals to serve as their own council in both civil and criminal cases. Moreover, rather than restrictions ratcheting up over time, they receded as the Civil War approached, with some states making direct passage of the bar examination sufficient for

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licensure.[155] An even stronger reaction against licensing occurred in the realm of health care provision.

Health care providers

By the late medieval/early modern period, health care providers in Britain included a range of specialists from apothecaries (pharmacists) to dentists, doctors, midwives, and surgeons. As with the guild system, attempts to keep each specialist in tightly controlled occupational boxes were usually frustrated by complex economic realities, especially the existence of practitioners with local reputations for knowledge of the sundry healing arts.[156]

Early colonial America attracted few formally educated physicians or other specialists. Most had served apprenticeships in the Royal Navy and served their communities as apothecaries, doctors, and surgeons. Many called themselves Practitioners of Physick, and they thrived or failed on their reputation for healing, or at least not killing, their patients. A few found their businesses boosted by licenses granted to them by name based on their general reputations. There was no effort, however, to prevent others from practicing the healing arts. As late as 1744, even a cobbler managed to develop a reputation as a doctor.[157]

However, in the late colonial period, scores of colonists began to head off to Edinburgh for formal medical credentials. They formed the medical school at what is today the University of Pennsylvania in 1765. Swelled in their ranks by the medical veterans of the Revolutionary War, they formed a vanguard seeking professionalization of medical practice.[158]

Licensing of doctors in the early national United States was at first done privately through nonprofit associations that branded individual doctors as qualified by verifying their credentials, checking references, and ejecting members who did not follow prescribed quality control protocols.[159] States soon helped by enacting laws that gave the associations the power to license whomever they believed to be competent doctors and surgeons and that punished unlicensed practitioners with fines and/or the inability to collect their fees in court.[160] Attempts at licensing arbitrage were stymied by laws that forced doctors and surgeons licensed by other states or nations to obtain a state license if they intended to practice domestically—for example, in New York.[161]

The rationale for such laws was clear: when patients directly hired these specialists, which was the norm prior to the twentieth century, the asymmetric information involved was high relative to, say, picking a hospital, which were fewer and thus with more accurate and widely known reputations. In addition, the costs of hiring a bad health care provider were relatively high compared with, say, hiring a bad hairdresser.[162]

Nevertheless, in the 1830s and 1840s many states repealed the penalties previously placed on unlicensed doctors, allowing putative "quacks" to practice medicine checked only by the patients' judgment and prevailing views of the value of various emerging therapies, like homeopathy, hydropathy, and Thomsonian botanical medicine, which many Americans found more curative than the humoral medical practices of the licensed, "orthodox" doctors. Alabama, for example, repealed its medical licensing law in 1837 and allowed any health care

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provider to again use the state's courts to collect debts.[163] Georgia revoked its medical licensing law of 1825 only to reinstate it in 1847, with the proviso that graduates of the Botanico-Medical College duly licensed by the Medical Board of Botanic Physicians were allowed to practice without penalty.[164] It later resorted to colonial practice by licensing individual homeopathic doctors directly by statute.[165] In short, the occupational licensing of health care providers in the antebellum period foundered on the empirical inability of governments and establishment medical societies to differentiate adequately between high- and low-quality health care provision in an age when all health care remained essentially quackery.[166]

Apothecaries were licensed at times, but solely as retailers—that is, for revenue and regulatory reasons, not based on their knowledge of medicinal botanicals or chemicals. Most of course sold alcohol.

Dentists and surgeons were also licensed in some states, like Alabama, which starting in 1841 required the state medical board to examine applicants "under the same rules and regulations, and subject to the same restrictions as those who apply for license to practice Medicine," including a $50 fine for practicing without a license and their inability to collect debts in state courts.[167] Surgery, though, was much less contentious than internal medicine because cause and effect were more readily discerned, so surgeons' public reputations loomed larger than their licenses.

Claims to the contrary notwithstanding,[168] midwives and nurses remained largely untouched by antebellum licensing laws, mostly because, as with surgeons, it was relatively easy to discern good practitioners from bad ones based on readily observable patient outcomes. Indiana, for example, explicitly exempted midwives (and apothecaries) from medical licensure.[169]

Ship Pilots

The licensing of ship pilots was different from that for the practice of internal medicine because the causal connection between the skill of an individual pilot and voyage outcome—ship safety or wreckage—was palpable, with little room for excuses because pilots decided not only where but when to dash into or out of a particular port or hazardous stretch of river. Ship captains, however, could not know who the most skilled pilots were. Pilots had intense knowledge of often rapidly changing local conditions, whereas captains traveled widely, rarely entering the same port more than once a year. On inbound voyages, captains were at sea and thus had no opportunity to inquire into the availability or reputation of specific pilots, and even on outbound voyages or along inland river routes, few people could speak with authority on pilot qualifications. Lawmakers in Indiana, for example, noted that "great inconveniences have been experienced, and many boats lost in attempting to pass the rapids of the Ohio for want of a Pilot, and from persons offering their service to strangers, to act as pilots by no means qualified for the business."[170]

Little wonder, then, that the government licensing of pilots began in the colonial period and persisted, and even spread, throughout the period under study. According to New York jurist James Kent, shipmasters were duty bound,

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and bound by insurance contracts, to hire pilots whenever entering or leaving port and to give the pilot exclusive control of the navigation of the ship. New York pilots were supposed excellent because each had to serve five years as an apprentice and three years as a deputy and then pass an examination administered and judged by the port wardens before obtaining a full pilot license. They also had to post surety bonds. Other states, like Massachusetts, implemented different rules for different ports depending on the ease or difficulty of entering them without intimate knowledge of the approaches. To induce the use of licensed pilots, in many states captains had to pay pilotage fees even if they refused a pilot's services. No port wanted a reputation as a ship graveyard.[171]

States continued to license pilots exclusively until 1837, when two disastrous shipwrecks in New York harbor induced the United States Congress to restore some competition to the system by mandating that New Jersey pilots be allowed to compete for business in New York harbor, a rule also applied to other interstate routes, like the Delaware and Chesapeake bays. Congress refused to go further, however, arguing that "in an industry unshackled by legislation lies the best guaranty of the prosperity of a country. If the door is thrown open to every competent man, the public wants will be attended to." New York increased the stringency of its examinations, but unregulated New Jersey competitors undercut its pilots, so it repealed its licensing regulation in 1845.[172]

In 1852, the federal government began to regulate steamships more heavily, in part by requiring annual examination and licensing of pilots and engineers. In 1855, over 2,000 pilots and over 2,500 engineers were licensed. That year, 74 applicants were refused licenses and 58 licenses were revoked. Tellingly, the pilots and engineers complained, in the words of historian Leonard White, "that they had as much right to carry on their trade without government interference as a tailor or a shoemaker." The families of the thousands of people who died each year in steamship accidents thought differently. "This is a monstrous power," the Treasury clerk charged with administering the licensing program argued, "but it is a monstrous evil it is intended to avert."[173]

By 1867, so many state and federal laws regarding pilotage were in effect that a congressional committee reviewed them all and reestablished the rigorous state examination systems that had been inadvertently abolished by federal law in 1866.[174]

Conclusions

Precedents for widespread occupational licensing extend back only to the Progressive Era. Prior to passage of the Fourteenth Amendment, the US federal government licensed only a few occupations, including Indian traders, pilots, and privateers who engaged in interstate or international commercial activities. It also temporarily licensed local retailers, but strictly as a wartime revenue measure. Most occupational licensing for revenue or regulatory purposes took place at the municipal level, but only after explicit state statutory authorization. Some licensing, like that of dry goods retailers and scavengers, constituted a form of taxation. Other licensing regimes were clearly designed to regulate sins like

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alcohol or gambling while also increasing government revenue. Some extreme licensing fees, like that of lottery brokers, constituted a soft ban on their activities.

Only in the cases of attorneys, doctors, and ship pilots could policy makers credibly claim that licensure reduced asymmetric information enough to protect customers from low-quality producers. They began as private affairs and remained partly so, with state governments providing enforcement, but the power and scope of professional licensure waned somewhat over the antebellum period because screening proved imperfect.

After the Civil War, the presumption of occupational liberty lost ground and occupational licensing gained momentum with help from increasingly numerous and powerful professional lobbying organizations.[175] Health care professionals led the way by rallying behind the American Medical Association's code of ethics and "rational medicine" rather than specific medical practices.[176]

A correlation between urban size and licensing requirements suggests that claims that licensing was economically necessary became more convincing to legislators as traditional mechanisms for discerning service quality decreased in effectiveness as cities grew larger and more anonymous after the Civil War.[177] At the same time, however, technological developments opened new avenues of information creation and dissemination.[178] Therefore, instead of licensing governments might have simply mandated that clients report bad outcomes to a trusted third party, as creditors did with debtors or as consumers would later do with the Better Business Bureau.[179] They could have remained tied to Cooley's three criteria and encouraged the development of the other voluntary options available including competition, bonding, and insurance.[180]

The rise of national professional associations with a vested interest in restricting entry appears to have been the proximate cause of the renewed and increasingly vigorous application of occupational licensing laws.[181] By creating artificial barriers to entry under the guise of ensuring quality service, governments increased the value of the protected occupations, allowing them to extract higher license fees as well as to garner political support. That process began in the antebellum period with, for example, a New York law that granted licensed cartmen a monopoly on the sale of firewood in the streets of New York City and continues to this day.[182]

In short, occupational licensing became subject to the same sort of "Baptist and bootlegger" scenario that led to Prohibition.[183] Professional organizations and other types of incumbents played the role of bootleggers who extracted rents by limiting entry. Progressives played the role of Baptists who believed that government, a sort of secular deity, could better protect consumers than consumers themselves could. Addressing the question of why special interests and paternalism increasingly prevailed in policy circles after the Civil War remains beyond the scope of this article, but changes in legal and other forms of graduate education certainly played a part.[184]

Notes

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[6] Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: University of North Carolina Press, 1991), 3–9, 16–41, 95–99.

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[13] Sheilagh Ogilvie, "The Economics of Guilds," *Journal of Economic Perspectives* 28, no. 4 (2014): 169–92.

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[15] Swanson, "Illusion of Economic Structure," 41–43.

[16] Swanson, "Illusion of Economic Structure," 33–37.

[17] Martin Hutchinson, *Forging Modernity: Why and How Britain Developed the Industrial Revolution* (Cambridge: Lutterworth Press, 2023), 95; Sheilagh Ogilvie, "The Economics of Guilds," 171–72; Livermore, *Early American Land Companies*, 17.

[18] Steuart, *An Inquiry*, 85.

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[20] Hutchinson, *Forging Modernity*, 3.

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[30] https://oll.libertyfund.org/quote/william-penn-on-property-as-one-of-the-three-fundamental-rights-all-men-have-1679.
[31] Steinfeld, *The Invention of Free Labor*, 41–54. Quoted on 41.
[32] Perkins, *Economy of Colonial America*, 115–16.
[33] Lemon, *The Best Poor Man's Country*, 128, 141, 149.
[34] Ver Steeg, *The Formative Years*, 60–61.
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[36] Lemon, *The Best Poor Man's Country*, 4–10.
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[43] Robert A. East, *Business Enterprise in the American Revolutionary Era* (Gloucester, MA: Peter Smith, 1964), 195–212, 263–84, 322–25, quote at 196; Nettles, *Emergence of a National Economy*, 98–103; Robert E. Wright, *One Nation under Debt: Hamilton, Jefferson, and the History of What We Owe* (New York: McGraw-Hill, 2008).
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[46] Faye M. Kert, *Privateering: Patriots and Profits in the War of 1812* (Baltimore: Johns Hopkins University Press, 2015), 5–12, 44, 115. "Government refusal or withdrawal of a letter of marque was rare, though not unheard of." Most were thought too small if under 20 men. At 11–12.
[47] U.S. Constitution, Article 1, §8.
[48] *Laws of New York* (1814), 11–12.
[49] Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (New York: Oxford University Press, 2007), 236; Wiecek, *Lost World*, 44.
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[65] Smith, *An Inquiry*, 122.
[66] Kent, *Commentaries*, 2:319–29.
[67] Kent, *Commentaries*, 1:651b.
[68] As quoted in Wiecek, *Lost World*, 86–87.
[69] As quoted in Steinfeld, *Invention of Free Labor*, 15, 158–60, 185–87. Quoted at 15.
[70] Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* (New York: Cambridge University Press, 2001), 290–314.
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[75] Smith, *An Inquiry*, 122.
[76] An Act in Relation to Mortgages against Preferred Stock in, and the Delivery of Goods by, Railway Corporations, *Laws of Michigan* (1859), 252–55, at 255.
[77] Robert E. Wright, *Financial Exclusion: How Competition Can Fix a Broken System* (Great Barrington, MA: AIER, 2019), 1–12, 309–53.
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[80] An Act to Amend the Charter of the City of Maysville, *Laws of Kentucky* (1838), 136.
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[82] An Act to Establish a Turnpike Corporation, for Improving the Road, from the City of Hudson, to the Line of Massachusetts, on the Route to Hartford, *Laws of New York*, 22nd Legislative Session (1798), chap. 59, 377–81.
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[85] An Act to Provide for and Regulate the Inspection of Tobacco, *Laws of Tennessee* (1841), 117–24.
[86] See, e.g., An Act, to Relieve Pilots and Seamen from Public Duties on Land, and for Other Purposes, *Laws of Mississippi* (1821), 29; An Act to Establish the Gloucester Canal Corporation, *Laws of Massachusetts* (1822), 674; An Act for the General Valuation and Assessment of Property in This State, and to Provide a Tax to Pay the Debts of the State, *Laws of Maryland* (1841), xvii–xli, at xl.
[87] See, e.g., An Act Establishing an Equitable Mode of Levying the Taxes of This State, *Laws of Ohio* (1824), 58–89 at 65.
[88] See, e.g., A Supplement to the Act, Entitled, An Act to Alter and Amend the Charter of the City of Annapolis, *Laws of Maryland* (1827), ccli.
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[92] An Act to Amend an Act Entitled "An Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes and Mulattoes," *Laws of Mississippi* (1831), 349–53 (passed June 18, 1822).
[93] An Act Relating to Crimes and Misdemeanors, *Laws of Florida* (1832), 63–76, at 74.
[94] An Act Concerning Fees, *Laws of Delaware* (1841), 430.
[95] An Act to Prevent the Use of Fire Arms by Free Negroes and Free Molattoes and for Other Purposes, *Laws of Delaware* (1832), 180–82.
[96] An Act to Prohibit Magistrates from Issuing License to Negroes to Carry and Use Fire-Arms, *Laws of Mississippi* (1852), 328.
[97] David T. Hardy, "Original Popular Understanding of the 14th Amendment as Reflected in the Print Media of 1866–68," *Whittier Law Review* 30 (2009): 695–722.
[98] Robert E. Wright, *History and Evolution of the North American Wildlife Conservation Model* (Cham, Switzerland: Palgrave, 2022).
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[100] The first licenses in Europe, in fact, were not licenses to produce but rather to consume goods like alcohol and tea, explicitly in lieu of excises and tariffs (Smith 1937, 828–29).
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