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Labor Watch

Right to Work 2.0

Politicians and bureaucrats use licensing and other rules to stop the creation of jobs. Here's what to do about it.

By Derek Khanna

Summary: *Unions and other advocates of Big Government defend policies—license requirements, for example, and other "barriers to entry"—that make it difficult if not impossible to create new businesses and new jobs. Existing businesses are also often backers of laws and regulations that limit competition, stifling innovation and growth. But real reforms—policies that might be called "Right to Work 2.0"—could knock down these barriers.*

Sabina Loving (upper left), whose business serves the South Side of Chicago, fought against efforts to require a license to work on tax preparation. Other targets of licensing schemes have included Segway tour guides and hair braiders.

Imagine if, in 2005, a 21-year-old Mark Zuckerberg decided to launch what was then called "TheFacebook.com"—but before he could do so he had to apply for his organization to be a "licensed social network" in every state.

► Imagine that to apply to be a licensed social network, Zuckerberg needed to pay large licensing fees to 50 states and regular renewal fees, while maintaining addresses in every jurisdiction, and be subject to lawsuits therein. Instead of hiring coders, Zuckerberg may have hired lawyers. He may even have had to hire a lobbyist. If that didn't work, he may have had to pay PAC donations for political help to get approval across the country.

► What if Zuckerberg had to take an exam to become a licensed social network provider? Not a joke exam, but an exam that had a passage rate comparable to the bar exam?

► What if a licensed social network was only lawful if it followed certain prescribed market models, like prohibiting a private beta version to colleges and requiring it be open to everyone across the country before launching to the public?

► Lastly, what if this exam was created, run, and operated by Myspace and Friendster, then the incumbent social networking companies?

If that were the state of the law in 2005, there would be no Facebook.

This scenario may sound absurd. But today this sort of absurdity is the status quo in most states for many occupations. In fact, such requirements affect more than 25% of all occupations. It is not a coincidence that we see dynamic competition and growth in websites and apps, while the rest of the economy has slowed to a crawl.

Occupational licensing

The way that occupational licensing stifles employment opportunities is well-known. Across the country, licenses are required for locksmiths, ballroom dance instructors, manicurists, interior designers, upholsters, and, in Washington, D.C., even tour guides. All 50 states require licenses for anyone working with hair, which usually includes all hair braiders, despite the inconvenient fact that hair braiding is not actually taught in cosmetology school. [See the article by Steven J. Allen on page 4.]

Regulations like these affect real people. Clark Neily's book *Terms of Engagement* chronicles the story of how regulations on the floral industry impacted one individual:

> Sandy Meadows was a widow who lived by herself in Baton Rouge and

November 2015

loved working with flowers. She had little education and nothing in the bank when her husband died. She'd never had to support herself before, and her only vocational skill was making floral arrangements. Unfortunately, Louisiana is the one state in the country that licenses florists, just like doctors or lawyers.

Sandy tried five times to pass the licensing exam, but it was too subjective. Besides taking a written test, applicants had to make four floral arrangements in four hours. A panel of working florists would grade the arrangements and decide whether the applicant was good enough to set up shop and compete with them. Usually they said no.

When agents of the Louisiana Horticulture Commission found out that Sandy was managing the floral department of an Albertsons grocery store without a license, they threatened to shut it down. The store had no choice but to let her go and hire a state-licensed florist instead. Prevented by government from doing the only work she knew, Sandy had no way to make a living. She had no car, no phone, and, on the last day I saw her alive, no electricity because she couldn't afford to pay her utility bill. In October 2004, Sandy Meadows died alone and in poverty because the State of Louisiana wouldn't allow her to work in a perfectly harmless occupation.

These occupational licenses requirements are not just harmful to individuals, but collectively the thicket of regulations form a barrier to competition across the economy. These barriers to competition, growing larger every day, have a definite economic impact upon our society by limiting competition and growth. In the 1950s, five percent of the workforce was required to hold a license; that percentage has quintupled to 25 percent today. The large number of occupational licenses across the economy means that more and more occupations are effectively off-limits to competition. This means that for one in four occupations competition and true market forces are stifled by government regulation, and often stifled specifically to protect incumbent firms (people who are already in that business).

Free-market capitalism is increasingly being replaced by licensure-based capitalism, which is generally a form of cronyism. As Nobel Prize-winning economist Milton Friedman explained, licensure is "essentially a medieval guild kind of regulation" where "the state assigns power to members of the profession." He explained that a license requirement "almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public." The impact goes beyond merely making many Americans unable to join these occupations. Because of these requirements, goods and services cost more, and a few incumbent companies who create, operate, or benefit from the licensure-based capitalism model receive a disproportionate share of the profit, while upstart companies can't compete at all. We should expect, and the data show, that innovation and growth in these sectors of the economy slow to a trickle.

Permissionless innovation

Silicon Valley, where I work, has a concept that I hope policy-makers could embrace in Washington, D.C.: "permissionless innovation." The concept of permissionless innovation is that an 18- or 25-year-old can have an idea on a Friday, pull together a team on Saturday, write software code on Sunday—often straight through the night—and then launch an app on Monday. Sectors of the economy with permissionless innovation produce economic dynamism with incredibly high competitive intensity. Thousands of new apps and websites launch per day, with new companies often displacing old companies. Dynamic competition is generally what a healthy economy looks like, if government policies get out of the way.

But this is not how the rest of the economy looks.

Facebook succeeded because of this permissionless innovation. Mark Zuckerberg and a few friends could launch a relatively primitive version of Facebook without hiring a lawyer or raising money. Any individual can register a website on GoDaddy.com for about the cost of a drink at Starbucks, and they can complete the transaction even faster than a barista could pull together your drink. Zuckerberg could take his lunch money, register the domain, and get to work.

Zuckerberg was also able to launch small. The website was available at first only to Harvard students, then only to colleges, before it became available to the general public. He was able to improve his product as he grew. In Silicon Valley, this concept of starting small and improving accordingly is referred to as a "minimum viable product" or MVP. The goal of an MVP is to make a minimal investment to test a hypothesis about a business model. Often when pitching a company, investors will caution you to "go small" and use an MVP to test out your idea before they open their checkbooks.

The problem with most government licensure and similar regulation is that those restrictions make it almost impossible for entrepreneurs to start small and improve along the way. If Zuckerberg had to raise money to hire a lawyer and get licensing approval in all 50 states before he could launch the first version of Facebook, it's unlikely any investor would have given him enough money to succeed. His idea was too risky a proposition to compete in a market then saturated by Myspace and Friendster. Zuckerberg believed that Myspace and Friendster could be displaced with a new market model. Few agreed, but he turned out to be right. (Famed Venture Capitalist Peter Thiel's new book, *From Zero to One*, asks entrepreneurs to consider: "What important truths do very few people agree with you on?")

Zuckerberg didn't ask for large investments to launch the website. Instead, he started small. Then the viral success of Facebook across college campuses proved what Zuckerberg already knew: that there was a thirst for a new social network. With rapid

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growth, raising the money was easy, and the rest is history.

I know from personal experience that asking investors to invest to pay for lawyers is always a difficult proposition. I tried to launch a company in the heavily regulated sector of campaign finance, and while all the co-founders, myself included, were working without salary, we couldn't find lawyers with expertise in the domain to work on equity. I was in law school at the time, but we needed a lawyer experienced in campaign finance law and who not only knew the players at the Federal Election Commission (FEC) well enough to ask permission, but also had the credibility to arrange necessary meetings with key people and elicit their positive response.

At first, legal approval was one of many issues our team was working on, but as FEC approval became a bigger issue, we gradually shifted our attention and resources to prioritize raising the money to pay for a lawyer. Eventually, it became the sole priority of our company, to raise money for legal fees. That completely sidelined the development of the product. After repeated attempts, we failed to find investors willing to pay for the lawyers necessary to test the market model we envisioned. Now, in truth, it's entirely possible our model was uncompetitive in the marketplace, but we'll never find out, because this catch—needing a lawyer, needing money for a lawyer, and not having investors willing to pay for a lawyer—forced us to shut down the company.

This kind of story happens every day across the economy.

Success should never be assured in any marketplace, but success or failure should be based upon the strength of your team, your product, your market model, and your execution—rather than if you hired the right lawyer to ask permission.

If a government regulation shuts down an existing business, the owners and managers of that business can at least complain to the people responsible for that regulation, or to the officials responsible for overseeing the regulators. But *what if a business never comes into existence at all?*

When a start-up fails in incubation phase, where are the lobbyists to knock on the doors of Congress? Congress doesn't appear to have ever held a hearing on companies that were shut down before they could become big enough to complain about it.

Policymakers rarely, if ever, hear the stories of the businesses that fail to exist because of over-regulation and licensing type requirements. Yet, if policymakers want to promote economic growth, these are stories on which they must focus. If we want growth, job creation, and wage increases, then one critical objective is clear: to increase permissionless innovation as much as possible. Make the physical world look more like the app economy, in which anyone with a good idea is able to launch his or her product in the real world—and sink or swim based on the merits of the idea. And where start-ups can't advocate for themselves, policy-makers must investigate and meet with those on the frontiers of the economy to advocate on their behalf.

Licensure-based economies and creative destruction

As policymakers increase the sectors of the economy that require occupational licenses or that have other unwarranted restrictions, one would expect a decline in the intensity of competition. In Louisiana, no one can launch an Uber for flowers and survive as a business, because the state's florist exam is twice as hard as the exam for lawyers. If Mark Zuckerberg didn't have to ask for permission to launch Facebook, why is a florist required to ask for permission to launch a business in the floral field? (Each of these markets may seem small, but even the flower market is rather large as the cut flower market is an $8 billion national market.).

The German economist Joseph Schumpeter explained that a core driver of economic growth and innovation is a process he called "creative destruction." It is, he wrote, a "process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism."

Under creative destruction, new firms force old companies to innovate or die. The effect is seen in the fact that, in the last 30 years, all net job growth in the United States has been as a result of new firms. As a general matter, a government policy is economically beneficial if it furthers the creative destruction process, and detrimental if it stifles it.

Occupational licensing is quite often a tool of big firms to throw a wrench in this process in order to avoid the process of innovating or dying. With this wrench, an incumbent firm can rake in "rentier" (monopolistic) profits by abusing its dominant position in the marketplace. Make no mistake: This is not free-market economics at all, and this is not capitalism. This is abject cronyism, as are most occupational licensing systems.

In Michigan, it will take you just 26 days to become an Emergency Medical Technician, but 1,460 days to become an athletic trainer. This disparity has no explanation other than cronyism. In Nevada, taking the bar exam costs $700, but getting a travel guide license costs $1,500; cronyism is the only explanation.

These problems are not merely sad stories for the professions involved. The wickedness of cronyism has major economic impacts upon the entire economy. People in the marketplace realize that the incentive to lobby is increasingly higher than the incentive to innovate, and they act quite rationally on that belief.

This is an existential issue for long-term growth in the United States. In fact, the often cited statistic that 25 percent of U.S. occupations require occupational licensing *underestimates* the problem. While 25 percent of professions are under licensure, that doesn't count a number of other restrictions upon businesses such as 23andMe, Uber, and Tesla.

Direct to Consumer DNA testing

Over the past year, the cost of a home DNA test for active proteins has dropped well below $1,000. Analysts had predicted this as the tipping point at which the home DNA test market would expand rapidly. At a price point rapidly approaching $100, there is no reason why every American shouldn't have his DNA sequenced once in his lifetime.

Home diagnostics has significant benefits for preventive medicine, which could save the federal government billions of dollars in health-related entitlement spending. DNA testing is just the beginning, as testing our entire proteome (including

When the government protects us from braiding

Isis Brantley, 57, spent 20 years battling the government over her right to braid hair—specifically, the hair of women of African heritage—and to teach others how to do so. She told *Cosmopolitan*:

> In 1997, [the cops] came to my salon—two undercover cops, and then when I looked around, five uniformed cops were standing before my client, and they basically just told me that I was going to jail. They carted me off to jail like a common criminal. The crime was braiding without a cosmetology license. . . . I'm not a cosmetologist. I don't use chemicals or any type of unhealthy or caustic chemicals, or anything that would hurt the client—no sharp instruments or anything like that. They did shut my business down. Me and my five kids became homeless, and one of the community leaders gave me his house, and from there, I just tried to put my pieces together and not fall apart. I just started braiding in that particular house.
>
> After [the arrest], I decided to go ahead and try the 300 hours they were proposing. First, the [Texas Cosmetology Commission] said 1,500 hours. [Then they decided,] well, you don't need to go all the way to cosmetology school, just take 300 hours for a weaving course. I'm not a weaver either. . . .

According to the Institute for Justice, which entered the case on behalf of Brantley, "When the state of Texas began regulating hairbraiders in 2007, it wedged Texas's hairbraiding license into the state's barbering statute. As a result, to teach the 35-hour braiding curriculum Texas required, Isis Brantley had to do three useless things: (1) install ten barber chairs that she was not even required to use; (2) obtain at least 2,000 square feet of floor space she was not required to fill; and (3) mount five sinks (even though Texas braiders were prohibited from offering services that required a sink). Texas also told Isis Brantley she had to become a licensed barber school instructor, which meant spending up to 750 hours learning to teach barbering, and passing written and practical exams on barbering instruction."

In January 2015, a federal judge struck down the Texas laws on hair braiding. In June, Gov. Greg Abbott (R-Texas) signed a law exempting hair braiders from having to acquire a cosmetology license to operate within the state. Yet much damage was already done, Brantley said.

> Hundreds and hundreds and hundreds of women have been starving and asking the government for help, on welfare and food stamps because they could not allow themselves or appear to be making money as a braider. So they would hide and do it in the kitchen or at home. And many, many women in Texas have had their doors kicked in by police, knocked on, beat on, and [the police have] come into those apartments in Dallas, Texas, and fined those young women because they heard that they were in the house braiding.

Nick Sibilla of the Institute for Justice wrote in *Forbes*:

> Instead of protecting the public, occupational licensing protects established businesses from competition. That can net a tidy sum. Licensure can raise wages for the licensed by up to 15 percent, according to research by Morris Kleiner and Alan Krueger, a professor at Princeton University and former chair of President Barack Obama's Council of Economic Advisers. Kleiner estimates that "the restrictions from occupational licensing can result in up to 2.85 million fewer jobs nationwide, with an annual cost to consumers of $203 billion," based on work he did with Krueger and Alexandre Mas.

Government interference may have cost her a fortune, Brantley said.

> You try being out of business for 20 years, and you tell me if you will survive. . . . I've opened up the door for huge competition. That means that some cosmetology school decides, "Now I've made millions of dollars as a cosmetology school, I'm going to turn it into a braiding facility now," and I'm still sitting here in a deprived community, a drug-infested community with prostitution, waiting for my big break to come.
>
> ***—SJA***

RNA) is feasible and provides enormous amounts of actionable information on the current state of a person's health. It won't be much longer until we have defined the genetic underpinnings of all seven thousand Mendelian diseases such as sickle-cell anemia and cystic fibrosis. But the Food and Drug Administration has decided that Americans can't handle access to analysis of their DNA. Therefore, the FDA has shut down the competitive U.S. marketplace on consumer-DNA testing. As a result, China is beginning to dominate and undercut Western firms with its own DNA testing.

23andMe was the first direct-to-consumer genomic company. The people at 23andMe launched their product in 2007, with a $999 saliva test to provide information on gene variants related to risk of 14 medical conditions. (The name comes from the fact that humans have 23 pairs of chromosomes, the structures that contain most DNA.) Since 2012, costs dropped to $99 and provided gene variant reports for over 250 medical conditions, as well as DNA medication interactions for 30 drugs. These products were a commercial success, as millions of consumers found utility in knowing more about their DNA.

In 2010, Pathway Genomics was about to launch its saliva test kit at all Walgreen stores. Then, one day before the launch, the FDA sent a letter informing the people at that company that their test had not been approved. Subsequently, Walgreens dropped the program. The FDA's assault was just beginning. On June 2010, the FDA sent cease-and-desist letters to all direct-to-consumer genomic companies, including Navigenics, Decide, Pathway Genomics, and 23andMe. Only 23andMe continued in the face of the order.

In 2013, the FDA effectively banned 23andMe from providing analytics services for its DNA tests. With that draconian action, government regulators put a brake on an entire industry, shifting significant investment abroad.

In its letter to 23andMe, the FDA referred to concerns about the way women would react to information that they have the BRCA2 gene that indicates a high predisposition to breast cancer. The FDA's threat was stark. "Failure to take adequate corrective action may result in regulatory action . . . [T]hese actions include, but are not limited to, seizure, injunction, and civil money penalties." The FDA wrote that "serious concerns are raised if test results are not adequately understood by patients." The agency was supposedly worried that direct-to-consumer models may inspire people to "self-manage" their care.

Talk about being out of touch. More self-management is exactly what consumers want, and what the country needs to drive down costs.

Entrepreneurs quite logically interpreted this action against a well-funded start-up as a sign that this sector of the economy is simply not open for innovation. 23andMe was founded by Anne Wojcicki, soon-to-be wife (now ex-wife) of Google co-founder Sergey Brin, with over $50 million in capital and a large legal team. Venture capitalists concluded that, if a $50 million start-up with Google money and a robust legal team couldn't survive in the DNA testing market because of the FDA, then no one can.

Since the shutdown of 23andMe, the launching of consumer-oriented DNA testing start-ups has slowed to a trickle, and the impact is larger than just DNA testing. Funding has likely decreased for start-ups in the entire health diagnostic marketplace—precisely where the United States needs more innovation and competition. In the past week, 23 and Me announced they will be re-releasing a limited DNA test, with 60 separate DNA reports, based upon a few specific approvals granted by the FDA. 23 and Me is still limited in the analysis it can provide to the general public.

Car dealership racket

The car-selling market is one of the most significantly regulated markets nationwide, for no coherent reason. In every state across the country, government-sanctioned monopolies restrict auto manufacturers from selling directly to consumers. These restrictions greatly stifle competitive innovation, hurting consumers for no justifiable reason. Forty-nine million Americans cannot legally procure Tesla cars because they live in states that ban Tesla dealerships, and 69 million live in states with significant state regulations limiting Tesla's ability to sell cars to willing customers.

In Texas, Tesla cannot provide test drives, discuss price points, or even direct potential buyers to Tesla's website; the company may only have car "galleries" where consumers may look at vehicles. In the other states where Tesla is not banned, car dealership laws stifle innovation nevertheless. Fixing this problem is bigger than just Tesla. It involves opening the floodgates to dozens of other Teslas and keeping innovation in America. These limitations are one reason why there has been almost no real competition in the car market in decades. The last successful new American-made participant before the recent entry of Tesla was—believe it or not—Chrysler in 1925.

The Justice Department's Antitrust Economic Analysis Group recently published an economic analysis finding that, "as a matter of economics, arguments for state bans . . . are not persuasive." If the arguments are not persuasive, then the bans need to go away. Studies find that the "tax" these regulations effectively produce is 9.3 percent. The same studies likely underestimate current costs, because the Internet has created myriad opportunities for new market models.

For instance, Scott Painter founded Carsdirect.com in 1998 to sell cars directly to consumers via a national "virtual" dealership. State regulations required Carsdirect to own dealerships in every state in order to sell cars directly to consumers online. The company needed to acquire 2,000 car dealerships, and abide by 50 separate state laws, before it could operate across the country. Why shouldn't buying a car be as easy as looking it up on Amazon and paying shipping? Shouldn't the consumer be able to choose?

These two non-occupational licensing examples, 23andMe and Tesla, were chosen to show that the problem of government-imposed barriers to entry is bigger than merely occupational licensing. Across the economy, policy makers are doubling down on the economy of old, and destroying the possibilities of the future. This is devastating for innovation, entrepreneurship, and growth and job prospects across the board. Every company that is stopped from competing is one that could have produced jobs.

The solution: Right to Work 2.0

State and federal agencies and legislatures have an incentive to pass laws and regulations that protect incumbent industries at the expense of competition. Not all regulations are the result of misguided thinking, but many of them are, and many remain on the books long after their usefulness ends. Each occupational license or 1920s-era regulation may seem small in its impact, but aggregated together these barriers produce a broader story of the way entire sectors of the economy gradually become off-limits to new entrants. This is not a partisan problem; governments in Republican and Democratic states alike are complicit in these acts of cronyism.

It is not enough to play Whac-A-Mole, to take action each time stupid regulations/laws inhibit legitimate innovations. Things are getting worse, too fast for us to tackle new problems as they pop up. Every year we sink further into this hole of our own making. It's a bit like being in quicksand, sinking one inch every hour, and someone hands you a spoon when you really need a rope, anchored to some object, to pull yourself to safety.

Recently, more and more people on both sides of the political divide have come to recognize that occupational licensing and other barriers to entry are a major problem for the economy. Conservative and libertarians are largely united in the need to address this problem and have recently been joined by liberals such as Matthew Yglesias of Vox. Yet there have been few significant efforts at reform.

The reason we don't have real reform is because this is a case of "industry capture," a phenomenon in which a few businesses co-opt the regulatory system at the expense of new entrants who lack clout. I have spoken personally with hundreds of policymakers who told me something along the lines of "Yes, you are right on the problem, but you can't possibly expect me to go up against X lobby/industry. Do you have any idea how much money they have?" This is the problem of "factions" that the Founders warned us about hundreds of years ago.

There is a secondary problem: Policymakers lack the imagination to recognize how a small idea today can become a huge industry tomorrow. So the impact of siding with the car dealership lobby against a Tesla, or taxi cab companies against Uber, or hotels against Airbnb, may seem small until we see the full potential of Tesla, Uber, and Airbnb.

These two problems were forecast five centuries ago by the political philosopher

Niccolò Machiavelli:

> It must be considered that there is nothing more difficult to carry out nor more doubtful of success nor more dangerous to handle than to initiate a new order of things; for the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order; this lukewarmness arising partly from the incredulity of mankind who does not truly believe in anything new until they actually have experience of it.

Creative destruction requires a new order of things. And new entrants, like Uber, Tesla, and Airbnb, become enemies of those who profit by the old order. We can't afford to be lukewarm defenders of the future.

Right to Work is the idea that an individual should be able to launch a business or join a profession without being forced to join a union. My colleagues at the pro-liberty group Lincoln Labs and I would propose a series of reforms that could be collectively called "Right to Work 2.0."

Just as an individual should be able to join a profession without being forced to join a union, he or she should be able to launch a business or join a profession without being forced to get permission from a government regulator (or, worse, from incumbent companies). Right to Work 1.0—the traditional state law that allows "open shop" businesses—is in effect in 25 states. Right to Work 2.0 is in zero states currently, but we hope to make Right to Work 2.0 as popular as Right to Work 1.0. Because what use is "right to work" legislation if you still need a license to compete in the marketplace?

Economic liberty

The Founders created a Constitution to protect our natural rights, including our natural right to economic liberty. The philosopher John Locke said the very purpose of government was to protect these natural rights, a view that was echoed in the Declaration of Independence ("[A]ll men . . . are endowed by their Creator with certain unalienable Rights . . . [T]o secure these rights, Governments are instituted among Men . . . "). In the Founding era, the protection of natural rights was an obsession among the nation's leaders. The Bill of Rights includes specific protections for several of them. Yet many Founders worried that a Bill of Rights could be counterproductive: If we protect these enumerated rights specifically, they asked, will future generations think these are the only rights protected under the Constitution? Theodore Sedgwick, who would later be the fifth Speaker of the House, challenged the proponents of a Bill of Rights by asking why they didn't specify that "a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper?"

So James Madison, considered the father of the Constitution, crafted a solution, the Ninth Amendment, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In other words, the Bill of Rights was not exhaustive, and there were other unenumerated—uncounted—rights that were retained by the people. The Fourteenth Amendment's "privileges or immunities" clause also specifically protects natural rights against state action.

Unfortunately, the Supreme Court essentially gutted the Privileges or Immunities Clause in the Slaughter-House Cases of 1873. Today, almost any rule, regulation, or law is upheld by the courts as long as it passes a so-called "rational basis test." Under this test the person complaining, not the government, must prove the regulation is not rationally related to a "legitimate government interest." In practice, it's almost impossible to strike down a regulation under this threshold, regardless of how preposterous it is.

By contrast, the courts have ruled that when laws/regulations affect "fundamental rights," the government must establish that the measure is "necessary for a compelling government interest" and that it is "narrowly tailored" to that interest. If the government cannot meet this legal burden, then the regulation or law is struck down. This so-called "strict scrutiny" approach does not eliminate all regulations and laws, but it makes it more difficult to hamstring the economy, because fewer restrictions can meet this level of scrutiny.

Economic liberty is a fundamental right that the Founders intended to protect in the Constitution, and the courts should show it the same respect as other rights. Economic liberty is of comparable importance to our free speech rights, our right of assembly, and our religious freedoms. Just as the Founders didn't want a country where individuals needed permission to speak or to criticize the government, they didn't want a country where individuals needed permission to join a profession or launch a business. Such a system was ripe for abuse and violated the core concept of natural rights espoused by John Locke.

How to protect economic liberty

What should be done to protect economic liberty and our right to work? The easiest solution to drain the swamp of thousands of regulations and laws that stifle innovation and jobs is to implement a requirement for heightened scrutiny of these measures in the courts. Under such a rule, Louisiana would have to justify its onerous floral exam requirements as necessary to achieve a compelling government interest. The court would ask, "Why couldn't the marketplace just create quality control over florists? What is the compelling government interest, and why is this regulation necessary?" It's highly unlikely such regulation would survive this legal test.

But it's up to the Supreme Court to reverse its Slaughter-House Cases and make this a reality. While there is renewed interest today on the court—Justice Thomas voiced it in his opinion in a major gun control case—this idea is at best a long-term solution. The Court as a whole appears extremely hesitant to reconsider its precedent of more than 140 years.

If we presume the Court won't protect economic liberty, then the Congress, the states, and the people themselves can protect economic liberty instead. The options include:

> A. Congress passes a statute saying that all regulations must meet intermediate scrutiny or strict scrutiny by the courts. Given that Congress has largely given up its lawmaking role in many regulatory areas in favor of letting unaccountable bureaucrats regulate as they please, the least Congress could do is make it easier to invalidate rules and regulations which the government can't justify in court. If Congress still thinks a particular regulation is worthy, even after invalidated by the courts, Congress can pass a bill the next day

and accomplish the same objective via statute.

B. Congress and the states could pass a Constitutional amendment that requires heightened scrutiny for Congressional laws and executive regulations. This proposal has the advantage of applying to laws as well as bureaucratic regulations.

C. Since most of the barriers to entry are imposed at the state level, Congress could use an appropriately limited application of the Commerce Clause to place state laws and regulations that stifle interstate commerce under heightened scrutiny.

D. States could pass a similar law or state constitutional amendment to require that all regulations and laws need to survive heightened scrutiny.

Legislation or a new Constitutional amendment could establish that "Courts shall assess regulations and laws under a strict scrutiny threshold." That simple, one-page bill could knock out ridiculous occupational licenses and regulations for good, creating a permanent check against regulations without strong justification and laws past their prime. With thousands of unneeded laws and regulations struck down, thousands of business start-ups could enter previously over-regulated industries.

To be clear, a heightened scrutiny world is not a no-regulation world. Many regulations will still be upheld, but first the government must show its homework.

Some ask, "How would heightened scrutiny work?" This is the same system we apply to laws and regulations that have a disparate impact upon different races, or that treat men and women differently, or that affect religious liberty and freedom of speech. We have tens of thousands of cases that analyze a law under heightened scrutiny to see if the law is narrowly tailored to an important governmental interest. Just as so-called "fundamental liberties" are protected in this way, economic liberty must be so protected.

A BRAC-type commission + Ending "Chevron"

Another approach worthy of consideration would be a National Innovation Commission. Congress could establish a temporary taskforce that would divide the economy sector by sector and assess the regulations and laws holding back growth without justification. The list of regulations and laws the commission suggests ending could then be given an up-or-down vote, like the BRAC commission list that shut down unnecessary military bases. Like military bases, these regulations and laws may be hard to kill individually, but lawmakers may find it easier to eliminate them if they are lumped in a group.

Lastly, Congress could choose to override "Chevron deference." Chevron deference is a complicated doctrine in administrative law where the courts accept regulations by deferring to an agency's "reasonable interpretation of the law." In practice, this doctrine leads to a highly regulatory state in which bureaucrats have nearly free reign to make rules and regulations that have the force of law, regardless of how ridiculous they are.

Agencies prevailed 76 percent of the time in cases involving Chevron deference, according to a 2008 study. As Justice Scalia notes, "Too many important decisions of the Federal Government are made nowadays by unelected agency officials . . . rather than by the people's representatives in Congress." Congressional action can change how the courts defer to the decisions of agencies, and thereby provide more accountability for rules and regulations.

These three approaches would result in major changes to our economy. In fact, I think these changes would be the most significant advance in economic policy since President Ronald Reagan cut tax rates from 70 percent to 28 percent. These changes would be easy to implement and for the Courts to enforce, and they are also politically achievable.

Conclusion

The French thinker Alexis De Tocqueville noted a century ago, "I cannot help fearing that men may reach a point where they look on every new theory as a danger, every innovation as a toilsome trouble, every social advance as a first step toward revolution, and that they may absolutely refuse to move at all." Today, as Tocqueville feared, new theories are often attacked as dangerous and innovations as troublesome. The result is largely political stagnation. Policymakers have become one of the biggest impediments to long-term growth in the United States, and their track record is growing worse.

Free markets are messy, and creative destruction requires old businesses to innovate or die, and as those old business are forced to adapt or die they will be fierce opponents of any change to the old order, but the alternative to "messy" is "worse"—much worse. If we do not find ways to help the economy grow, the shortfall between spending and tax revenue will increase, our politics will become more divisive, and our problems will become more expensive to fix over time. The longer we wait to get the U.S. economy back on track and geared towards innovation, the more our competitors will grow and be able to outcompete us. Growth should be policymakers Number One priority.

Right to Work 2.0 is a common sense proposal consistent with the principles of limited government and the Founder's original intent for the Constitution. If we care seriously about allowing individuals to work, then we must act swiftly to drain the swamp of regulations and occupational licensing. Going regulation-by-regulation and license-by-license will not work quickly enough.

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LaborNotes

Unions and their allies on the left have been pressuring businesses, under threat of local, state, and federal legislation and executive actions, to raise the minimum wage they must pay their employees. Executives at larger businesses often go along, figuring that the pressure to raise wages will help put some of their smaller, struggling competitors out of business. **Walmart**, the nation's largest retailer, announced in February that it was raising the minimum wage for its U.S. workers to $9 an hour, and $10 an hour next February. Now the bill's coming due. On October 14, the company's stock suffered its biggest one-day decline in 25 years, which analysts blamed on an earnings drop (6 to 12 percent for fiscal 2017) due largely to the wage hike.

Bloomberg News reported that, although company officials had predicted Walmart's minimum wage ploy would improve morale and employee retention, "the policy is having the opposite effect" for hundreds of thousands of workers, with many "calling the move unfair to senior workers who got no increase and now make the same or close to what new, less experienced colleagues earn." One Walmart veteran said, "It is pitting people against each other. . . . [P]eople feel that they aren't being appreciated." A spokesman for the **United Food and Commercial Workers Union** said that "hard-working Walmart employees all across the country began seeing their hours cut soon after the new wages were announced." Reuters reported last month that "Suppliers of everything from groceries to sports equipment are already being squeezed for price cuts and cost sharing by Wal-Mart Stores. Now they are bracing for the pressure to ratchet up even more after a shock earnings warning from the retailer last week. The discount store behemoth has always had a reputation for demanding lower prices . . . [but] even by its standards Wal-Mart has been turning up the heat on them this year."

Twenty-six states have increased minimum wages since January 2014. **Democrats** in **Congress** are pushing a $12 an hour minimum (on top of an average of $1.70 an hour that employers will pay for Obamacare). **Hillary Clinton** supports the planned $15 hourly minimum for fast food workers in her home state, and her main opponent for the Democratic nomination, **Sen. Bernie Sanders** (I-Vt.), supports $15 nationally. Cities like **San Francisco** and **Los Angeles** are phasing in a $15 minimum, albeit with exemptions for unionized workplaces. The **Berkeley, California** labor commission has proposed a $19 minimum, on which the city council is expected to vote in November. **President Obama** has also proposed seven days of mandatory paid leave and an expansion of the number of employees who must be paid time-and-a-half for overtime, and local governments across the country are considering restrictions on employers' ability to adjust employees' work schedules.

In **New York**, prominent restaurateur **Danny Meyer** announced that, to ensure "fairness," as well as to deal with increased costs due to government mandates, his restaurants will eliminate tipping while raising menu prices across the board—by as much as 35 percent.

Meanwhile, the federal government's jobs report for October showed 142,000 new payroll jobs for the previous month and 136,000 for the month before that, which compares to an average last year of 260,000 a month. It's almost as if something were slowly strangling the U.S. job market.

The **U.S. Supreme Court**'s 5-4 decision in ***Harris v. Quinn*** [see *Labor Watch*, January 2014] is having an effect in **Illinois**. The principal plaintiff in the case, **Pamela Harris**, had a 25-year-old son with a genetic disorder for whose care she received a monthly Medicaid check of approximately $1,300. Using that subsidy as an excuse, state officials declared home healthcare providers like her to be state employees, even when they were caring for their own relatives. The state picked the **Service Employees International Union** to be the providers' union, at which point the union began collecting dues automatically (about $90 a month from Harris). But the Supreme Court ruled that the workers couldn't be forced to join the union. Now, nearly 47 percent of some 7,000 home healthcare workers have stopped making payments to the union.

That's despite the fact that neither the union nor the state took action to inform the providers of their right to stop paying, and despite the fact that some of the "members" never even joined. According to the **Freedom Foundation**, "Only **SEIU 775** [the local "representing" the workers] knows for sure how many . . . have never signed membership cards but are nonetheless currently paying dues. . . . [A union official] admitted that about 6,000 [home healthcare workers in the union] had not signed union membership cards. According to the union's circular reasoning, these providers are 'members' because they are paying dues and are paying dues because they are 'members,' despite never providing any indication that they wished to join the union and pay its dues. . . . [Also,] SEIU 775 has used its state-funded platform at [workers'] mandatory training and certification classes to falsely tell them that union membership remains mandatory." SEIU, of course, is the union with which President Obama is most closely associated.