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In Arizona, nibbling away at free enterprise

By George F. Will, Published: September 25

Cindy Vong is a tiny woman with a problem as big as the government that is causing it. She wants to provide a service that will enable customers "to brighten up their days." Having fish nibble your feet may not be your idea of fun, but lots of people around the world enjoy it, and so did some Arizonans until their bossy government butted in, in the service of a cartel. Herewith a story that illustrates how governments that will not mind their own business impede the flourishing of businesses.

Vong, 47, left Vietnam in 1982, and after stops in Indonesia, Thailand, Taiwan and Hong Kong, settled in San Francisco and lived there for 20 years before coming here to open a nail salon with a difference. Her salon offered $30 fish therapy, wherein small fish from China nibble dead skin from people's feet. Arizona's Board of Cosmetology decided the fish were performing pedicures, and because all pedicure instruments must be sterilized and fish cannot be, the therapy must be discontinued. Vong lost her more-than-$50,000 investment in fish tanks and other equipment, and some customers. Three of her employees lost their jobs.

The plucky litigators at the Goldwater Institute are representing Vong in arguing that the Constitution protects the individual's right to earn a living free from unreasonable regulations. In a 1932 case (overturning an Oklahoma law requiring a new ice company to prove a "public need" for it), the U.S. Supreme Court said that the law's tendency was to "foster monopoly in the hands of existing establishments." The court also said:

"The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense. . . . The theory of experimentation in censorship [is] not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."

Unfortunately, soon after 1932, New Deal progressivism washed over the courts, which became derelict regarding their duty to protect economic liberty. Courts deferred to governments eager to experiment with economic micromanagement. Inevitably, this became regulation in the service of existing interests. And regulatory agencies often succumbed to "regulatory capture," whereby regulated businesses and professions dominate regulatory bodies. Arizona's Board of Cosmetology consists mostly of professional cosmetologists.

In the Cato Institute's journal Regulation, Timothy Sandefur of the conservative Pacific Legal Foundation examines how "certificate of necessity" (CON) laws stifle opportunity and competition. For example, Michael Munie of St. Louis has a federal license for his moving business to operate across state lines, but when he tried to expand his business to operate throughout Missouri he discovered that state law requires him to somehow prove in advance that there is a "public need" for his business outside St. Louis.

Who, Sandefur wonders, could have *proved* 20 years ago that Americans would support a nationwide chain of coffee shops called Starbucks? And in 1985, experts at Coca-Cola thought they knew the public wanted New Coke.

CON laws began with early-20th-century progressives who, like their ideological descendants today, thought that resources should be allocated not by markets but by clever, disinterested experts — themselves.

As Sandefur says, the toll on opportunity is obvious: "Requiring an unknown dreamer, with no political connections, reputation with consumers, or allies among local business magnates to persuade a government board to let him open a new business can often be a prohibitive cost."

Such laws often are explicitly biased against new businesses. In Illinois, someone wanting to open a car dealership must get a certificate from the Motor Vehicle Review Board, and if any existing dealer objects, the board must consider, among other things, "the effect of an additional franchise . . . upon the existing" dealers and "the permanency of the investment of the objecting motor vehicle dealer."

When in March Florida's legislature considered a bill to end licensing requirements for 20 professions, including interior design, the interior design cartel, eager to restrict entry into the profession, got a professor of interior design to ask legislators: "Do you know the color schemes that affect your salivation, your autonomic nervous system?"

In regard to her concern over unsanitary hospital fabrics, a Tampa interior designer warned the panel: "What you're basically doing is contributing to 88,000 deaths every year."

Fatal color schemes? Who knew. This overwrought designer should calm down, perhaps by having some fish nibble her feet.