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The Case Against State Occupational Licensing Boards

By Stephen Slivinski

On their face, occupational licensing laws—the requirement that members of a regulated profession obtain a mandated license issued by the government before they can legally conduct business and which impact nearly one out of every five workers—look like many other state regulations. However, licensing laws are enforced differently than other state laws. Instead of relying on the traditional executive branch enforcement, state governments often delegate that power to a quasi-governmental board of industry insiders who have a strong financial incentive to box out their business competitors. Many of these boards operate independently with little oversight.

Licensing laws have been shown to have clear and far-reaching economic harms. Legislators should consider eliminating most occupational licenses and avoid adding new occupations to the list. As an interim step, however, lawmakers should reform licensing systems that give boards primary enforcement authority and thus hurt entrepreneurs, workers, and consumers. Instead, state legislatures need to move the enforcement of these state laws back to the executive or legislative institutions already assumed in the state constitution—the same bodies that enforce most other laws—and restore the attendant accountability and checks on power that doing so provides.

A BRIEF CASE AGAINST OCCUPATIONAL LICENSING LAWS

Licensing laws, on their own, have measurable economic costs which tend to outweigh, on net, any small benefits they may provide. Multiple decades of empirical research have shown that occupational licensing requirements are one of the most pernicious barriers to entrepreneurship and employment in many states and they inhibit many sorts of positive economic outcomes:

- Licensing laws, by definition, result in restrictions of labor supply due to the often onerous requirements to achieve a license—requirements that are usually out

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of proportion to the potential threat to public health and safety an occupation might pose. This reduced competition among service providers increases prices for consumers with little to no commensurate increase in the level of quality or safety.[1]

- Licensing depresses business starts and employment, particularly among low-income and low-skilled populations and occupations.[2] The magnitude of this effect has been estimated to lower employment rates for these groups between 11 percent and 27 percent.[3]
- Licensing laws typically hurt those who have completed a prison sentence and are trying to reintegrate into the workforce. Those potential workers find themselves kept out of the labor market because of licensing laws that prohibit them from getting an occupational license even if they've completed all the requisite training and paid all the necessary fees. This tends to steer many of those people back into crime and drives up the criminal recidivism rate in a state.[4]
- Licensing mandates restrict geographic mobility (because licenses do not transfer between states without state action to allow reciprocity) as well as movement up the income scale (because licensing laws decrease employment available to lower-income workers).[5]

WHY STATE LICENSING BOARDS EXIST AND WHAT THEY ARE ALLOWED TO DO

Typically, the state licensing boards that exist today were created by state statute. These laws, passed by state legislatures and signed into law by the governors, outline the number of board seats, the qualifications of board members, and other administrative matters.

These laws are often different from the ones that create the occupational license requirement itself, and these licensing laws define what constitutes the act of engaging in that occupation (sometimes called the "scope of practice," particularly for the medical occupations, but other occupations can have a similar sort of practice act). These licensing laws also define the standards that must be met to obtain a license—the number of hours of training required or the passing of a specific exam or performing a particular number of procedures, for instance. Sometimes it's a combination of these.

The laws that create the licensing boards deem them the enforcer of the licensing laws and delegate certain powers to those boards. Although some state licensing boards may have broader or narrower powers, most are generally empowered to carry out some form of the following:

- Make rules that pertain to the interpretation and enforcement of licensing laws. Sometimes referred to as the power to "promulgate" rules, this allows boards to define many of the administrative rules that license holders are required to follow. It also often requires interpretation of statute or regulation language (some of which might be vague) regarding whether certain economic activity falls within the purview of the licensing board and therefore requires the provider to obtain a license (with all the attendant costs and the potentially thousands of hours of training required) or face civil—or sometimes criminal —penalties.
- Collect (and sometimes set) the fees required to obtain a license.
- Administer the licensing exam, which also often includes the power to set the passing score and the content of the exam.
- Launch investigations and issue penalties for violations of licensing laws. Some boards have investigators on staff for this purpose, although some need to rely on the resources allocated to them by executive branch agencies, such as the attorney general's office. This power also allows boards to investigate those who are practicing in a profession and occupation without a license, typically based on the board's usually broad interpretation of the licensing laws.

In many other types of economic regulation, these powers reside in, and are exercised by, the executive branch or the judicial branch. When it comes to licensing laws, however, state governments often delegate those law enforcement and interpretation powers to licensing boards.

Far from being an anomaly, the connection between the law and this unique brand of enforcement runs deep in the

history of licensing laws. This connection opens the door wide for conflicts of interest. A recently published history indicates that the best predictor of whether a licensing law was enacted in a state and a board was created to enforce such a law was the presence of a professional trade association already established for that occupation within that state.[6] As Vanderbilt University professor and antitrust expert Rebecca Allenworth describes it, "licensing boards are public-private partnerships that in some ways combine the most dangerous features of a professional association and a governmental agency. Boards have all the interests and incentives of a private club, and the police power of the state to back them up."[7]

As we will see, the nature of these licensing boards, how they are constructed, and how they operate cast serious doubts about whether they should be the primary enforcers of licensing laws or, for that matter, whether they should be given any enforcement power at all.

BOARD COMPOSITION: BUILT-IN CONFLICTS OF INTEREST

Licensing boards seem intentionally designed to serve as the gatekeepers of an occupation and, in the process, they exhibit the look of a cartel. Of the more then 1,700 occupational licensing boards across the country, roughly 85 percent are required by statute to award a majority (and sometimes a supermajority) of voting seats on the board to those who are already licensed and currently active in the profession.[8] Some boards—particularly those that regulate the cosmetology industry—even have seats reserved for owners of schools that derive tuition revenue from the required training to obtain a license.[9]

In an attempt to introduce some sort of balance, some board seats are reserved for members of the public who are not currently license holders in the regulated occupation. However, these seats almost never constitute a majority of voting members on a licensing board, and that's assuming these seats are filled in the first place. Many remain vacant for long stretches of time. Nor do quorum rules require the presence of public members: Board proceedings may commence with only the industry members present.[10]

Even when public members are present, they are often precluded from voting on specific regulatory and disciplinary matters. Furthermore, many states lack what are often called "no pecuniary interest" laws, which restrict public board membership to true industry outsiders by requiring that they not have any financial tie to the regulated industry. As such, many public member seats can legally be held by someone with a spouse or relative who is involved in the regulated industry.

The process by which board members are chosen also strongly favors insiders. On the surface, the governor is usually required to appoint the board members, with confirmation by the state legislature. Yet, in many instances, the governor may only choose board appointments from a list of candidates provided by the professional associations of the industries. Some statutes explicitly name which of these associations shall provide the lists, or they may require that the lists contain only three or four names. In other cases, the professional association holds an election open only to existing license holders, and then the governor must rubber-stamp the winners.

In my 2022 report I looked at the nomination process for licensing boards in all 50 states for 17 licensed professions. Among the states, 23 effectively hand over the power of nominating the private sector board members to a trade association for at least one board.[11] In each of these examples, it is unlikely that a reform-minded candidate would survive the filter of trade associations that have an incentive to continue to use the licensing board as a powerful tool to protect the existing business cartel.

ADVERSE INCENTIVES: PROTECTING THEIR TURF, NOT CONSUMERS

The built-in type of lopsided board structure just described introduces an obvious and instant bias against new entrants into an occupation. Unfortunately, most boards are legally empowered to erect such barriers: About 78 percent of licensing boards have authority to create many of the rules (meaning they have what is called "direct rulemaking authority") that applicants and license holders must follow.[12] As I'll show in the next section, these rules are not usually subject to a systematic and substantive legislative or executive branch approval or review.

Defenses of licensing laws and board activities—not to mention the websites of the licensing boards

themselves—have often assumed and stated that their goal is to protect the health and safety of the public. However, there is no evidence that licensing requirements consistently increase the quality of services or actually lead to better-than-average health and safety outcomes, regardless of how actively a board enforces state law.[13]

Instead, records of what actual board enforcement actions look like can tell a different story. Analysis of a cross section of board enforcement actions in several states shows that boards often spend more time and resources pursuing cease-and-desist actions and penalties against those practicing without a license, not against license holders who are providing subpar service or creating a public safety hazard.[14] Other published case-study research quantifies actual enforcement action taken by boards in Idaho and finds that more than half, sometimes through coordinated sting operations, are intended merely to check if a service provider or their employees have a license.[15] If health and safety were primary concerns of licensing boards, they could use much less economically destructive and costly means to achieve that goal, such as surprise site inspections for cleanliness or safety code conformity, rather than restrictions on who can or who should be licensed.

Far from merely carrying out the letter of licensing laws, boards consistently use questionable and expansive legal interpretations of the statutes which define who needs a license to expand the scope of who they can investigate and prosecute on the periphery of the industry. State board responses to the rise of telemedicine as a popular and cost-effective choice for consumers is an example. Dental and other medical boards have consistently interpreted the act of practicing medicine to require an in-person "tactile" exam and, therefore, those providing telemedicine services are in violation of state law, even if those states do not have a law prohibiting telemedicine services or the patients have willingly chosen to use those services knowing there will be no in-person visits.[16] Additionally, although a patient may reside in a different state than the doctor, the fact that the medical provider providing telemedicine services may even be duly licensed in good standing in the state the patient resides in matters not to a licensing board determined to shut down out-of-state competition.

LACK OF ACCOUNTABILITY: LICENSING BOARDS OPERATE OUTSIDE THE USUAL CHANNELS OF GOVERNMENT POWER

Although they enforce state laws, licensing boards are not structured, nor do they operate, like other regulatory or enforcement bodies in a state government. They are best described as quasi-governmental and more often resemble the gatekeepers of a guild than a regulatory body. They often have their own budget, which is financed through fees paid by license applicants, and they tend to have little active legislative or executive branch oversight.

Perhaps the most famous example is the North Carolina State Board of Dental Examiners. The board's structure and actions were at the center of a landmark Supreme Court decision that was handed down in 2015. Starting in 2003, the dental board sent more than 45 cease-and-desist letters to entrepreneurs offering conventional teeth-whitening services. These services mainly consisted of providing assistance for customers in applying the products (many of which are available over the counter today) and sometimes an ultraviolet lamp was provided and operated by the staff. The dental board also convinced the state's Board of Cosmetic Arts Examiners to issue similar letters. In 2007, the board also began sending letters to shopping mall managers recommending eviction of the offending businesses.[17]

The Supreme Court, in a 5–4 decision, deemed the actions of that licensing board as being anti-competitive. Because the board was not actively supervised by the state government and consisted almost entirely of dentists (8 of the 10 members, which the majority opinion described as "active market participants") who offered competing services at higher prices, the conflict of interest was enough for the Court to rule that the board members should not have the same legal protection that other government enforcers have.[18]

The Court did not go as far as many legal scholars and licensing critics hoped, but the ruling still should have prodded states to reform their licensing board arrangements.[19] However, since the *North Carolina State Board of Dental Examiners* case was decided, no state has changed its laws to decrease the industry control of dental boards. Three states—Georgia, Michigan, and North Dakota—have actually increased the number of board seats

held by people with clear conflicts of interest. And eight states still allow lobbyist control of dental licensing board nominations by requiring that the governor choose board members only from a list provided by a state or national dental association.[20]

A problem with the Supreme Court's decision, it seems, was that it was not clear on what "active supervision" might mean, and states appear to have exploited this ambiguity to resist reform. The ruling's implicit assumption is that the executive branch or legislative branch simply having the ability to overturn a board decision is merely a passive form of supervision, and one that seems to be rarely exercised. A board simply abiding by a state's administrative procedures act is also not an active form of supervision. Furthermore, the traditional sunset review processes that requires a periodic review of board operations in many states are usually rubber-stamp affairs that might include only a cursory financial audit. Only in rare cases are legislatures likely to give more than a stern rebuke to the board before reauthorizing them for another cycle. This, too, does not likely qualify for inclusion in the Supreme Court's definition of "active supervision." Yet because the term is unclear, states seem to believe they need not act, and the continued majority or supermajority status of active market participants on licensing boards remains a cause for alarm.[21]

Despite the wiggle room in *North Carolina State Board of Dental Examiners*, there are several good reasons for states to embrace reform, beyond the economic and fairness concerns. The precedent laid down by the Supreme Court's decision still applies today for all occupations regulated by such a board structure. This exposes state boards to liability on federal legal grounds. The fact that there haven't been many cases to challenge licensing boards on these grounds likely stems from the fact that antitrust cases are hard to pursue unless the plaintiff is another government body, such as the Federal Trade Commission or the antitrust division of the US Department of Justice.

Today, however, there are reasons for states to feel vulnerable to a renewed antitrust focus by the federal government. A task force initiated early in 2025 in both the Department of Justice antitrust division and the Federal Trade Commission identified occupational licensing laws and the boards that enforce them as targets of scrutiny in a renewed focus on labor market distortions.[22] Although it is unclear how either agency intends to approach this policy question, there is a chance that antitrust pressure could be applied or that federal enforcement actions could be filed against states and board members based mainly on existing legal precedent.

From a state constitutional perspective, there are also reasons to question whether the powers given to the boards by the state legislature can be farmed out to boards in the first place. The doctrine of nondelegation is a principle rooted in constitutional interpretation and court precedent at both the federal and state level. That principle, embodied in Article I, Section 1 of the US Constitution and sometimes called the Legislative Vesting Clause, might suggest that Congress cannot award the power of legislating to other bodies. In fact, many state high courts have used this reasoning to more strictly prohibit the delegation of power by the state legislatures than federal courts have created in relation to Congress, particularly in regard to the delegation of state power to external parties for the benefit of specific private interests. The primary conclusion of these state judicial decisions is that many board activities are best substantively defined as legislative activity and, as such, fall into the category of state power residing in a board that functions fundamentally like a private guild gatekeeper.[23]

PROPOSED REFORM: ENDING LICENSING BOARDS (AS WE NOW KNOW THEM)

Short of eliminating licensing laws altogether for many occupations, which is an important policy reform that any state should consider, there is a solution that addresses many, if not all, of the problems outlined here: terminating licensing boards as currently constructed.

There is little compelling reason for the government to delegate the enforcement (and sometimes interpretation) of licensing laws to boards that are designed to be ruled by those with a clear conflict of interest. To put it another way, there is no real reason why licensing laws can't be enforced by the usual executive state government entities, just like many other state laws. Licensing boards should be eliminated or fundamentally reformed to reflect this fact.

Terminating a licensing board doesn't mean that the occupation then becomes unregulated. It simply means that the enforcement and regulatory functions are carried out by a more conventional state regulatory entity. The likely most appropriate option is an existing state executive agency or an office constituted within that branch for that purpose. Some states, such as Tennessee, already structure their licensing enforcement like this for some occupations.[24] Other states, such as Michigan, house the occupational licensing boards in a regulatory agency that is designed to provide more active oversight of the boards.[25]

If licensing boards are kept as independent bodies, they should be stripped of most, if not all, of their active enforcement powers and be made, at most, an administrative body. The latter role could include administering exams, collecting fees, and reviewing license applications. However, the actual enforcement of licensing laws should still reside in publicly accountable executive branch agencies, with consumers and the media acting as a significant additional check on licensed professionals.

Licensing boards could still be allowed to provide advice to the executive regulatory agency, but such advice could be ignored by a duly-appointed member of said agency or executive branch entity. Yet keeping the boards around to serve as advisory bodies is not essential or necessary. That decision may vary by state or by occupation.

Eliminating the boards as they are currently structured and empowered would also move the investigatory power intended to monitor license holders back into the hands of a traditional judicial or executive branch officer, such as the state attorney general's office. Boards, in an advisory capacity, might recommend investigation of license holders who may be violating state law, but it would be up to the executive branch officer, who is accountable to either voters or the governor who appointed them and bound by both legal and budget constraints, to decide whether to pursue such an investigation. This arrangement has the potential to avoid the anti-competitive witch hunts that many unaccountable boards have embarked on in the past. It would also maintain the traditional due process protections for licensees in administrative and judicial proceedings, which are sometimes lacking in board-initiated enforcement procedures, and provide an adjudication and appeals process that occurs within the state's constitutional judicial system.

Even if licensing boards are given only an advisory role, additional reforms can further decrease the sway of incumbent industry interests on the board:

- Increase the number of public, nonindustry board seats to a near majority or parity on the board, and institute substantive "no pecuniary interest" rules. This could encourage a diversity of opinion on the board.
- Restore the governor's power to appoint members, just as they would for other posts, by eliminating any requirement in the law that board members must only be chosen from a list created by trade associations of the regulated industry or from association elections in which only other licensed members have a vote.

These small reforms could be enacted without removing the power of enforcement from existing licensing boards. Yet, while this might have some marginal benefit on the board operations and provide some pushback on needlessly aggressive enforcement activity, the effects are likely to be limited and not as impactful as pairing these reforms with fundamental changes in the institutional nature of those boards.

All of these reforms align with existing Federal Trade Commission guidance issued on the heels of the *North Carolina State Board of Dental Examiners* decision, which reads in part: "In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated."[26]

In the absence of stripping the boards of all their enforcement power, however, more accountability is certainly needed. An executive or legislative body that is tasked with actively reviewing and having veto power over actions that are deemed to be self-serving or primarily anti-competitive would provide a crucial and necessary institutional check on whatever power the board retains. It is not only prudent governance, but also aligns with the federal guidance and legal precedent on state occupational board power.

CONCLUSION

Elimination or deep fundamental reform of state licensing boards will not cure everything that is wrong with occupational licensing. Only the elimination or fundamental reform of licensing laws themselves can achieve that goal. There remain strong reasons to pursue such reforms.

However, dissolving the conflicts of interest inherent in a board system run by insiders and empowered to pursue anti-competitive objectives could lead to many improvements both at the margin and in the short term. Changing how the enforcement of these laws is carried out can incrementally decrease the economic cost associated with the aggressive, arbitrary, and self-serving enforcement that has proven to be a key defining feature of licensing board actions over the past several decades.

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