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A Cosmetology Board Capture Index: Measuring the Influence of Self-Interest in Occupational Licensing

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Executive Summary

Occupational licensing policies are widely understood to suppress employment and entrepreneurial opportunities as well as raise prices to consumers. What has not been studied much is the mechanism by which occupational licensing restrictions are influenced by the boards created to enforce them. Those boards are often dominated by existing licensing holders and other active market players who have a direct self-interest in keeping the barriers to entry into the occupation high.

This study focuses on the specific example of cosmetology boards to create an index that measures the extent to which that industry's licensing boards are "captured" by incumbent license holders as well as representatives from cosmetology schools. Many states require that board seats be awarded to members of the public, ostensibly for the purpose of providing some balance in deliberations. However, those members rarely have a majority of seats and can be easily outvoted.

The most heavily "captured" cosmetology boards — those with zero public representatives — are New York and North Dakota. Following closely behind are Louisiana, Massachusetts, Mississippi, Oklahoma, Vermont, and Wyoming.

Maine and Arkansas are the least captured due to the state legislature eliminating the state licensing board in 2009. Of the states with licensing boards, Arizona and California are the rare boards on which public members have a majority. (Arizona is in this category thanks to reforms passed in the state in 2020 to expand the number of seats of members of the public and reduce the number awarded to incumbent licensing holders and cosmetology school representatives.)

There is some preliminary evidence that cosmetology board capture is related in some form to higher barriers to entry. In the eight states with the most strongly captured licensing boards, it takes 50 more calendar days than the national average to fulfill the state requirements to obtain a cosmetology license.

States should be encouraged to reform the occupational licensing board system in a number of ways. Those reforms can run along the lines of the recent Arizona board reforms. Other ideas include requiring the timely filling of public board seats, changing quorum rules to require at least one public member be present, and requiring that public members have no direct financial stake in the industry they are regulating. More fundamental reforms could be to make licensing boards subordinate to other executive branch agencies (or eliminating the boards altogether) and enacting universal licensing (often called “reciprocity”) which would

neutralize the influence of the board on new entrants coming from out-of-state.

Introduction

In 2015, the U.S. Supreme Court handed down a decision in the case of *North Carolina State Board of Dental Examiners vs. Federal Trade Commission*.¹ The facts of the case detail the actions taken by the North Carolina occupational licensing board that oversees the dental profession in their attempts to regulate vendors who did not have a licensing to practice dentistry from selling teeth whitening services. These services were often sold at shopping mall kiosks or by small storefront operators. Subjecting these vendors to licensing requirements would mean those shopkeepers would need to obtain a medical degree in dentistry, pass exams, and pay fees all for the right to simply carry on their business. This would undoubtedly bankrupt those vendors.

But that unfortunate economic outcome was not the centerpiece of the main legal dispute put forward by the Federal Trade Commission (FTC) in that case, although the reality was acknowledged. Instead, the argument was that the dental licensing board was illegally expanding their scope of authority to regulate these services because of who sat upon that board: practicing dentists (the Court called them “active market participants”) who already had a state license and who had a direct economic stake in driving these vendors out of business. The FTC was making, in essence, an antitrust

¹ See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

case in which the licensing boards, which are a state government body, were being used to further private interests.

There are in fact 1,790 occupational boards in the United States, and 85% of them are dominated by active market participants.

The Supreme Court ruled against the North Carolina dentistry board. They even went so far as to say that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates” must be, as described by Vanderbilt University law professor Rebecca Allensworth, “actively supervised by the state or else face antitrust lawsuits brought by private parties and government enforcers.”²

The future legal implications alone should be enough for a state government to act to reign in occupational licensing boards. The economic impacts are also relevant and compelling. The research consensus is that occupational licensing hurts workers and entrepreneurs and consumers in a variety of ways.³ Therefore, the government institution that enforces these laws should also be the focus of research, and particular focus can be on who sits on these boards and whether dominance of those boards

contributes to the higher barriers to entry into an occupation, the main source of the economic losses identified in the academic literature.

To date, little has been done to quantify the level of dominance that “active market participants” have on licensing boards. The dataset used in this paper stems from the seminal work of Prof. Allensworth. That dataset has been updated and augmented by the Center for the Study of Economic Liberty. This paper is the first product of that initiative.

That dataset originally revealed that there are in fact 1,790 occupational boards in the United States, and 85% of them are dominated by active market participants.⁴ But not all boards are equally dominated and there is variance between states and occupation types. Within this variance are rich research questions to consider.

One of the goals of this paper is to contribute a framework for thinking about approaching this question from the perspective of political economy, a perspective that takes into account the incentives and institutional arrangements that lead to what are generally understood to be suboptimal policy outcomes. Another goal of this paper is to operationalize some of this framework by applying it to a specific occupational licensing board — in this case,

² See Rebecca Allensworth, “Foxes at the Henhouse: Occupational Licensing Boards Up Close,” 105 *California Law Review* (2017), vol. 105, no. 6, pp. 1567-1610

³ U.S. Department of Treasury Office of Economic Policy, the Council of Economic Advisers, U.S. Department of Labor, “Occupational Licensing: A Framework for Policymakers,” July 2015, available at: https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf

⁴ Allensworth *ibid.*

cosmetology boards — and construct a “regulatory capture index” that can be used by researchers and policymakers to gauge the amount of decision making that is being left to active market participants and in potential violation of the U.S. Supreme Court decision.

Regulatory Capture and Licensing Boards

When economists view the regulation of an industry, they often highlight the potential for the regulatory bodies that enforce those regulations to be “captured” by the entities they regulate. This means that the regulatory body ends up, despite the best intentions by the regulators, being unduly influenced by and eventually to the wishes of the firms or organizations whose market power those regulatory bodies were designed to check.⁵

One result can be less strict or non-existent enforcement of the rules. This kind of capture can occur even if the regulators are civil servants who may not have any direct stake in the regulated industry. This is often the story that is the more popular one told by many policymakers and members of the public.

An alternate result of the capture of a regulatory body is more insidious: the influence over the regulatory body is not intended for the purpose of softening the regulatory burden but instead an increasing in the burden of the regulations. The assumption here is that the regulated firm or

individual would see in a government’s regulatory powers a potent tool that can be used to punish competitors or keep out new entrants. This outcome, just like the prior one, can also occur even if the members of the regulatory body have public-minded intentions and no direct stake in the industry.

The influence over the regulatory body is not intended for the purpose of softening the regulatory burden but instead an increasing in the burden of the regulations.

But what if the regulatory body is composed mostly of people who do have a direct financial stake in the industry? Either outcome outlined already is certainly possible. However, we do not need to speculate about what might happen. We have that type of regulatory body in the form of occupational licensing boards. Studying the incentives they face and how they are composed can help increase our understanding of this form of regulatory capture. It can help us better understand how the occupational licensing system operates and yields the adverse outcomes that at least two-decade’s worth of empirical analysis have observed.

⁵ The seminal article on this topic is George Stigler, “The Theory of Economic Regulation.” *The Bell Journal of Economics and Management Science*, vol. 2, no. 1, 1971, pp. 3–21. JSTOR, www.jstor.org/stable/3003160. Accessed 16 Oct. 2020.

The Power, Structure, and Potential Influence of Occupational Licensing Boards

Each state with a statute that mandates the licensing of an occupation — meaning, it requires a state-issued license to legally practice in an occupation within the state — usually enforces those statutes through an occupational licensing board.⁶ Most boards will specialize in the regulation and enforcement of one specific occupation, but there are many boards that combine two or three specialties or occupations. Some medical boards simultaneously regulate registered nurses and nurse practitioners, for instance, even though they may have different legal allowances to practice in certain ways.

These licensing boards can have broad or narrow authority depending on state law. Often these boards have the authority to levy fines or revoke licenses as a disciplinary action. Some can set the fees for obtaining the license. Others have the ability to decide what is on the exam required to obtain a license. All boards have the ability to decide what filed complaints about a license-holder they follow-up on or how aggressive they are at pursuing people who engage in providing services (whether for free or otherwise) without a license.

All have the ability to issue legal guidance and regulatory rules. Some may have discretion to interpret vague legal statutes. This is particularly evident when a board is eager to expand the scope of their enforcement through the redefinition of what qualifies as falling into their

purview. (Recall the dentistry board example from North Carolina.) Sometimes attempts like to do this may occur in states where the statutes are not even particularly vague.

State law also lays out how many members of the board there are and who must appoint them (such as the governor or leaders of the legislative branch). Licensing board seats are not elected offices but appointed ones.

Much of the time, state law requires board members to be existing license holders.

To this end, an additional set of characteristics codified in law (and the focus of most of the discussion in this paper) is the type of person who can occupy a board seat. Much of the time, state law requires board members to be existing license holders (which are referred to as either “active market participants” broadly or as “incumbent license holders” in this paper). Sometimes members of the public who have no direct financial stake in the industry have seats reserved for them. These requirements vary by state.

Because board members are typically not elected positions, they by definition are overseen by state government, both legislative and executive branches. They are sometimes overseen by an additional layer of executive branch oversight — medical boards or those

⁶ The broad descriptions of licensing board powers as summarized here are from Allensworth, *ibid*.

occupations with a significant bearing on public health are sometimes subordinate to the state department of health, for instance.

Dominance of the licensing board could be a key, if not primary, aspect of an explanation of why licensing burdens vary by state and why they continue to persist.

These boards do not look like regulatory entities staffed by civil servants or even elected officials. They are fundamentally different. In a very real sense, they are already “captured” by design because they were intentionally created that way. Whether the capture occurred as a result of incumbent industry players pushing to erect boards of this sort or it’s the result of legislators being extraordinarily deferential to those inside the industry is beyond the scope of this paper (although it’s certainly worth exploring). Suffice it to say that whatever their origins, we are left with a real-world example of what a functionally “captured” regulatory body looks like. The next step is to hypothesize how they might act with this power — are they more likely to reduce barriers to entry into an occupation and relax the restrictions on the industry, or are they more likely to restrict entry?

We do know that licensing regulations themselves clearly have the effect of restricting entry. Substantial evidence has mounted for decades and the consensus has formed around that conclusion.⁷ That could certainly occur in spite of the board being dominated by incumbent license holders or even in the absence of a board at all. All that is necessary is the presence of a state-mandated license. Still, it is worth considering that the boards might be an important part of the longevity of licensing even in the face of overwhelming evidence that they are counterproductive in many occupations.

Licensing boards do not always have the power to determine on their own how many training hours are mandated, or fees are required. Some states do indeed have this power: Minnesota and West Virginia gives their cosmetology boards to set some or all of the licensing requirements.⁸ Boards and board members, however, can still have a significant impact on the legislative and public debate over either an expansion or decrease in the training and fee requirements to obtain a license whenever change are proposed. Legislators may defer to them as experts about their industry and licensing enforcement process.

Dominance of the licensing board could be a key, if not primary, explanation of why licensing burdens vary by state and why they continue to persist. Explaining how restrictions on entering

⁷ See Morris Kleiner and Evgeny Vorotnikov, “At What Cost?” Institute for Justice, November 2018, https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf

⁸ Dick Carpenter, Lisa Knepper, Kyle Sweetland, and Jennifer McDonald. *License to Work (2nd edition)*. Institute for Justice, November 2017, https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf

an industry might be influenced by the degree of licensing board dominance might first requires a measure of that dominance. The remainder of this paper will outline an attempt to construct such a measure with a particular focus on cosmetology licensing boards. This paper will then turn to a discussion of reforms that can reverse or dull the influence that the inherent capture of these boards can have on public policy.

Who Sits on Cosmetology Licensing Boards?

Cosmetology is one of the few non-medical occupations that is licensed in all 50 states plus the District of Columbia. As a result, almost every state has a licensing board that enforces the licensing statutes.⁹ (The exceptions are Maine and Arkansas, which eliminated its cosmetology boards in 2009 and have opted instead to regulate licensing through their Department of Licensure and the Department of Health respectively.)¹⁰

Yet not all boards look the same. Data on the composition of licensing boards has been fairly minimal until recently. This paper builds on a dataset that first appeared in a law review article by Vanderbilt University professor Rebecca Allensworth.¹¹ The data was shared with, updated, and augmented by researchers at the Center for the Study of Economic Liberty at Arizona State University and serves as the basis for the discussion here.

Board seats are usually split between three types of individuals: 1) members who already hold a license; 2) members of the general public; and, 3) members who represent cosmetology schools (either as an instructor or owner).

Most states have a stand-alone board of cosmetology while others combine the enforcement of both barber and cosmetologists licensing laws into one board. Board seats are usually split between three types of individuals: 1) members who already hold a license; 2) members of the general public; and, 3) members who represent cosmetology schools (either as an instructor or owner).

Here, again, states differ. The composition of the cosmetology board in each state appears in Table 1. Most cosmetology boards have at least one public member. Only seven of the fifty state cosmetology boards in the U.S. do not include any public members whatsoever (excluding Maine, which also does not have public members for same reason it does not have incumbent license holders on the board).

⁹ Ibid.

¹⁰ Maine Public Law 369, 2009, https://www.maine.gov/pfr/professionallicensing/professions/barbers/pdf/LD_369.pdf

¹¹ Allensworth *ibid.*

Table 1
Seats on Cosmetology Licensing Boards (by type)

State	Total # of board members	Total # of school owners and instructors	Total # of public members	Total incumbent members
Alabama	7	0	1	6
Alaska	7	0	1	6
Arizona	7	0	4	3
Arkansas ¹²	0	0	0	0
California	9	0	5	4
Colorado	6	2	1	3
Connecticut	9	0	3	6
Delaware	11	0	5	6
District of Columbia	14	0	2	12
Florida	7	0	2	5
Georgia	9	2	1	6
Hawaii	7	0	3	4
Idaho	7	1	1	5
Illinois	11	0	1	10
Indiana	7	1	1	5
Iowa	7	1	2	4
Kansas	8	1	2	5
Kentucky	5	2	1	2
Louisiana	8	0	0	8
Maine	0	0	0	0
Maryland	7	1	2	4
Massachusetts	9	0	0	9
Michigan	9	1	3	5
Minnesota	7	2	1	4
Mississippi	5	0	0	5
Missouri	11	2	2	7
Montana	9	0	2	7
Nebraska	13	0	2	11
Nevada	7	0	1	6
New Hampshire	7	1	1	5
New Jersey	13	1	4	8
New Mexico	7	1	2	4
New York	9	2	0	7
North Carolina	6	1	1	4
North Dakota	5	1	0	4
Ohio	13	2	1	10
Oklahoma	11	3	1	7
Oregon	7	0	1	6
Pennsylvania	13	0	5	8
Rhode Island	7	0	1	6
South Carolina	7	0	1	6
South Dakota	5	0	2	3
Tennessee	14	3	2	9
Texas	9	2	2	5
Utah	9	0	2	7
Vermont	4	0	0	4
Virginia	10	0	2	8
Washington	10	2	1	7
West Virginia	9	0	4	5
Wisconsin	9	2	2	5
Wyoming	5	1	0	4

¹² Chart revised (November 10, 2020): Arkansas board was terminated in 2009 and is therefore equivalent to Maine in this measure.

Those states are Louisiana, Massachusetts, Mississippi, New York, North Dakota, Vermont, and Wyoming.

Similarly, not all boards have representatives of cosmetology schools, either, but many do. Twenty-four states have seats that must be filled by those representatives. They do not have a majority on any particular board — they have captured the biggest share of total boards seats (33%) in Colorado.

Public members do not usually have majority status on most boards, either. However, California, in what might be described as uniquely populist, are one of only two state that have a majority of public members. (Arizona does too, but it is a more recent entrant, as will be described below.) Some states that have a high number of public member seats are still outnumbered: New Jersey, for instance, has 4 public members, but they are outvoted 2-to-1 by the license holders.

This variation between states means states can be scored and ranked based on how dominant the cosmetology school representatives and the incumbent license holders are on the board. In other words, an index can be created based on the data in Table 1 that can measure the “capture” that is present in each state’s cosmetology board.

A Cosmetology Licensing Board Capture Index

To create a “capture index” for each state (which appears below in Table 2), the following procedure was followed:

- 1) A percentage was derived for each category of licensing board seat type (public, school owner/instructor, and incumbent license holder) for each state board. This percentage represents the share of seats occupied by that board member type as a share of the total number of seats. (So, for instance, two public seats on a 7-member board would yield a 28.5% share for that state board, and so on for the other categories.)
- 2) Those percentages were assigned a score of 0 to 1 based on a traditional scaling where the distance from the outermost frontier determines the score. In this case, because it’s an index designed to measure the amount of capture of the board (i.e., the dominance of incumbent license holders and school owners/instructors) the highest scores go to the boards that were most dominated by incumbent interests and the lowest scores were those that had the most public representation on the board.
- 3) The scores were aggregated. The public seat score was given double weight in the final aggregate. This was done for two purposes: to create a larger spread between the final scores to minimize

scoring ties and to give additional credit to the boards that are less dominated by the incumbent license holders (which, by definition, assured that the 8 boards that had absolutely no public members scored at the top as the most captured). The scores were then aggregated.

- 4) The aggregated scores were divided by 3, and then multiplied by 10. This method resulted in two scores above 100: New York and North Dakota, which are the two most captured boards on the list. They received the top two spots (and an over-100 score) because those cosmetology boards exhibited the three characteristics of highest incumbent dominance: no public board seats, reserved seats for school owners/instructors, and a 75%+ supermajority of incumbent license holders.

The final scores and ranks appear in Table 2. The most captured state cosmetology boards (which include no public board members) take up the first eight spots. There are some ties, particularly in the middle of the list. In these cases, the states that had tied scores were listed alphabetically but awarded the same rank. (Just because a state is listed first in a multi-state tie in no way implies that it is less captured than a state it tied with.) A better way of describing a state is by its capture index score. The lower the score, the less the board is dominated by incumbent interests.

Table 2
The Cosmetology Board Capture Index

State	Rank	Score
New York	1	111.11
North Dakota	2	110.00
Louisiana	3	100.00
Massachusetts		
Mississippi		
Oklahoma		
Vermont		
Wyoming		
Ohio	4	96.15
Washington	5	95.00
Georgia	6	94.44
Minnesota	7	92.86
Colorado	8	91.67
Kentucky	9	90.00
Tennessee	10	89.29
Illinois	11	86.36
Idaho	12	85.71
Indiana		
New Hampshire		
North Carolina	13	83.33
Missouri	14	81.82
Alabama	15	78.57
Alaska		
District of Columbia		
Nevada		
Oregon		
Rhode Island		
South Carolina		
Texas	16	77.78
Wisconsin		
Nebraska	17	76.92
Virginia	18	70.00
Kansas	19	68.75
Utah	20	66.67
Montana		
New Mexico	21	64.29
Maryland		
Iowa		
New Jersey	22	57.69
Florida	23	57.14
Michigan	24	55.56
Connecticut	25	50.00
Pennsylvania	26	42.31
South Dakota	27	40.00
Hawaii	28	35.71
West Virginia	29	33.33
Delaware	30	31.82
California	31	14.81
Arizona	32	14.29
Arkansas	33	0.00
Maine		

The bottom spot on the list is occupied by Maine and Arkansas, which receive a score of zero due to the fact that they abolished their cosmetology licensing boards in 2009. Although there is still a

requirement that a practicing cosmetologist in those states must first obtain a state-issued occupational license (and, hence, are still included on this list), there would be by definition much less influence by incumbent interests over policy and enforcement.

Finally, of particular note is Arizona's place on this list. In June 2020, Governor Doug Ducey signed into law reforms to the occupational licensing boards in his state that, while holding the number of total board seats constant, decreased by the number of school owner/instructor and license-holder seats on the state cosmetology board by two and replaced them with public member seats.¹³ The capture index takes those reforms into account and, as a result, Arizona earns the honor of having the least captured board among those states that still have a licensing board.¹⁴ If those reforms had not occurred and Arizona was scored based on the old law, the state cosmetology board capture index score would have been a little over 70 — nearly five times the score it received as a result of the reforms. In fact, Arizona is now only one of two states with a cosmetology board on which the public members have a 55%+ majority (the other is California, as previously mentioned). This serves as a good example of the value of simple reforms that increase public input into the operation of licensing boards.

The national average for cosmetologists is 385 calendar days. The average in the top 8 most-captured states is 435, a difference of 50 days.

One reason to quantify the dominance of incumbent interests is to allow more transparency into and understanding of the licensing policy and enforcement process for the benefit of citizens and policymakers. Another reason is that it helps researchers understand the institutional environment in which policy is made in the states and how it might influence both the status quo and the future prospects for reform. For instance, an implicit assumption of this index is that a more heavily captured state might have higher barriers to entry into the occupation over which they have licensing authority than a less-captured state. There does seem to be some evidence of this. An estimate of the number of calendar days required to complete all of the instructional hours or additional work experience hours mandated by state law for cosmetologists has been estimated for each state by the Institute for Justice.¹⁵ The national average for cosmetologists is 385 calendar days. The average in the top 8 most-captured states is 435, a difference of 50 days.¹⁶

¹³ SB 1274, Arizona State Legislature, 54th Legislature, Second Regular Session, transmitted to governor, 2020. Available at: https://www.azleg.gov/legtext/54leg/2R/summary/H.SB1274_052620_TRANSMITTED.pdf

¹⁴ One of the seats in the Arizona law can be awarded to a school owner/instructor. The new law, however, does not require that the seat must be occupied by a school owner/instructor as other state laws do. Arizona is scored on this accordingly.

¹⁵ Carpenter et al, *ibid*.

¹⁶ A different calculation for dominance that included school owners/instructors as part of the licensing holder total yielded an average difference of over 90 days. See Stephen Slivinski, "Membership of Occupational Licensing Boards and the Barriers to Entry," CSEL Research Note, July 2020, <https://csel.asu.edu/research/publications/July-2020-research-note>

A correlation like this does not necessarily mean that the board is driving this difference. The causation could be the other way around: states that are predisposed for a variety of reasons to have higher barriers to entry in cosmetology are also more likely to erect institutions that help sustain those barriers. Even so, an insight that the two might be related — regardless of the direction of the causation — can still be valuable.

This capture index methodology can also be expanded to rank and score other occupational licensing boards in a similar way. Additionally, it can help us understand how dynamics on the board can influence licensing enforcement activity, the assessment and setting of fees, and illuminate the incentives that each incumbent interest have in relationship to licensing law generally and the process by which those laws are extended, interpreted, or reformed. Future research on these topics are possible using a capture index of the sort outlined here.

Challenges to Public Representation on Licensing Boards

The capture index in this paper reflects the statutory requirements for board membership by state. There is only so much that an index of that sort can do, however, particularly as it applies to the public board seats. Indeed, there are a number of ways that state policymakers and incumbent interests can dilute their power even in a state that requires public representation on licensing boards.

Unfilled vacancies. One-way public input on licensing boards is undermined is the failure of policymakers to fill vacancies in those public seats. Because most state licensing laws do not allow a majority of seats to be awarded to public members, the licensing boards are able to carry out their enforcement and lobbying activity and achieve a simple majority in their proceedings without those seats being filled for an indefinite period of time.

Quorum rules. Relatedly, the quorum rules for many licensing boards are designed to allow dominance of the agenda by the incumbent interests on the board. Usually a quorum simply consists of a certain number of members of the board regardless of whether they are public members or not.

Lack of “no pecuniary interest” laws. The implied goal of including public members on licensing boards is to serve at least as a partial barrier to the types of enforcement excesses that a heavily-captured licensing board might engage in. The public members are generally expected to not have a conflict of interest. Yet, many of the ostensibly “public” members may still have a conflict of interest. Although some states do not require school-affiliated members to sit on the board, many of them also do not forbid those same people from occupying the public member seats. The absence in state law of a “no pecuniary interest” standard could allow this to happen. This sort of standard requires that a public board member has no direct financial interest or stake in the licensing board’s activities — such as pushing for higher training

requirements because it would mean increased demand in the future for cosmetology school classes, for instance.

Many of the ostensibly “public” members may still have a conflict of interest. Although some states do not require school-affiliated members to sit on the board, many of them also do not forbid those same people from occupying the public member seats.

Policy Reforms

Policymakers and members of the public with an interest in restraining the influence of occupational licensing boards can look to a number of policy reforms for guidance. Some of them address the power of boards to act without public member input. Others address the root of the board power — i.e., licensing laws themselves. Reforms along these lines can be viewed along a spectrum, from improving the status quo all the way to changing it altogether. All of them can be added to state statutes by a legislature with a governor’s signature.

- 1) *Increasing the number of public seats and a simultaneous reduction in seats of incumbent license holders or school owners/instructors.* A reform of this type would mirror what Arizona has done with its cosmetology boards. By

increasing the number of public seats on a board while also reducing those that are awarded to incumbent license holders and/or school owners/instructors would increase public input on licensing boards. This might have the impact of beneficially influencing board activity by reducing potentially superfluous or politically motivated enforcement activity. It would also decrease a state’s capture index score and address some of the legal issues resulting from the *North Carolina Dental* decision.

- 2) *A change of quorum rules.* Another way to ensure public member input on a board that already has public members is to change the quorum rules to require that at least one member of the quorum be a public board member.
- 3) *Timely filling of public member board positions.* State policymakers and incumbent licensing board members should be required to fill the public member seats on a licensing board in a timely fashion. Explicit timeframe and expedited processes could be included in state statutes. This could also include a presumption of legal standing for someone who wants to challenge board decisions based on the failure to fill public member seats. Coupling these with changes to the quorum rule as described above might maximize the impact of either.
- 4) *“No pecuniary interest” requirements.* State statutes can specify that public member seats can only be filled by

candidates who plainly have no direct financial stake in the decisions of the board. That means at the very least that public board seats cannot be filled by those who currently or have owned a school that offers the sort of training required by state licensing law.

Additionally, such a “no pecuniary interest” law can strictly forbid public seats from being occupied by those who currently have or have had in the past an occupational license in the field that is regulated by the board.

- 5) *Increase oversight of licensing boards by making them subordinate to another agency.* Some states, like Michigan, have a layer of executive branch oversight that can review the decisions and actions of a licensing board. Other states, like Maine, have decided that the administration and regulation of licensing professions can occur without a licensing board of the type typically seen in most states. Either of these options might decrease arbitrary or selective enforcement of licensing laws and address some of the legal issues that arose in the *North Carolina Dental* decision. Eliminating the licensing board altogether in favor of executive branch administration of licenses is an even more effective option.
- 6) *Adopt universal licensing/reciprocity*
State laws that automatically recognize

out-of-state licenses takes licensing boards out of the equation when it comes to new entrants to the state. Setting the default assumption to be that someone with a license in good standing from another state can automatically receive a state license in their new state of residence reduces the market distortions that can come with a captured licensing board.

- 7) *Elimination of the occupational license requirement.* Finally, the most direct way of weeding regulatory capture out of the system is to simply eliminate the regulation itself. The public health and safety goals can be achieved in another way besides licensing and do so using levers that do not require the creation of a licensing board that is inherently subject to capture.¹⁷

State laws that automatically recognize out-of-state licenses takes licensing boards out of the equation when it comes to new entrants to the state.

Conclusion

The institutional realities of occupational licensing are an important element of understanding how the licensing system works in the real world. This understanding can help us determine why licensing persists, even in the

¹⁷ See T.A. Hemphill & D.M. Carpenter, “Occupations: A hierarchy of regulatory options.” *Regulation*, Fall 2016, p. 20-24.
https://object.cato.org/sites/cato.org/files/serials/files/regulation/2016/9/regulation-v39n3-5_0.pdf

face of a policy consensus that concludes it is counterproductive at worst and more costly than beneficial at best. Insights derived from a better understanding of the institutional realities can help point the way to the best route toward

fundamental reform of occupational licensing generally.

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