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## In Defense of Occupational Licensing: A Legal Practitioner's Perspective

Jeffrey P. Gray

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## In Defense of Occupational Licensing: A Legal Practitioner's Perspective

BY JEFFREY P. GRAY\*

### ABSTRACT

*In recent years, occupational licensing boards have come under fire from critics across the nation. Much of the recent critique of occupational licensing boards has centered on the breadth of power these boards hold and the supposed lack of state supervision over them. And yet, occupational licensing boards in North Carolina are subject to significant state supervision. This Article seeks to rebut arguments of no state supervision over occupational licensing boards. This Article's primary goal is to provide a cogent defense of occupational licensing boards in an effort to show their validity and legitimacy.*

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## INTRODUCTION

“No one has a right to practise . . . without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services . . . that he possesses such learning and skill . . . .”<sup>1</sup>

Occupational licensing is a form of government regulation that requires a credential of some type, for instance a license, to engage in a particular profession, occupation, or vocation for compensation. Therefore, it becomes illegal to practice the given occupation without a license. The “for compensation”—something of value—is a key component.

Statutes in most states, and the scholarly literature, most often describe it as “occupational licensing,” but it is more accurate to describe it as occupational and “professional” licensing. Professions in America are generally those vocations that require advanced knowledge acquired by a prolonged course of specialized intellectual study, including those requiring a bachelor’s or advanced degree, such as doctors, nurses, attorneys, engineers, architects, and landscape architects. Occupations are all the others, including plumbers, electricians, barbers, cosmetologists, and locksmiths. All of these, however, tend to be grouped under the single descriptive term—“occupational licensing.”

Licensing is, and has been, under fire for the last decade. Licensing advocates argue that it protects the public health, safety, and welfare (a legal prerequisite), and keeps incompetent and unscrupulous individuals from lawfully performing certain tasks. Denouncers, of which there are many, claim that there is little effect on the overall quality of services provided, it prohibits a certain segment of the possible workforce from earning higher wages, and the methods employed to license individuals, especially where a licensing board or commission is involved, smacks of a restraint of trade.

The opponents tend to focus much of their energies on the “independent” boards and commissions, and it is there that I will focus my defense. But mostly all forms of licensing are considered suspect by their opponents.

Since 1957, North Carolina has shifted between a licensing scheme administered by an independent board or commission and those that are not, but there was always some question as to the true number. In 2019, the legislature finally tried to distinguish between the two. To know the difference goes a long way in understanding the opposition toward the

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1. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (referring to medicine and physicians).

independent boards and commissions, and also to understanding a seminal case from the United States Supreme Court that originated from North Carolina but has had national implications.

*A. What is Occupational Licensing?*

A concise description of occupational licensing is found in the chapter of the North Carolina's statutes that defines an occupational licensing board. Chapter 93B of the North Carolina General Statutes defines an "occupational licensing board":

[A]ny board, committee, commission, or other agency in North Carolina which is established for the primary purpose of *regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation*, and which is authorized to issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses.<sup>2</sup>

This was the definition for sixty-two years, and every other form of licensing, registration and certification was by any method other than by an independent board. The defining factor was whether the board was staffed by State employees.<sup>3</sup> In 2019, the legislature amended section 93B-1 of the North Carolina General Statutes and added a subsection (3) listing the others, now called "[s]tate agency licensing boards."<sup>4</sup> A "license" is also defined in the same section:

Any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage

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2. N.C. GEN. STAT. § 93B-1 (2019) (emphasis added).

3. In practice this was not as pure as it appeared. Four boards and commissions, the Criminal Justice Education and Training Commission, the Sheriffs' Education and Training Standards Commission, the Private Protective Services Board, and the Alarm Systems Licensing Board, are staffed by state employees but were also considered—or treated as—Occupational Licensing Boards (O.L.B.s).

4. An Act to Clarify and Simplify a Licensee's Qualifications for Licensure and to Require Recognition by Licensing Boards of Certain Apprenticeship and Training Experiences, 2019 N.C. Sess. Laws 91, sec. 2. While it historically has been debatable, the most accurate list of O.L.B.s is found in the Index to Title 21 of the North Carolina Administrative Code. A close reading even shows that two, "House Movers" and "Water Well Contractors," were relocated since they did not meet the traditional definition. In my opinion, the Cemetery Commission, Chapter 87, should be relocated since it does not license individuals (i.e., "persons.").

in or represent himself to be a member of a particular profession or occupation.<sup>5</sup>

While other forms of regulation exist, such as state certification (as opposed to certification by some private organization or entity) and registration, “license” is the generic term encompassing all forms and is the term I use herein.

### *B. Misleading and Erroneous Comparisons*

Commentators frequently compare licensing boards to the European guild system or to unions. While the first has its similarities, it is a misleading characterization, and the second—a comparison to unions—is just plain erroneous.

The first guilds were organized by merchants in the cities and towns as early as the twelfth century. They reflected the vocational framework of the period and were an early outgrowth of the revival of trade after the so-called Dark Ages. Their basic purpose was to protect the economic interests of their members, though they also served as a means of providing some protection against economic and trade practices which would be harmful to the community. The guilds received legal recognition by municipal authorities including the right to restrict membership and to regulate trade among various communities.

The merchant guilds tended to become quite exclusive bodies, the members of which enjoyed considerable wealth and social prestige. Naturally they guarded their privileged status by carefully limiting their membership and by refusing to admit persons from different segments of the economy. The result was the formation of new types of guilds consisting of free artisans who practiced the several crafts which developed or were revived during this period.

The new guilds were organized along craft lines and like the earlier groups had as their major purposes the protection of the economic interests of their members. They instituted a system of self-regulation, governing prices, wages, hours, working conditions and other aspects of [trade].<sup>6</sup>

Occupational licensing boards are not the reincarnation of the guild systems, as some would have you believe, but some current licensing

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5. N.C. GEN. STAT. § 93B-1.

6. William L. Frederick, *The History and Philosophy of Occupational Licensing Legislation in the United States*, 58 J. AM. DENTAL ASS'N 18, 18–19 (Mar. 1959) (indicating Frederick was the Eastern Representative of the Council of State Governments).

practices serve some of the same purposes such as ensuring only competent persons are allowed to enter the vocation or trade.

There are no accurate similarities to a union. A labor union in the United States is an organization that represents workers in many industries recognized under United States labor laws. Their activity in modern times centers on collective bargaining over wages, benefits, and working conditions for their members, and on representing their members in disputes with management over violations of contract provisions.<sup>7</sup> A state occupational licensing entity, be it a board, commission, or a state agency, does none of that—zero. In fact, these licensing entities are prohibited by federal (and sometimes state) law from doing so.

While there are some similarities between the British “trade unions,” which are more likened to the ancient guilds, calling occupational licensing “unionism” is merely cheap dog-whistling to cast dispersion on an otherwise beneficial process.

### *C. A Few Words about “Title Acts”*

The “licensing” of an individual to engage in a vocation or occupation comes in degrees. By that I mean it starts with the most rigorous, which is licensing, and descends through “registration,” then “certification.” Within that there is a variation. These are known as “title acts”; an individual cannot use a specific title without having met the qualifications established by the legislature and administered by a board or commission or state agency. The most familiar are “M.D.,” “D.D.S.,” “R.N.,” and “D.V.M.” for “Medical Doctor,” “Doctor of Dental Surgery,” “Registered Nurse,” and “Doctor of Veterinary Medicine,” respectively. But there are many others: “C.P.A.” for Certified Public Accountant and “P.E.” for Professional Engineer, for instance. You can be an accountant or an engineer, but you cannot use the particular designator, or “title,” without authorization from the respective board. Many previous title acts slowly morphed over the years into full-blown licensing acts.<sup>8</sup>

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7. Most unions in the United States are aligned with one of two larger umbrella organizations: the AFL-CIO, created in 1955, and the Change to Win Federation which split from the AFL-CIO in 2005. Both advocate for policies and legislation on behalf of workers in the United States and Canada and are very active politically.

8. One example is landscape architects in North Carolina. Once a registration and title act, section 89A of the North Carolina General Statutes became a full-blown licensing law in 1979. However, licensed landscape architects still use the designator “R.L.A.” for Registered Landscape Architects. It is worth noting that some authors and commentators erroneously define “certification” as merely a process that allows for the exclusive use of a title. Such is not the case.

D. “Public health, safety, and welfare” and the United States Supreme Court

While often lost on some, the most critical aspect of the licensing, registration, or certification of any profession or occupation is centered on a catchphrase few attorneys think about when they read it: the protection of the “public health, safety, and welfare.” Yes, you read that phrase often, but why?

“The right to practice a recognized profession is not an absolute or unqualified right.”<sup>9</sup> That right is subject to the police power of the state. Due to the limits of federalism, plus the recognition of the state as sovereign, that police power is within the exclusive province of the state. The state’s interest, of course, is the protection of the public. Consequently, as the case law has evolved, the state controls the various aspects of professional practice including among other things, admission to practice, standards of practice, continuing competency, removal from practice, and readmission to practice.

Scholarly journals and case law have thoroughly documented the authority of states to regulate the admission to the practice of professions. The landmark Supreme Court decision discussing that authority is *Dent v. West Virginia*,<sup>10</sup> which I quoted in the introduction. In *Dent*, the newly created West Virginia State Board of Health was granted authority to license physicians and surgeons who were graduates of a reputable medical college, who had been in practice for the ten years preceding the passage of the act, or who had passed the board’s examination.<sup>11</sup> Dent was denied a license because his diploma was not from a reputable college of medicine in the opinion of the state board, nor had he met the other admission requirements.<sup>12</sup> Dent was tried before a jury on a criminal charge of practicing medicine without a license and fined \$50.00 and court costs.<sup>13</sup> He appealed, and the case ultimately reached the United States Supreme Court. Justice Field, writing in *Dent*, said the following:

As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession

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9. DIANE KJERVIK AND EDITH ANN BROUS, LAW AND ETHICS IN ADVANCED PRACTICE NURSING 149 (2010) (attributing this quotation to Gloria Damgaard, former director of the South Dakota Board of Nursing).

10. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

11. *Id.* at 115.

12. *Id.* at 117.

13. *Id.* at 118.

being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.<sup>14</sup>

This was 1898, and such challenges are still forthcoming.

Since the time of *Dent*, the evolution of the law in the federal and state courts can be most simply summarized this way: A state cannot regulate entry into an occupation or profession unless it can be shown that the regulation of the occupation or profession is to protect the public health, safety, and welfare. This is rooted in the rational relation test, the lowest tier of three standards established by the United States Supreme Court, to determine the permissiveness of a state action that allegedly infringes on a constitutional right.<sup>15</sup>

Midway through the last century, courts were already discerning the breadth of *Dent* and expanding its scope beyond the health professions. As stated by the Ninth Circuit in a California case challenging the state's statutes governing professional engineers,

The principles stated in the *Dent* case have been widely applied by all the states in a great variety of professions and businesses, including engineering. We think that there can be no question of the power of the State of California to regulate the business of engineering, both mechanical

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14. *Id.* at 122.

15. *See, e.g.*, Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1050 (9th Cir. 2000) (referencing psychologists); Potts v. Ill. Dep't. of Registration & Educ., 538 N.E.2d 1140, 1143 (Ill. 1989); Maguire v. Thompson, 957 F.2d 374, 376 (7th Cir. 1992) (referencing naprapathy); Feingold v. Commonwealth, 568 A.2d 1365, 1368 (Pa. Commw. Ct. 1990) (referencing naturopaths); Williams v. State *ex rel.* Med. Licensure Comm'n, 453 So. 2d 1051, 1054 (Ala. Civ. App. 1984); People v. Rosburg, 805 P.2d 432, 437 (Colo. 1991) (referencing midwifery); Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 644-45 (3d Cir. 1995) (referencing midwifery); Lange-Kessler v. Dep't of Educ. of N.Y., 109 F.3d 137, 140 (2d Cir. 1997) (referencing midwifery); Smith v. California, 336 F.2d 530, 533 (9th Cir. 1964) (referencing engineers). This is a mere representative list and is by no means exhaustive.

and electrical, for the protection of the public, and that the means that the state has used do not on their face violate any provision of the federal constitution. In this regard the complaint does not present a substantial federal question.<sup>16</sup>

It is the “public health, safety, and welfare” concept that is so essential. In reading many of the enabling acts for the licensure of any occupation or profession in North Carolina, there will be a preamble section of the statute making a declaration of legislative intent based on this concept.<sup>17</sup> And it was the inability to substantiate this concept that resulted in the repeal or sunset of three occupations: photographers,<sup>18</sup> watchmakers,<sup>19</sup> and tile contractors.<sup>20</sup>

While I am most certain this observation will bring cries of protest from the industry, it was not until the worst draught conditions ever faced by our state that irrigation contractors were successful at becoming a licensed occupation after numerous previous attempts.<sup>21</sup> They could finally show protection of the public health, safety, and welfare.

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16. *Smith*, 336 F.2d at 534 (citation omitted).

17. *See, e.g.*, N.C. GEN. STAT. § 87-98.3 (2019) (well contractors); N.C. GEN. STAT. § 88A-2 (2019) (electrologists); N.C. GEN. STAT. § 89A-1(3) (2019) (landscape architects ) (this section does not include a preamble, but does include a definition of profession and standards for continuing education in 21 N.C. ADMIN. CODE 26.0308(c) (2020)); N.C. GEN. STAT. § 89B-1(b) (2019) (foresters); N.C. GEN. STAT. § 89C-2 (2019) (engineers & land surveyors); N.C. GEN. STAT. § 89E-2 (2019) (geologists); N.C. GEN. STAT. § 89F-2 (2019) (soil scientists); N.C. GEN. STAT. § 90-2(a) (2019) (establishing a “Medical Board to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina”); N.C. GEN. STAT. § 90-22(a) (2019) (dentists); N.C. GEN. STAT. § 90-85.2 (2019) (pharmacists); N.C. GEN. STAT. § 90-113.30 (2019) (substance use disorder professionals).

18. *See* N.C. GEN. STAT. § 92 (2019), *invalidated by* State v. Ballance, 51 S.E.2d 731 (1949).

19. *See* N.C. GEN. STAT. § 93C (2019), *repealed by* Act to Establish a System for the Periodic Review and for the Termination, Continuation, or Reestablishment of Certain Licensing and Regulatory Agencies, ch. 712, sec. 2, 1977 N.C. Sess. Laws 901 (1977).

20. *See* N.C. GEN. STAT. §§ 87-28 to -38 (2019), *repealed by* Act to Establish a System for the Periodic Review and for the Termination, Continuation, or Reestablishment of Certain Licensing and Regulatory Agencies, ch. 712, sec. 2, 1977 N.C. Sess. Laws 901 (1977).

21. *See* N.C. GEN. STAT. § 89G (2019). Prior to passage of S.L. 2008-177, there had been two attempts to obtain passage of a licensure law in 2001 (H.B. 984, 2001 Leg., 145th Sess. (N.C. 2001)) under the existing Landscape Contractors, and in 2003 (H.B. 947, 2003 Leg., 145th Sess. (N.C. 2003)); and inclusion in 2004’s Study Act (Act Concerning Studies and Other Purposes, ch. 161, 2004 N.C. Sess. Laws 546 (2004)).

## I. LICENSING STATUTES AND ENABLING ACTS

While reviewing the scholarly literature espousing elimination, or at a minimum “reform” of occupational licensing, much of the focus is on the boards and commissions made up of appointed members (now, the section 93B-1(3) of the North Carolina General Statute boards). These are the so-called “independent licensing boards.” There is little distinction, short of funding source and staffing; however, there are numerous other state agencies that issue some type of license, registration, certification or permit that allows a person (or business) to engage in a profession or occupation or some other means of making a living.<sup>22</sup> The independent boards make an easier target, however, for claims of protectionism, self-dealing, and restraint of trade. Albeit, as argued below, such is not the case in reality.

*A. License and regulate.*

One of the major points missed by detractors is that the purpose of the entity—be it a board, commission, or state agency—is not just to license, it is to “regulate.” It is to regulate the minimum qualifications to practice the vocation, whether through a certain experience, education, or a combination of the two. It is to determine the moral and ethical standards that are to be considered, typically evidenced by a lack of a criminal record, but financial ability or stability is often considered. Then, once licensed, the licensee is held to standards: community standards as to practice and job performance; professional standards through a code of conduct or ethical standards; and a general policing of behavior that demonstrates an unfitness to remain a licensed member entitled to practice the vocation. And finally, for many occupations and professions, the licensee must maintain competence by way of required continuing education.

These requirements are nothing more than the sovereign state exercising its constitutionally protected police powers to provide for the general safety and welfare of its citizens as determined by those citizens’ elected representatives. How can any group, be it Republican, Democrat, Independent, “Tea Party,” Libertarian, or by whatever label, be opposed to a method of regulation chosen by the people?

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22. See, e.g., the numerous board and commissions set forth in N.C. GEN. STAT. § 93B-1(3) (2019), the “State agency licensing boards.”

*B. Basic Scheme for an Occupational Licensing Board*

For North Carolina, as well as the vast majority of other jurisdictions around the nation, the statutory scheme for licensing follows a typical structure:

- A “preamble” or “purpose” section stating the need for regulation to protect the public health, safety, and welfare;<sup>23</sup>
- Definitions, especially of the scope of the regulated occupation or profession;<sup>24</sup>
- The establishment of the board or commission, including the number of members, the appointment (or recommending for appointment) authority, removal and vacancies, officers and meetings, and compensation;<sup>25</sup>
- Powers and duties of the board or commission including the obvious, such as administer and enforce the provisions of the enabling statute, adopt, amend and repeal administrative rules, and examine and determine qualifications. Also often included is the power to hire employees, fix compensation, and maintain records;<sup>26</sup>
- Qualifications, examinations, application, and issuance;<sup>27</sup>
- Reciprocity and/or comity;<sup>28</sup>
- Renewal;<sup>29</sup>
- Exemptions;<sup>30</sup>
- Fees;<sup>31</sup> and
- Acts or conduct that can result in application denial or revocation, suspension or some other discipline of a license.<sup>32</sup>

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23. *See, e.g.*, N.C. GEN. STAT. § 90C-21 (2019).

24. *See, e.g.*, N.C. GEN. STAT. § 90C-22 (2019).

25. *See, e.g.*, N.C. GEN. STAT. § 90C-23 (2019).

26. *See, e.g.*, N.C. GEN. STAT. § 90C-24 (2019).

27. *See, e.g.*, N.C. GEN. STAT. § 90C-27 (2019).

28. There is a difference. “Reciprocity” exists where one jurisdiction recognizes the license of another, typically with some caveat such as the standards of the boards of the other jurisdictions are “substantially equivalent to or higher than” the granting state. N.C. GEN. STAT. § 90C-33 (2019). “Comity,” on the other hand, is where a jurisdiction accepts or recognizes the person based solely upon the person having a license in that jurisdiction, typically with the requirement the person has practiced the vocation for a specific amount of time. *See, e.g.*, N.C. GEN. STAT. § 89F-12 (2019).

29. *See, e.g.*, N.C. GEN. STAT. § 90C-29 (2019).

30. *See, e.g.*, N.C. GEN. STAT. § 90C-34 (2019).

31. *See, e.g.*, N.C. GEN. STAT. § 90C-28 (2019).

32. *See, e.g.*, N.C. GEN. STAT. § 90C-32 (2019).

There are a few other common provisions, such as statutes that require an annual report to the Governor, legislature, or Secretary of State (that likely pre-date the myriad of reports required elsewhere),<sup>33</sup> grant independent boards and commissions the ability to own real property,<sup>34</sup> and provide a number of boards with a recovery fund to compensate the public when financially injured by the conduct of a licensee.<sup>35</sup>

## II. THE ANTI-LICENSING ARGUMENT

### A. *The opponents*

“Onerous, arbitrary, unaccountable,”<sup>36</sup> “protection racket,”<sup>37</sup> “monopolistic,”<sup>38</sup> restraints of trade,<sup>39</sup> “medieval guild[s],”<sup>40</sup> economic

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33. See, e.g., N.C. GEN. STAT. § 93B-2 (2019); see discussion *infra* Section VI. B.

34. See *infra* note 170.

35. See, e.g., N.C. GEN. STAT. § 85B-3.1(c) (2019) (limiting collateral pledged by the Auctioneers Commission to the Commission’s assets); N.C. GEN. STAT. § 87-9.1(a) (2019) (limiting collateral pledged by the Board of General Contractors to the Board’s assets); N.C. GEN. STAT. § 87-18 (2019) (limiting collateral pledged by the Board of Plumbing, Heating, and Fire Sprinkler Contractors to the Board’s assets); N.C. GEN. STAT. § 87-42 (2019) (limiting collateral pledged by the Board of Electrical Contractors to the Board’s assets); N.C. GEN. STAT. § 87-63.1(a) (2019) (limiting collateral pledged by the Board of Refrigeration Contractors to the Board’s assets); N.C. GEN. STAT. § 89C-10(i) (2019) (limiting collateral pledged by the Board of Engineering & Land Surveying to the Board’s assets); N.C. GEN. STAT. § 90-85.11A(a) (2019) (limiting collateral pledged by the Board of Pharmacy to the Board’s assets); N.C. GEN. STAT. § 90-210.23(h1) (2019) (limiting collateral pledged by the Board of Funeral Service to the Board’s assets); N.C. GEN. STAT. § 90-270.92(13) (2019) (limiting collateral pledged by the Board of Physical Therapy Examiners to the Board’s assets); N.C. GEN. STAT. § 93-12(17) (2019) (limiting collateral pledged by the Board of CPA Examiners to the Board’s assets); N.C. GEN. STAT. § 93A-3(f) (2019) (limiting collateral pledged by the Real Estate Commission to the Commission’s assets).

36. Michelle Cottle, *The Onerous, Arbitrary, Unaccountable World of Occupational Licensing*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-obama-occupational-licensing/536619/> [<https://perma.cc/JY27-BDA6>].

37. Mark Flatten, *Protection Racket: Occupational Licensing Laws and the Right to Earn a Living*, GOLDWATER INST. (Dec. 6, 2017), <https://goldwaterinstitute.org/article/protection-racket-occupational-licensing-laws-and/> [<https://perma.cc/DN4D-UM7L>].

38. *Id.* (quoting STAGES OF OCCUPATIONAL REGULATION, *infra* note 50); Robert Everett Johnson, *Boards Behaving Badly*, INST. FOR JUST. (Mar. 2015), <https://ij.org/report/boards-behaving-badly/> [<https://perma.cc/JG9Y-ND7R>].

39. See Johnson, *supra* note 38.

40. Robert Thornton, *Who Benefits Most from Occupational Licensing?*, LEHIGH UNIV. (Apr. 27, 2018) <https://business.lehigh.edu/blog/2018/who-benefits-most-occupational-lice>

protectionism,<sup>41</sup> and unions;<sup>42</sup> these are just a few of the descriptions of occupational licensing, and particularly of the independent boards, used by writers and commentators.<sup>43</sup>

The advocates for change, reform, or out-right elimination come from a number of sides: the libertarian law firm Institute for Justice,<sup>44</sup> the Goldwater Institute,<sup>45</sup> the Mercatus Institute at George Mason University,<sup>46</sup> the Brookings Institute,<sup>47</sup> and the John Locke Foundation and its North Carolina publication “The Carolina Journal.”<sup>48</sup> Their efforts have dated back over a decade. Even the White House got involved and released a seventy-six-page report in 2015 prepared jointly by the Department of Treasury Office of Economic Policy, the Council of Economic Advisors, and the Department of Labor: “Occupational Licensing: A Framework for Policy Makers.”<sup>49</sup> While this push began as a libertarian issue, it has

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nsing [<https://perma.cc/DV3Q-397S>] (quoting MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 141 (1962)).

41. See Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, BROOKINGS (Mar. 15, 2018), <https://www.brookings.edu/research/how-occupational-licensing-matters-for-wages-and-careers/> [<https://perma.cc/TE6P-Y6NB>]; accord Rebecca H. Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards up Close*, 105 CALIF. L. REV. 1567, 1592 (2017).

42. Cf. Johnson, *supra* note 38 (alluding to the union-like behavior of occupational licensing boards by explaining that “[i]n *Dental Examiners*, a dental board composed of practicing dentists sought to exclude non-dentist teeth whiteners from the market, not because the teeth whiteners posed a danger to consumers (they did not), but rather because they threatened dentists’ lucrative monopoly on teeth whitening services”).

43. One North Carolina legislator even referred to our occupational licensing boards collectively as “cartels” in a committee meeting while debating the PED report.

44. See generally INST. FOR JUST., <https://www.ij.org/> [<https://perma.cc/V25W-CDEL>] (this website is fraught with juicy tales of overreach, and its track record for litigation—which is impressive—indicates a tendency to pursue only the most absurd examples so as to garner media coverage, such as casket-making monks and African hair braiders).

45. See generally GOLDWATER INST., <https://goldwaterinstitute.org> [<https://perma.cc/2BT7-EAK9>].

46. See generally MERCATUS, <https://www.mercatus.org> [<https://perma.cc/H2V5-MKAK>].

47. See generally BROOKINGS, <https://brookings.edu> [<https://perma.cc/2BT7-EAK9>].

48. See generally CAROLINA J., <https://www.carolinajournal.com/> [<https://perma.cc/UJ5G-8Y4R>]. See also AMS. FOR PROSPERITY, <http://www.americansforprosperity.org> [<https://perma.cc/7Z6E-VQKA>]; AM. LEGIS. EXCH. COUNS., <http://www.alect.org> [<https://perma.cc/D5F8-BZP6>].

49. DEP’T OF THE TREASURY OFF. OF ECONOMIC POL’Y, COUNCIL OF ECON. ADVISORS, & DEP’T OF LAB., *OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS* (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_none\\_mbargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_none_mbargo.pdf) [<https://perma.cc/6TDH-FFQD>]. Interestingly, while many commentators have opined that former President Donald Trump’s only discernable policy initiative was to undo

morphed into a philosophical one, with Republicans and Democrats joining the cause.

The anti-licensing movement is reflected not only in the scholarly reports of the entities mentioned above, but in hundreds of articles in business journals; magazines devoted to business, economics, and sociology; the American Bar Association's *ABA Journal*; and online news sources devoted to politics, such as *The Hill*. There are too many to list.

But were you to read them all, it would not take you long to realize that it is an echo chamber. The calls for repeal of licensing laws—claiming they block competition; create a privileged class within the workforce; create a wage advantage, labor market inequality, wage inequality, or wage premium; allow “rents” to accrue to a licensee; suppress innovation; prevent job migration; create a guild system; allow for state-sanctioned unions; and a host of other unimaginable ills—all trace their roots back to the research and reports of one academic: Morris M. Kleiner of Michigan State University. Kleiner, alone and in concert with other respected academics, has studied and written about the economic impacts of occupational licensing not only in the United States, but also in foreign countries including the United Kingdom and the Netherlands.<sup>50</sup>

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everything former President Barack Obama set in place, one area the two agreed on—and a policy Trump embraced—was “fixing” occupational licensing. Within months of his appointment, new Labor Secretary Alexander Acosta called on state lawmakers to repeal licensing laws. See Eric Boehm, *Trump's Labor Secretary Tells State Lawmakers: 'Fix Occupational Licensing'*, REASON (July 24, 2017, 11:16 AM), <https://reason.com/2017/07/24/trumps-labor-secretary-tells-state-lawma/> [<https://perma.cc/Q3JQ-7XBF>].

50. See generally MORRIS M. KLEINER, STAGES OF OCCUPATIONAL REGULATION: ANALYSIS OF CASE STUDIES (2013), [https://research.upjohn.org/up\\_press/222/](https://research.upjohn.org/up_press/222/) [<https://perma.cc/ZG5V-PUEF>]; MORRIS M. KLEINER, GUILD-RIDDEN LABOR MARKETS: THE CURIOUS CASE OF OCCUPATIONAL LICENSING (2015), [https://research.upjohn.org/cgi/viewcontent.cgi?article=1254&context=up\\_press](https://research.upjohn.org/cgi/viewcontent.cgi?article=1254&context=up_press) [<https://perma.cc/D4Q8-PM2P>]; MORRIS M. Kleiner, *The Influence of Occupational Licensing and Regulation*, IZA WORLD OF LAB., Oct. 2017, at 1; Amy Humphris et al., *How Does Government Regulate Occupations in the United Kingdom and United States? Issues and Policy Implications*, in EMPLOYMENT IN THE LEAN YEARS: POLICY AND PROSPECTS FOR THE NEXT DECADE 87 (David Marsden ed., 2011); MARIA KOUMENTA ET AL., OCCUPATIONAL REGULATION IN THE EU AND UK: PREVALENCE AND LABOUR MARKET IMPACTS (2014), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf); MORRIS M. Kleiner et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, 59 J. OF L. & ECON. 261 (2016); MORRIS M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. OF INDUS. REL. 676 (2010); MORRIS M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013); Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 INDUS. & LAB. REL. REV. 142 (2016); MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY

To quote a reviewer of his research, “As do all econometric studies, Kleiner’s end up as essays in persuasion.”<sup>51</sup>

Albeit, as large as Kleiner’s body of work may be—and the even larger body of commentaries parroting his work in support of one or more contentions—the basic premise of those opposed to the licensing<sup>52</sup> of occupations and professions can be summarized in a few theories: economic damage; consumer protectionism; health, safety, and welfare; and disparity between states.

The economic damage argument essentially states that a wage inequality exists between licensed and unlicensed individuals, which causes an increase in the cost of goods and services from licensed individuals.<sup>53</sup> The consumer protectionism argument is nothing more than an antitrust argument—that licensing lessens competition and restrains free trade.<sup>54</sup> The health, safety, and welfare argument takes consumer protectionism one step further to say that the repeal of licensing boards will actually further society’s health, safety, and welfare.<sup>55</sup> An argument predicated on the disparity between states in regulating certain industries points to the difficulty in interstate migration for licensed individuals.<sup>56</sup> While Kleiner’s works have evolved over time, and others have riffed off of his research with theories of their own, these are the foundational arguments used to oppose a licensing scheme.

Because many have relied on Kleiner as their foundational base, a few interesting observations have presented themselves consistently throughout.

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OR RESTRICTING COMPETITION?” (2006), [https://research.upjohn.org/cgi/viewcontent.cgi?article=1034&context=up\\_press](https://research.upjohn.org/cgi/viewcontent.cgi?article=1034&context=up_press) [<https://perma.cc/CS3R-LYQP>]; Morris M. Kleiner & Robert T. Kudrel, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*. 43 J.L. & ECON. 2 (2000); Morris M. Kleiner et al., *Barriers to Labor Migration: The Case of Occupational Licensing*, 21 INDUS. REL. 383 (1982).

51. Uwe E. Reinhardt, *Does Occupational Licensing Deserve our Approval? A Review of Work by Morris Kleiner*, 11 ECON. J. WATCH 318, 322 (2014).

52. Included within the general premise of occupational licensing reform or elimination are its various forms, which range from total elimination of all licensing, to licensing only those professions that require advanced knowledge or skill (e.g., doctors, nurses, attorneys, engineers, surveyors, etc.), registration of only certain occupations and professions, certification of only certain occupations and professions, and a system where only private entities certify (such as exists with the alphabet soup of designations that follow the name on the business card of your apartment manager or financial planner).

53. See sources cited *supra* note 50.

54. *Id.*

55. *Id.*

56. *Id.*

First, much of the initial data used is now stale.<sup>57</sup> Second, aside from hard numbers, many of the articles rely on pure speculation. But the one truly interesting aspect of the whole, mostly one-sided debate, is the contradictory positions taken by those who have chosen to tackle this topic by way of advocating for reform or elimination.<sup>58</sup>

*B. Debunking the data/statistics*

Until recently, it appears little had been done by the “pro-licensing” crowd to counter these attacks.<sup>59</sup> However, there is only a smattering of research available. Most notable is a 2017 examination of occupational licensing that contradicts the decades old research. It found that professional licensing does not limit competition, nor does it increase wages.<sup>60</sup>

Authored by Beth Redbird, Assistant Professor of Sociology in the Weinberg Western College of Arts and Sciences at Northwestern University, the study was based on a new occupational dataset covering thirty years, thereby contradicting decades old research on the impact of occupational licensing. This is the most comprehensive examination of licensing to date. The study relied on more than 4.5 million workers across 500 occupations.<sup>61</sup>

“The most substantial growth” of vocation licensure over the past thirty years has been in so-called “blue-collar occupations, and particularly the production and transportation sector, which more than doubled its licensed workforce.”<sup>62</sup>

Redbird argues that instead of increased wages, licensure creates a set of institutional mechanisms that enhance entry into the occupation,

57. Much of the statistical data relied upon and quoted in Kleiner’s various articles date to the mid-1980s. *See id.*

58. I am no authority on “isms” and have struggled while studying religions of the world to understand the tenants of Hinduism and Buddhism, but I do have a political scientist’s understanding of the philosophical positions that are espoused in the political realm. So, everyone should make the same amount of money irrespective of skill or ability? And that is being championed by avowed libertarian think-tanks? Is that not what we call “socialism”? Along that same line, every state should govern its people in the exact same manner as every other, a position being proffered by the likes of the John Locke Foundation? Are they not the voice of the federalists? This all seems a bit contradictory.

59. The rise of the pro-licensing advocates, such as ARPL, is discussed below. *See* discussion *infra* VII.B.

60. Beth Redbird, *The New Closed Shop? The Economic and Structural Effects of Occupational Licensure*, 82 AM. SOCIO. REV. 600, 610–18 (2017).

61. *Id.* at 607–09.

62. *Id.* at 600.

particularly for historically disadvantaged groups, while simultaneously stagnating quality. Her study is different from previous examinations of the topic in that it relies on two important research innovations. First, it tracks licensing legislation across all fifty states through an exhaustive search of statutes and administrative codes. For example, licensed cosmetologists in one state are compared to unlicensed cosmetologists in another within the same year, then licensed occupational therapists are compared to unlicensed occupational therapists, and so on. Second, for the first time, the effect of licensing has been studied over time. Utilizing a longitudinal approach, Redbird's study examines wages in the year following enactment of a licensing statute and evaluates exactly how they change when a law is passed.

Redbird's study finds the opposite of those conducted by Kleiner and others: the typical weekly wage declines by between 0.19% and 1.23% due to licensure.<sup>63</sup> Additionally, the results of the study show that after licensing, the number of workers in the occupation increased by an average of more than 7% over original levels.<sup>64</sup>

In an article in ScienceDaily, Redbird was quick to acknowledge that "the research could have implications for changing how workers enter an occupation," recognizing that through licensure, regulations "can define the 'proper' way to practice, since license requirements are essentially comprehensive lists of ways to [enter a profession, then] be excluded or removed."<sup>65</sup>

A very recent study, commissioned by the Alliance for Responsible Professional Licensing, further adds to the discussion and debate about the benefits of occupational and professional licensing.<sup>66</sup> Produced by Oxford Economics, the study is a first-of-its-kinds quantitative research study which explores the impacts of professional licensing in highly complex, technical fields.

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63. *Id.* at 611.

64. *Id.* at 613.

65. Hilary Hurd Anyaso, *New Examination of Occupational Licensing Contradicts Decades of Research*, SCIENCE DAILY (Oct. 17, 2017), <https://www.sciencedaily.com/releases/2017/10/171017153004.htm> [<https://perma.cc/P233-VSKX>]. In doing so, Redbird also noted that licensure can "limit innovation, reduce experimentation and perhaps hinder growth in knowledge," an acknowledgment of the fact that "practitioners in unlicensed markets are free to compete on all aspects of their occupations, [while] licensed workers must obey legal limitations on both what they do and how they do it." *Id.*

66. OXFORD ECON., VALUING PROFESSIONAL LICENSING IN THE US: A REPORT FOR THE ALLIANCE FOR RESPONSIBLE PROFESSIONAL LICENSING (2021) [http://www.responsiblelicensing.org/wp-content/uploads/2021/02/ARPL\\_Jan2021.pdf](http://www.responsiblelicensing.org/wp-content/uploads/2021/02/ARPL_Jan2021.pdf) [<https://perma.cc/H8KN-NKCN>] [hereinafter VALUING PROFESSIONAL LICENSING IN THE US].

Released in January 2021 and entitled, “Valuing Professional Licensing in the US,” the study centered around two hypotheses: (1) the impact of licensing varies by the skill level required to perform a particular occupation or profession, and (2) the impact of licensing varies by gender and race.<sup>67</sup>

The study used a three-step approach. First, it reviewed the empirical literature, including the works of Professors Morris M. Kleiner and Beth Redbird.<sup>68</sup> Next, it constructed an individual-level database, combining license status and salary data with a range of demographic characteristics such as gender, age, and educational attainment.<sup>69</sup> Then, it developed econometric models<sup>70</sup> to better understand the relationship between salaries and licensing, accounting for other socio-economic factors.<sup>71</sup>

As noted in Section II.A. above, prior research arrived at generalized conclusions about the monetary and societal impacts of licensing. The Oxford Economics study, however, takes a more in-depth analysis of the available data, revealing nuanced findings about the effects of licensing while also pointing out the deficiencies of prior research’s reliance on “pooled data” from all licensed professions and occupations, which only resulted in generalized conclusions across the licensing spectrum.<sup>72</sup> Those deficiencies fostered the notion that a weakening or elimination of licensing across all professions and occupations would well serve all professionals and the public.<sup>73</sup> The Oxford Economics study sees that conclusion as an empirical problem; that the conclusion is flawed because such “pooled” research methodology does not account for important distinctions that exist across various professions and occupations.<sup>74</sup>

One of the study’s most interesting findings is that the value of licensing is especially significant for those engaged in the trades or

67. *Id.* at 6.

68. *Id.* at 9–10.

69. *Id.* at 11–16.

70. An “econometric model” is a tool economists use in analyzing past economic relationships to forecast future developments within a particular economic phenomenon. Saul H. Hymans, *Forecasting and Econometric Models*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/ForecastingandEconometricModels.html> [https://perma.cc/V47Q-HTAL].

71. Alice Gambarin, Senior Economist for Oxford Econ., & Elizabeth Hebron, Dir. of State Gov’t Affs. for the Am. Soc’y of Landscape Architects, Webinar for Council of Landscape Architectural Boards (Feb. 4, 2021).

72. *Id.*; VALUING PROFESSIONAL LICENSING IN THE US, *supra* note 66, at 18–19, 33.

73. VALUING PROFESSIONAL LICENSING IN THE US, *supra* note 66, at 33.

74. *Id.* This has also been my own experience, and one that I hope is reflected in the views I have express in this Article.

vocational occupations.<sup>75</sup> For instance, the study revealed that licensing provides a pathway to higher earnings: A barber can expect a 7.1% wage increase after licensure, while an architect can expect a 3.6% increase after becoming licensed.<sup>76</sup>

Another pertinent result of the study was evidence that licensing actually narrows the wage gap for women and racial minorities in highly complex, technical fields. A license narrows the gender-driven wage gap by about a third and the race-driven wage gap by about half in those fields.<sup>77</sup> Female engineers, surveyors, architects, landscape architects, and CPAs can expect, on average, a 6.1% hourly wage increase after becoming licensed compared to a 0.7% increase for their male counterparts.<sup>78</sup> Minority professionals in these same highly complex, technical fields can expect an 8.1% hourly wage increase on average; their white counterparts can only expect a 2.9% increase after licensure.<sup>79</sup>

One major emphasis of the study is that licensing effects professions and occupations differently, and licensing systems should reflect those differences. These differences suggest that solving any occupation-specific licensing challenges should not be approached with a “one-size-fits-all” view.<sup>80</sup> Before taking any action a governor or legislature should consider differences in skill requirements, especially in lower-skill vocations.

Further, policy makers should be cognitive of unintended consequences of a blanket approach. The Oxford Economics study tends to show licensing substantially supports women and minorities moving toward wage parity (but more so for highly skilled workers).<sup>81</sup> In the current political climate these two factors have strong public policy implications and reflect another positive benefit of occupational and professional licensing.

### *C. Anti-licensing and the truth about State Dental Board of Examiners v. FTC*

Since my first days in the North Carolina Attorney General’s Office in the mid-1980s, I heard from the attorneys in the Consumer Protection Section that the independent occupational and professional licensing boards in this state are “restraints of trade” and a violation of various antitrust acts,

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75. *Id.* at 33–36.

76. *Id.* at 34.

77. *Id.* at 35.

78. *Id.* at 36.

79. *Id.*

80. *Id.* at 33, 37.

81. *Id.* at 37.

both state and federal. Despite that, there were no reported cases establishing that fact. The claim had, and has, been made *ad nauseum* in studies, reports, and articles, without a single example of misconduct by a board or proof that any occupational licensing board has ever intentionally sought to exclude persons from an occupation or profession that was not otherwise qualified.<sup>82</sup> It had always been mere speculation—conspiracy theory at its finest.

The North Carolina State Board of Dental Examiners, however, breathed life into the conspiracy theorists and gave them the real-life example for which they had been longing. After years of unsubstantiated claims of anticompetitive restrictions created by licensing, particularly by occupational licensing boards, the opponents of occupational and professional licensing were given an appellate court case they could point to as proof.

That case was the United States Supreme Court's February 25, 2015, opinion in *North Carolina State Board of Dental Examiners v. FTC*.<sup>83</sup> For this very narrow practice area of administrative law, the case caused an uproar as boards and commission members, their executive or administrative officers, and especially their attorneys worked to understand the impact of the case. For two years, every national association of licensing professionals where the regulatory act was performed by a board or commission comprised of licensees and non-licensee citizens heard about the case. States, as well as the United States Congress, introduced

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82. In truth—and in my experience as a practitioner and attorney for numerous receipt-supported, independent licensing boards—the opposite is true. I address that fact below.

83. *North Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015).

legislation to address the issues raised by *Dental Examiners*.<sup>84</sup> The opponents beat the drum even louder for reform and continue to do so.<sup>85</sup>

For all the wringing of hands and gnashing of teeth, *Dental Examiners* is not a complicated case to understand,<sup>86</sup> but the opponents of licensing have used the case as a pretext for other arguments. It is not that they do not understand the case: it is intentional to achieve the goals of the anti-regulatory movement. And their voice is loud.

The legal basis of *Dental Examiners* is simple and merely addresses the scope of immunity from federal antitrust law. A state may engage in conduct that would otherwise be monopolistic and anti-competitive if its purpose is for regulating conduct for the good of its citizens. Immunity is afforded to the state through what is known as the “*Parker* immunity doctrine,” which was established by the Court in *Parker v. Brown*.<sup>87</sup> *Parker* is rooted in the bed-rock tenants of state sovereignty and held that actions by a state government acting in its sovereign capacity did not violate antitrust laws.

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84. There is a cached document available with a list compiled in 2016 by the National Conference of State Legislatures, *How is Your State Dealing with NC Dental?*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 20, 2016), <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/dealing-with-nc-dental.aspx> [<https://perma.cc/5HS3-E3V2>]. An updated list and statute will require a state-by-state search. Interestingly, North Carolina, the home state of *Dental Examiners*, introduced a bill in 2016, House Bill 1007, to address the concerns expressed by the Court’s majority, but then this bill was used as the vehicle to repeal House Bill 2, a controversial bill regarding public restrooms aimed at transgender persons. No attempt has been made since to bring North Carolina into compliance with this case, arguably a sign that some such adjustments need not be made in the eyes of our General Assembly. Albeit numerous bills have been introduced to otherwise “reform” occupational licensing in N.C., far too many to attempt to list them herein. On the federal level, a number of acts have been introduced to restore these licensing boards’ protection. See *infra* note 227.

85. Johnson, *supra* note 38 (“The bad behavior has been going on for decades . . . States . . . should seek to restrict the kind of underlying conduct that gets boards into trouble in the first place.”)

86. Albeit, as is typical in Supreme Court opinions, not everything was resolved by this single case. Cases are percolating in the federal district courts and federal appellate courts. See Jeffrey P. Gray, *DB II: Just When You Thought It Was Safe to Go Back in the Water*, NCBARBlog (Sept. 18, 2020), <https://ncbarblog.com/al-db-ii-just-when-you-thought-it-was-safe-to-go-back-in-the-water/> [<https://perma.cc/GCP8-TBY7>].

87. *Parker v. Brown*, 317 U.S. 341 (1943). The rationale behind *Parker* immunity is that Congress, in enacting the Sherman Antitrust Act’s prohibitions of anticompetitive actions and promotion of market efficiencies, was not intending the Act to apply to actions by a state. *Parker* originated from a New Deal raisin cartel created by the State of California. When state houses nationwide happily delegated *Parker* immunity to trade associations in the ensuing years, and groups, including attorneys, began using this delegation to set a price floor, the Court began reining in *Parker*. See, e.g., cases cited *infra* note 96.

North Carolina's legislature designated the North Carolina State Board of Dental Examiners to be "the agency of the State for the regulation of the practice of dentistry"<sup>88</sup> and required that six of the eight members of the Board be licensed, practicing dentists. Acting upon complaints by dentists, the Board issued cease-and-desist orders to non-dentists offering tooth whitening services and to teeth whitening product manufacturers, often warning that practicing without a license for dentistry is a crime. These orders prompted many non-dentists to stop offering these services in North Carolina.

On June 17, 2010, the Federal Trade Commission filed an administrative complaint alleging that the Dental Board's actions were anti-competitive and unlawful under the Federal Trade Commission Act.<sup>89</sup> The Board moved to dismiss the complaint on the ground that the Board was covered under the state-action immunity doctrine. The administrative law judge (ALJ) refused to dismiss the complaint and later ruled that the Board's concerted action was an unreasonable restraint of trade and a method of unfair competition, which ran afoul of antitrust law.<sup>90</sup> On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the ALJ's decision,<sup>91</sup> and the United States Supreme Court granted certiorari. Oral arguments were held on October 14, 2014.<sup>92</sup>

In a 6–3 decision, the Court ruled that a state licensing board that is composed primarily of active market participants has state action immunity from antitrust law only when that board is actively supervised by the state.<sup>93</sup> Justice Anthony Kennedy started the majority opinion by extolling the Sherman Antitrust Act as "a central safeguard for the Nation's free market structures," but then noted that the states' power to regulate would be "impermissib[ly] burden[ed]" if states had to obey United States antitrust law.<sup>94</sup> Kennedy then discussed *Parker* at length.<sup>95</sup> He reasoned that "[s]tate agencies [were] not simply by their governmental character sovereign actors for purposes of state-action immunity," and that immunity for these

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88. *North Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 494 (citation omitted).

89. *Id.* at 501. It is worthy to note that the FTC technically does not have the authority to enforce the Sherman Antitrust Act; this authority is vested in the Attorney General. 15 U.S.C. § 9 (2018). Albeit, the United States Supreme Court has routinely held that all violations of the Sherman Act violate the FTC Act. *See, e.g.*, *Fashion Originators' Guild of Am. Inc. v. FTC*, 312 U.S. 457, 463 (1941).

90. *North Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 501–02.

91. *Id.* at 502.

92. *Id.* at 494.

93. *Id.* at 497, 504.

94. *Id.* at 502–03.

95. *Id.* at 503.

agencies required “more than a mere facade of state involvement.”<sup>96</sup> Because the Sherman Act was designed to break private monopolies, Justice Kennedy did not accept that “congressional judgment” was to allow the states to grant “unsupervised control to active market participants.”<sup>97</sup>

After California delegated price fixing authority directly to wine merchants, the Court in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.* began limiting immunity to where “the State ha[d] articulated a clear . . . [anticompetitive] policy” and “the State provides active supervision of the anticompetitive conduct.”<sup>98</sup> North Carolina did not claim it had set any anticompetitive policy about teeth whitening, nor did it claim it exercised any supervision over the Board of Dental Examiners.<sup>99</sup> The Board argued that because a municipality received *Parker* immunity without active state supervision in *Hallie v. Eau Claire*,<sup>100</sup> active state supervision was unnecessary for any state agency.<sup>101</sup>

Unconvinced, Justice Kennedy declared that “*Parker* immunity does not derive from nomenclature alone,” but from supervision by someone who is accountable to voters in elections.<sup>102</sup> Because dentists controlled the Board, Justice Kennedy found the need for antitrust laws “applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market.”<sup>103</sup> However, Kennedy did not go so far as to define when a board is dominated by market participants or what state involvement was needed, writing, “It suffices to note that the inquiry regarding active supervision is flexible and context dependent.”<sup>104</sup>

The Court concluded by holding if “a controlling number of [a] Board’s decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it [is] subject to active supervision by the State.”<sup>105</sup>

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96. *Id.* at 505 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

97. *Id.* at 515.

98. *Id.* at 506 (quoting *Ticor*, 504 U.S. at 631).

99. *Id.* at 514–15.

100. *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985).

101. *North Carolina State Bd. Of Dental Exam’rs*, 574 U.S. at 510–11.

102. *Id.* at 511.

103. *Id.* at 514.

104. *Id.* at 515.

105. *Id.* For an excellent synopsis and analysis of *Dental Examiners*, see Alexandra W. Jabs, Note, *North Carolina State Board of Dental Examiners v. FTC: When Will Enough Active State Supervision Be Enough?*, 75 MD. L. REV. ENDNOTES 44, 45–57 (2016).

As with many United States Supreme Court opinions, the debate—and sometimes the more reasoned view—is found in a dissent. Here, Justice Alito, joined by Justices Scalia and Thomas, dissented.<sup>106</sup> Justice Alito first observed that “[t]here is nothing new about the structure of the North Carolina Board”<sup>107</sup> and that self-serving by such boards is not new either.<sup>108</sup> Alito then recalled that when the Sherman Act was enacted, Congress’s Commerce Clause power was much smaller, and the states frequently set price controls.<sup>109</sup> As such, Alito believed denying the Board antitrust immunity “diminish[ed] our traditional respect for federalism and state sovereignty.”<sup>110</sup>

Justice Alito viewed the North Carolina State Board of Dental Examiners as a state agency.<sup>111</sup> In support of that view, he included the North Carolina statutes referring to the Board as a list of bullet points.<sup>112</sup> Alito then attacked the majority for not articulating a clear standard for when a state agency is privately controlled.<sup>113</sup> To underline that point, he provided three full paragraphs of open questions.<sup>114</sup> Finally, Alito deplored the use of the Court to address regulatory capture, speculating that even the FTC had been captured.<sup>115</sup>

While nefarious motives have been ascribed to the Board of Dental Examiners and its dentist members, two truths are without question: (1) the Board had the clear statutory authority to regulate the conduct in question;<sup>116</sup> and (2) at the time, any reasonable interpretation of existing law said *Parker* immunity was applicable.<sup>117</sup>

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106. *North Carolina State Bd. Of Dental Exam'rs*, 574 U.S. at 516 (Alito, J., dissenting).

107. *Id.* at 516 (citing AM. ACAD. OF DENTAL SCI., A HISTORY OF ORAL AND DENTAL SCIENCE IN AMERICA 197–214 (Samuel S. White ed., 1876)).

108. *Id.*

109. *Id.* at 517–18 (citing Milton Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 4–6 (1976)).

110. *Id.* at 527.

111. *Id.*

112. *Id.* at 520–21.

113. *Id.* at 525.

114. *Id.* at 526.

115. *Id.* at 527 n.6.

116. See N.C. GEN. STAT. § 90-29(b) (2019) (defining what actions constitute the practice of dentistry). The second definition, behind only “[d]iagnosis, treats, operates or prescribes,” is “[r]emoves stains, accretions or deposits from the human teeth.” Teeth whitening is exactly that—the removal of stains, accretions, or deposits.

117. It wasn’t just the North Carolina State Dental Board that held this belief; the Attorneys General Association, the National Conference of State Legislators, the Council of State Governments, and sixteen other groups signed on to the action. *North Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 498.

The Board of Dental Examiners' conduct was not an overt attempt to thwart competition. The conduct was in fact nothing more than a state agency fulfilling its statutorily proscribed duty in enforcing a law duly enacted by the North Carolina General Assembly.<sup>118</sup> The issue of "adequate state supervision" or "active supervision" was a concept no one conceived of applying to a statutorily designated professional licensing board. While some commentators among the opponents have approached *Dental Examiners* with suggested reform within the confines of the Court's ruling itself,<sup>119</sup> many others have called for wholesale repeal of licensing laws as a result.

As a long-time practitioner, writer, speaker, and researcher in this limited area of law, I am convinced that the opponents of licensing—irrespective of any philosophical view—are not recognizing the positive benefits of occupational and professional licensing, be it by an appointed board or commission or by a state agency not overseen by licensees and citizens.

### III. THE ECONOMIC BENEFITS OF OCCUPATIONAL AND PROFESSIONAL LICENSING

As set out above in Section II.B., the Redbird study debunked much of the data and statistics on "wage premium" and "wage distribution" which had been exploited in smaller, older data sets, and the lack of any bona fide examples—short of the self-limiting terms of *Dental Examiners*—of restraints of trade by any board anywhere in the nation. There are truly benefits to the public at large, as well as workers, through regulation.<sup>120</sup>

#### A. *The positive effect.*

Despite all the negative rhetoric espoused by opponents of regulation, there are numerous positive effects, all of which should outweigh some wage disparity created by licensure.

First and foremost is the true protection of the public health, safety, and welfare. I am not an economist or sociologist, so I can speak only from the perspective of a legal practitioner who represents "both sides": the

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118. N.C. GEN. STAT. § 90-29(b).

119. See Johnson, *supra* note 38 (advocating for a "licensing ombudsman" to oversee all such licensing with broad authority). Other commentators have suggested placing all licensing boards and commissions under a cabinet level elected position such as the Secretary of State (found in most states), or appointed entity such as the state's Department of Commerce secretary or similar agency.

120. See Redbird, *supra* note 60.

independent boards that regulate and licensees that have run afoul of their regulatory board. I say this with the upmost honesty and candor: if the conduct I have witnessed by licensees who have appeared before my boards and those licensees I have represented before other boards is even a small indication of how persons would behave if unlicensed, the public should beg its elected leaders to do nothing that would change the status quo. For some, if they can, they will, and quite frequently their conduct endangers others.

Sometimes it is an honest mistake, other times ineptitude or a lack of knowledge or training, but many times the conduct is intentional, and frequently done to save time or costs: willful failure to obtain a local permit to avoid the inspection process, electrical wiring done incorrectly (which could result in fire), gas lines improperly installed or furnaces installed or maintained inappropriately (which can cause carbon monoxide poisoning), or engineering, architectural or construction defects (which can result in injury). All of these occur on a regular basis and are done by persons or businesses who risk losing their license to engage in the business or vocation if caught but do misdeeds anyhow.

And such conduct is not limited to the “trades.” We have all read and heard about medical doctors, lawyers, and Certified Public Accountants who have engaged in conduct harmful to the public. Some may scoff at the notion of “protection of the public health, safety, and welfare,” but that is the judicial and legislative standard required to regulate an occupation or profession, and every board I am familiar with takes that mandate seriously.<sup>121</sup>

The primary purposes of licensing, whether by an independent board or commission, is three-fold: to ensure persons engaging in the particular occupation or profession possess the minimum knowledge and skills to perform the functions required; to ensure continuing competence; and to take appropriate disciplinary action when a standard is violated. These three purposes all act in the name of the protection of the public health, safety, and welfare. Further, most licensing entities require a criminal history

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121. As one Auctioneers Commission member observed to me years ago while discussing the need for licensing, “A barber may give you a bad haircut, but it will grow back. An unscrupulous auctioneer can take everything your grandpa worked his whole life for and walk away.” (Note: The Auctioneers Licensing Board has a recovery fund for citizens who have been financially harmed by a licensed auctioneer. *See* N.C. GEN. STAT. § 83B-4.1 (2019)).

background check,<sup>122</sup> frequently by fingerprints,<sup>123</sup> and some require a credit history.<sup>124</sup> Comfort can be found by the citizenry in knowing the daycare worker or teacher who is with their child much of the day, or the technician that is in their house or business installing an alarm system, has a clean background. And if that licensed, registered, or certified worker is criminally charged, every licensing entity has mechanisms in place to discover the violation.<sup>125</sup>

So, the protection of the public is on both ends—an assurance of knowledge and skill and an assurance that the licensee does not have a

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122. The evolution and current status of the myriad ways in which the criminal history record check requirement for occupational and professional licensing boards are written is worthy of an exhaustive analysis and its own topic as a law review article. Some state agency or board statutes are as simplistic as “any felony,” “any felony or misdemeanor,” or “any felony or misdemeanor that bears on [some criteria],” while others set forth broad categories of crimes, sometimes by Article number under Chapter 14 of the North Carolina General Statutes. Still others have a “grocery list” of specific offenses that are grounds for denial or for suspension or revocation. It is also clear when reading these statutes collectively that either the board itself, or the General Assembly’s Legislative Drafting Division, modeled a number of boards statutory requirements after each other (e.g., Locksmiths, Nursing Home Administrators, Marriage and Family Therapists, Licensed Professional Counselors, Massage and Body Work Therapists, Substances Use Disorder Professionals, Nurses, and Physical Therapists (except the latter; Physical Therapists only are required to look at six factors, not seven)). These are essentially the same as the ten factors in N.C. GEN. STAT. § 93B-8.1(b1) (2019).

123. For many years, boards required applicants to send in a copy of a criminal record from the Clerk of Court of his or her county of residence, or “every county in which you have resided for the past five years,” or something similar. Needless to say, this was fundamentally flawed. In the mid-to-late 1990s, licensing entities began seeking legislative authority for criminal background checks via fingerprinting. Regulations on the National Criminal Information Center (NCIC) of the Federal Bureau of Investigation, the national electronic clearinghouse of crime data, necessitated creation of uniform language for enabling legislation since the authorization sought by state agencies frequently did not meet NCIC’s criteria. The requests of fingerprint-based criminal histories for applicants overwhelmed the State Bureau of Investigation’s Identification Division. During that same time, the Administrative Office of the Courts began refining its online system, but it was only good for a state-wide (as opposed to national) check. While the majority of boards retain, and utilize, fingerprint-based checks, the reliability of private vendors who perform the same service has begun to supplant that process.

124. *See, e.g.*, N.C. GEN. STAT. § 74C-12(a)(32) (2019) (private protective services); N.C. GEN. STAT. § 74D-10(a)(20) (2019) (alarm systems businesses); N.C. GEN. STAT. § 85B-8(a)(1) (2019) (auctioneers); N.C. GEN. STAT. § 87-10(a)(3) (2019) (general contractors). The statutory authority is typically “financial responsibility.”

125. Almost all boards’ enabling acts govern both initial application and renewal. Some state agencies’ or boards’ statutes say “charged,” others say “arrest” or “arrest or indictment,” while others just say “conviction.” Some state agencies’ or boards’ statutes give a time period to report, for example, “five days” or “thirty days,” while others only require that it be reported at the time of renewal of the license.

tendency toward criminal behavior. This is something few citizens could afford to determine themselves were it not for the state. Yet, the cost benefits to individuals and businesses do not end there.

*B. Cost benefits to businesses and private citizens*

While I am no economist, it is surprising that with the many studies performed to date, there has not yet been a study on the economic benefits of occupational licensing.<sup>126</sup> The benefits seem numerous.

*1. It saves businesses and citizens time and money*

The average small business cannot afford to vet everyone it hires to perform a task. Just because you have a truck with your name on it does not mean you know that hot is on the left, cold is on the right, and water runs downhill. A plumbing license ensures—at no cost to the business or individual citizen—that the person has the requisite skills to install that automated dishwasher in your restaurant or re-plumb your master bathroom during remodeling of your house. The licensee has paid for that assurance, not the consumer.

Additionally, with a licensed person performing whatever the service, a business or individual has a place for a redress of a grievance in many situations, and for a few licensed occupations and professions a bond is required,<sup>127</sup> liability insurance is required,<sup>128</sup> or there is a “recovery fund” to make a citizen whole for some loss at the hands of the licensee.<sup>129</sup> In most instances, it is financially unfeasible for a small business or the

126. A mere Google search of the phrase “economic benefits of occupational licensing” produces only “it’s bad” or “reform” studies and articles.

127. While once very common for occupations and professions, as well as elected persons such as a sheriff, bonds have been replaced by insurance requirements, and in a few instances, recovery funds. A bond is still required for a few, such as a licensed river navigational pilot, N.C. GEN. STAT. § 89D-16(a)(4) (2019), and an irrigation contractor, N.C. GEN. STAT. § 89D-16(a)(4).

128. Liability insurance is required for a security guard and patrol license, armored car license, and a private investigator license if armed with a firearm under N.C. GEN. STAT. § 74C-10(e) (2019); for an alarm installation license under N.C. GEN. STAT. § 74D-9(d) (2019); for a funeral director license unless employed by a licensed funeral establishment under N.C. GEN. STAT. § 90-210.25 (a)(2)(d) (2019); and for a home inspector license under N.C. GEN. STAT. § 143-151.58 (2019).

129. Some boards and commissions have done away with a bond requirement in lieu of a recovery fund to make an aggrieved citizen whole. *See, e.g.*, N.C. GEN. STAT. § 84-23 (2019) (N.C. State Bar); N.C. GEN. STAT. § 83B-4.1 (2019) (Auctioneers Commission); N.C. GEN. STAT. § 87-15.5 to -15.9 (2019) (Licensing Board for General Contractors); N.C. GEN. STAT. § 93A, art. 2 (2019) (Real Estate Commission).

average citizen to bring a civil action against a person or company for damages. A bond or insurance required as a condition of licensing protects the public and saves them time and money.

2. *Gives businesses and private citizens a “seal of approval”*

Yes, there is the Better Business Bureau, and online referral services such as Angie’s List™ and HomeAdvisor®, but there is no enforcement behind any of these services that recommend or rate a business or service provider.<sup>130</sup> With a licensing process in place, a state is reassuring—almost guaranteeing—that the business or person that holds the license has met certain standards, that they are knowledgeable and possess certain skills and abilities, that they have an acceptable personal history, that they are financially stable or are insured, and that there is an entity monitoring the licensee’s behavior that can take action if the licensee “fails to do right.” No private entity, be it an online review service or some private association that offers “certification,” can give this same protection.<sup>131</sup>

3. *An economy of scale*

Many of our business and economic systems in this nation, a capitalistic society, operate on an economy of scale. The more persons participating in, and contributing financially to, an operation, the less it costs to operate. While licensing entities within a state agency are typically funded at least partially by tax dollars, in North Carolina the independent occupational licensing boards and commissions are 100% receipt supported. Those “receipts” are almost exclusively license fees.<sup>132</sup> The entire licensing function, from initial application to renewal, to monitoring, to tracking continuing education, to any necessary complaint investigation, to disciplinary proceedings if warranted are all funded solely by the persons engaged in that occupation or profession. Boards and commissions do not discourage applicants; they are not some form of monopoly. Instead, boards and commissions encourage applicants because it is only through licensee

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130. Reliance on such services is discussed below. See discussion *infra* III.D.

131. Numerous commentators have suggested that state-mandated licensing can be replaced with “certification” or “credentialing” by a private, for-profit organization with no effect on the protection of the public.

132. A few boards are allowed to accept funds or “contributions” beyond license fees. See, e.g., N.C. GEN. STAT. § 88A-8 (2015) (electrolysisists); N.C. GEN. STAT. § 89D-22(b) (2015) (landscape contractors); N.C. GEN. STAT. § 74C-90-113.33 (2019) (substance use disorder professionals); N.C. GEN. STAT. § 90-270.80A(d) (2019) (occupational therapists); N.C. GEN. STAT. § 90-370 (2019) (dietitians/nutritionists); N.C. GEN. STAT. § 90-385(g) (2019) (pastoral counselors); N.C. GEN. STAT. § 90A-75(b) (2019) (on-site wastewater treatment facility operators).

funds that such an entity can continue to operate, and to do so it must have new applicants and an economy of scale.

*C. It's an incentive to "do right"*

I have also admitted I am no sociologist, but experience has shown me that when a person's livelihood, and that of others in that person's employ, depends on a license, there is a greater incentive to perform a service in the correct or proper manner. We will all admit and recognize that humans are human and all will take shortcuts or bend rules to accomplish a task, especially if there is an economic incentive to do so.<sup>133</sup> However, licensing provides an incentive to do all things related to the occupation or profession properly; the statutes and administrative rules governing that occupation or profession—which may or may not include a code of conduct—are an economic incentive that govern society. If "doing right" protects a person's right to continue to be employed in their chosen field, that person is more inclined to follow the mandates established by the elected legislators and their peers.

*D. Should Angie's List™ be the judge?*

Again, many of the commentators who oppose occupational licensing, be it a state agency or an independent board, advocate for a free-market system to control occupations and professions, which is not surprising. Most are "free-market" think tanks and advocacy groups.<sup>134</sup>

*1. No place for laissez-faire capitalism*

Often, laissez-faire capitalism is also referred to as free-market capitalism.<sup>135</sup> Theorized in a time of mercantilism,<sup>136</sup> and at the birth and

133. One commentator, in reviewing the works of Morris Kleiner, see sources cited *supra* note 50, describes the licensing of occupations as "a very forceful intervention in markets" observing, "[t]he prospect of losing that license then provides a powerful incentive to follow proscribed behaviors." Reinhardt, *supra* note 51, at 320.

134. See, e.g., MERCATUS, <https://www.mercatus.org> [<https://perma.cc/H2V5-MKAK>]; THE HERITAGE FOUND., <https://www.heritage.org> [<https://perma.cc/4NNH-B6R3>]; CATO INST., <https://www.cato.org/> [<https://perma.cc/Z4KC-SQDJ>].

135. Simply put, laissez-faire translates to "leave us alone," as in the government should remain out of the economy and instead allow individuals to freely carry out their own economic affairs.

136. "Mercantilism" is the economic theory that trade generates wealth and is stimulated by the accumulation of profitable balances, which a government should encourage by means of protectionism. It was common in Europe in the sixteenth through eighteenth centuries,

during the growth of the Industrial Revolution in the eighteenth and nineteenth centuries, it is most closely associated with Adam Smith and other prominent thinkers. As mercantilism was rejected and capitalism developed as the dominant economic system in the United States, Great Britain, much of Europe, and parts of Asia, the idea of government control of the economy was replaced with a focus on individuals. On the economic spectrum, laissez-faire capitalism is considered a right-wing ideology fundamentally based on private ownership, competition, free trade, self-reliance, self-interest, and the principles of supply and demand.<sup>137</sup> In contemplating these, it is easy to see how and why occupational and professional licensing has become a target for free trade advocates. In their view, regulation creates “vocational closure” and acts as a barrier to entry into a trade or profession.<sup>138</sup> The market, they argue, should determine who will survive in a particular profession.

The open market, however, is no place for determining if someone has the knowledge, training, and skills to be an engineer, a surveyor, an architect, a dentist, an embalmer, a heating contractor, or a veterinarian. The only way for the market to make this determination is after the person has already done harm. While the market may determine the best or most affordable product, elected state representatives determine how to best protect the public. Such a determination is too important to leave to the forces of the free-market.

In defense of a free-market approach, advocates claim that modern, generally accessible ranking and referral businesses (and that is what they are, a for-profit “business”) such as Angie’s List™ (for contractors, repairmen, etc., and more); CareDash, HealthGrades®, and RateMDs (for doctors); and Avvo® and Justia (for attorneys), provide all the protection needed to protect the public.<sup>139</sup> The argument is that while consumers may

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and England enforced a strong system of mercantilism on its colonies, including what is now the United States.

137. *Laissez-Fair Capitalism*, HIST. CRUNCH (July 29, 2019), <https://www.historycrunch.com/laissez-faire-capitalism.html> [https://perma.cc/296F-JAYK].

138. See, e.g., sources cited *supra* note 50; Lee McGrath, *A Primer on Occupational Licensing with Professor Morris Kleiner*, LIBERTY & L. (Inst. for Just., Arlington, Va.), Apr. 2008, at 8, [https://ij.org/wp-content/uploads/1426/02/LL\\_4-08.pdf](https://ij.org/wp-content/uploads/1426/02/LL_4-08.pdf) [https://perma.cc/J8BK-Z975].

139. An online search, picking somewhat random occupations and professions, tends to indicate there are ratings and review sites (or “leads generators”) for virtually everyone. For doctors, there are multiple; so many, in fact, one site is a “top 10 best” rating site for rating sites for doctors. See OPENMD, <http://www.openmd.com> [https://perma.cc/7976-AXNX]. For the home repair and construction trades, there are multiple as well, such as HomeAdvisor®, Houzz, Porch, Thumbtack, Yelp, and Bark. With many, and particularly HomeAdvisor, what appears to be a ratings and review site, is in actuality a service where

have needed government oversight and protection through licensing prior to the internet age, avenues like Yelp and Angie's List have given another avenue to protect the public, thus state regulation is no longer necessary.

The first inkling of this arose when a bill was introduced in the Washington State House of Representatives in 2017.<sup>140</sup> The brainchild of a free-market think-tank, the Washington Policy Center, the arguments were the same mantra: They don't want to establish and maintain standards, they want to cut out competition. This same proposal has been suggested by others since, as cited herein.

And yet, there is a problem: these online rating services are unreliable. The Consumer Federation of America and Consumer Reports have both questioned the veracity of Angie's List™ and similar services.<sup>141</sup> An article in the venerable business magazine *Forbes* explains that advertisers get a preferential rating, that bad reviews can be removed, and that it is easy for a business to have false reviews posted to boost its ratings.<sup>142</sup> These internet sites are not exactly reliable.

The *Forbes* article relates to a comparison of a plumbing company in San Francisco. Angie's List™ gave it an F while the Better Business Bureau gave it an A+.<sup>143</sup> Yelp users gave it an average of 2.5 stars out of five, while Consumer Checkbook subscribers rated the company as "superior."<sup>144</sup>

It makes no sense for a government to abdicate its role of protecting its citizenry by abolishing a system of protection that costs the citizens nothing in favor of a "free market" where the information the citizen relies on is inaccurate and can be easily manipulated. Further, a consumer is left to

businesspersons pay a fee for leads generated by visitors to the site. Angie's List™ and HomeAdvisor® are owned by the same parent company.

140. H.B. 1361, 65th Leg., 2017 Sess. (Wash. 2017). Introduced by Rep. Matt Manweller, this bill did not get beyond a committee hearing and by resolution was reintroduced in 2018 but did not pass. The bill called for a state-sponsored online portal as opposed to the private, for-profit services.

141. Kate Gibson, *Angie's List Favors Its Own Advertisers, Consumer Group Warns*, CNBC (Apr. 30, 2019, 7:51 AM), <https://www.cbsnews.com/news/angies-list-reviews-favor-its-own-advertisers-consumer-group-warns/> [<https://perma.cc/VP5A-W2VB>].

142. Eric Goldman, *Angie's List Must Defend Fraud Charges Over Pay-to-Play Review Manipulation*, FORBES (Aug. 12, 2015), <https://www.forbes.com/sites/ericgoldman/2015/08/12/angies-list-must-defend-fraud-charges-over-pay-to-play-review-manipulation/?sh=7239f7f65ee7> [<https://perma.cc/43DM-76E4>].

143. *Id.*

144. It is worthy of note that Consumer Report considered the review service Consumer's Checkbook more reliable since it automatically surveys customers rather than waiting until a customer with selfish motivations posts a review themselves.

their own devices with the only recourse being a civil lawsuit—few can afford such.

*E. A world without licensing.*

If violations of the law, administrative rules, various codes, regulations and ordinances, and the criminal charges related and unrelated to the licensed profession or occupation are indicative of how a person will behave with a state agency controlling their livelihood, a world without licensing would be frightening. We as a state and nation have so many entities, public and private, engaged in “consumer protection” because consumers need protecting. For whatever inexplicable reason, humans prey on other humans, both physically and financially.

While occupational and professional licensing by a government entity may not be perfect in the eyes of all, it is better than the alternative. And when it comes to independent licensing boards and commissions, it is the people governing themselves.

#### IV. GOVERNMENT CLOSEST TO THE PEOPLE

It is undoubtedly ironic that the majority of the persons and entities, especially the “think-tanks,” that proffer these anti-licensing arguments are also self-proclaimed “federalists”<sup>145</sup> and believe that government should be at a state and local level and remain close to the people. Their views are at odds with each other.

*A. The vast majority of board and commission members are appointed.*

There are fifty-four independent occupational licensing boards in North Carolina.<sup>146</sup> Each board is comprised of a combination of regulated members and members of the public.<sup>147</sup> Several licensing boards employ a procedure in which members are elected by the governed occupation or profession, while the Governor ultimately makes the appointment for some

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145. Federalism is, in simple terms, the distribution of power between a central authority (i.e., a government) and the constituent. Historically, in America, federalism is associated with the founding of our nation, and it became a symbolic name for advocates of our current constitutional form of government.

146. *See supra* note 4.

147. Some boards and commissions have a seat for an elected or appointed official, state or local, or that official’s designee. *See* N.C. GEN. STAT. § 89E-4(b) (2019); N.C. GEN. STAT. § 90-182(a) (2019); N.C. GEN. STAT. § 90A-55(a) (2019).

of the boards.<sup>148</sup> Since they perform an executive branch function, the licensing boards are considered executive agencies. The legislature has slowly encroached upon the Governor's executive power over the past two decades, meaning the appointments have become more broadly based and are frequently "bi-partisan."<sup>149</sup>

In North Carolina, there is a strong tradition of the state's chief executive governing through extensive appointment powers.<sup>150</sup> A gubernatorial appointment is a delegation of power by that appointing authority to, ostensibly, act in accordance with the policies and philosophy of the appointing authority.<sup>151</sup> An appointed board or commission is merely an extension of the Governor. It is similar to a Governor appointing a cabinet secretary to oversee a department, except the appointed board is comprised of a group of persons. As is so dear to us living in a democracy, it is the citizens—the public—governing in the purest form.

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148. See N.C. GEN. STAT. § 84-17 (2019); N.C. GEN. STAT. § 90-22 (2019); N.C. GEN. STAT. § 90-85.7 (2019), N.C. GEN. STAT. § 90-171.21(b) (2019), N.C. GEN. STAT. § 90-238 (2019).

149. There has been pushback from the executive branch over the past six years beginning with Republican Governor Pat McCrory, who challenged the legislative appointment of members to a newly created panel, the "Coal Ash Management Commission." *State v. Berger*, 781 S.E.2d 248 (N.C. 2016). He prevailed. That decision was successfully cited by Democratic Governor Roy Cooper in opposing a majority of legislative appointments to various boards and commissions, one of which was an occupational licensing board. *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018). There is yet another challenge by Cooper to the legislature usurping executive power through the appointment process pending in Wake County Superior Court. Verified Complaint, *Cooper v. Berger*, 20 CVS 09542 (Wake Cnty. Super. Ct. Aug. 27, 2020).

150. See, e.g., *State ex rel. Wallace v. Bone*, 286 S.E.2d 79 (N.C. 1982) (discussing the history of executive appointment powers in North Carolina).

151. The *McCrory* court made clear that the Governor's ability to control executive branch officers, boards, and commissions—and concomitantly, the exercise of the final executive authority by those executive entities—depends on the Governor's "ability to appoint [such officials] to supervise their day-to-day activities." *Berger*, 781 S.E.2d at 256. This appears contrary to Justice Kennedy's conclusion in *Dental Examiners* that only those that answer to the voters at the ballot box can provide active state supervision. *North Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 511. Or does it mean that an appointee, whether a department head (i.e., "Secretary of . . .") or anyone else including an appointee to a board or commission with delegated authority, also answers to that same ballot box? The distinction with the North Carolina State Board of Dental Examiners is that all members, except one, are elected from the licensed profession. See N.C. GEN. STAT. § 90-22(b) (2019).

*B. The statutory composition of North Carolina's boards and commissions would thwart any attempt at "conspiracy."*

According to the writings of the many commentators opposed to occupational and professional licensing, particularly licensing boards, every board is nothing more than a cabal. According to these commentators, the boards are guilds, unions, or monopolistic trusts bent on keeping others from entering "their" profession. Their conspiracy theories read like a Dan Brown novel with hints of intrigue and secret handshakes. Such is not the case.

The statements of these commentators are mere conjecture. Research, a little common sense, and some knowledge of human nature quickly shows how difficult that would be. While some of North Carolina's boards are as small as five to seven members, typically with three to five licensed members and one or two public members,<sup>152</sup> most of the other boards are larger with not only different appointing authorities (i.e., Governor, Speaker of the House, President *Pro Tempore* of the Senate), but also, oftentimes, with appointments made from a statutorily designated organization or entity.<sup>153</sup>

- Licensing Board for General Contractors—nine total members: five licensees with proscribed backgrounds; three public; one engineer with a background in structural engineering.<sup>154</sup>
- State Board of Plumbing, Heating and Fire Sprinkler Contractors—seven total members, all Governor-appointed: one from an engineering school; one municipal plumbing or mechanical inspector; one air conditioning contractor; one licensed plumbing contractor; one licensed heating contractor; one licensed fire sprinkler contractor; one public.<sup>155</sup>
- State Board of Electrical Contractors—seven total members, five Governor-appointed and two others: one designated by Commissioner of Insurance; one from UNC faculty electrical engineer; one municipal electrical inspector; one

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152. Interestingly, the State Board of Examiners of Nursing Home Administrators has a majority of public members. Of the seven members, four are "noninstitutional members, with no direct financial interest in nursing homes," and three are from the industry with criteria relating to for-profit and non-profit employers. N.C. GEN. STAT. § 90-277 (2019).

153. Compare N.C. GEN. STAT. § 87-2 (2019), with N.C. GEN. STAT. § 87-39 (2019) (noting that different members of the Board must possess different qualifications and may be appointed by different individuals).

154. N.C. GEN. STAT. § 87-2.

155. N.C. GEN. STAT. § 87-16 (2019).

representative of the Carolinas Electrical Contractors Association; two public.<sup>156</sup>

- State Board of Refrigeration Examiners—seven total members, all Governor-appointed: one manufacturer; one UNC faculty engineer school; one faculty UNC School of Public Health; one engineer with a background in refrigeration; one public.<sup>157</sup>

The list could go on and on and include Landscape Contractors,<sup>158</sup> Soil Scientists,<sup>159</sup> the Medical Board,<sup>160</sup> and the Respiratory Care Board.<sup>161</sup> Of the fifty-four boards and commissions defined by section 93B-1(2) of the North Carolina General Statutes, as an “occupational licensing board,” nineteen have one or more non-licensee appointees from a specific field of knowledge. As to the “public” members, most of the appointment statutes clearly state that the appointee cannot be engaged in or associated with the licensed profession or kin to someone who is.<sup>162</sup> Other appointment statutes provide that appointments should reflect the state in regard to gender, ethnic, racial, and age composition,<sup>163</sup> facts generally taken into consideration, along with geographical location, by appointing authorities to ensure equal representation across the state.

If that alone is insufficient to show self-governance by the people and a virtually impossible scenario where a conspiracy to engage in monopolistic behavior could occur, a look at the appointing authority who makes the appointments should resolve such concerns.<sup>164</sup> Of the fifty-four boards and commissions defined as occupational licensing boards, the authority to appoint members is shared by the Governor, the Speaker of the

156. N.C. GEN. STAT. § 87-39.

157. N.C. GEN. STAT. § 87-52 (2019).

158. N.C. GEN. STAT. § 89D-14 (2019).

159. N.C. GEN. STAT. § 89F-4 (2019).

160. N.C. GEN. STAT. § 90-2 (2019).

161. N.C. GEN. STAT. § 90-649 (2019).

162. For instance, the Medical Board’s appointments statute states that a public member cannot be a healthcare provider or related to a healthcare provider and then defines “healthcare provider.” N.C. GEN. STAT. § 90-1(b)(1) (2019). The Interpreters and Translators statute says a public member cannot have a family member who is deaf or hard of hearing. N.C. GEN. STAT. § 90D-5(b)(9) (2019).

163. See, e.g., N.C. GEN. STAT. § 90-238 (2019) (stating that, for the North Carolina State Board of Opticians, “the Board must ensure that its candidates reflect the composition of the State with regards to gender, ethnic, racial, and age composition”).

164. For a reference to the judicial battles between Governors and the legislature over who has authority over appointments to executive branch boards and commissions, see discussion *supra* note 149.

House, and the President *Pro Tempore* of the Senate in twenty instances.<sup>165</sup> Since appointments tend to be “political” and reflect the policies and philosophy of the appointing authority, suffice it to say that in these politically divided times, all are not of a like mind.

*C. Everything every conservative candidate says about how government should operate.*

How many times have we heard the phrase from candidates and others that “state government should be run like a business?” Well, it is, but only in one area, and no other aspect of government comes close: the “independent” state occupational and professional licensing boards.

Of the fifty-four boards, each one is receipt-supported, and not a single tax dollar goes to their operation.<sup>166</sup> Their employees are employees of the board or commission,<sup>167</sup> and all salaries and benefits<sup>168</sup> are paid by the board. The boards manage their finances, typically through a “finance committee” made up of members, and for the most part, maintain balanced budgets.<sup>169</sup> At least eleven boards (and two commissions) have the statutory authority to rent or lease office space outside the state government leasing process, which includes the authority to own their own building.<sup>170</sup> Six

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165. A number of these appointment statutes violate *State v. Berger*, 781 S.E.2d 248 (N.C. 2016). Following that case, the legislature modified N.C. GEN. STAT. § 74C-4(b) (2019), regarding the Private Protective Services Board, later defined as a “state agency licensing board” in N.C. GEN. STAT. § 93B-1(3) (2019), but did nothing to change any of the others. See Act of June 21, 2019, ch. 32, sec. 4, 2019 N.C. Sess. Laws 32 (codified as amended at N.C. GEN. STAT. § 74C-4).

166. A few boards even have a statutory prohibition against using general revenues of the State. See, e.g., N.C. GEN. STAT. § 87-45 (2019).

167. Whether a board or commission was staffed by State employees or its own employees was the sole distinguishing fact in the pre-2019 version of the definition found in N.C. GEN. STAT. § 93B-1. See Act of July 8, 2019, ch. 91, sec. 2, 2019 N.C. Sess. Laws 91 (codified as amended at N.C. GEN. STAT. § 93B-1).

168. The only exception to these is that a few boards’ employees remain in the state retirement system. See, N.C. GEN. STAT. § 135-1.1. This fact is very complicated, with its roots in actions by the General Assembly in the mid-1980s to make these boards independent. The legal ramifications, and equities, of terminating a vested employee’s benefits ended up with a convoluted result which time has slowly resolved.

169. By no means, however, is this authority “independent.” The multiple audits and reporting requirements are discussed in Part VI, below. In recent history, two boards, the Electrologists and the Opticians have had financial issues, but not necessarily of their own making. The Opticians waited too late; they were unsuccessful with efforts in the legislature to authorize a fee increase during two Sessions.

170. N.C. GEN. STAT. § 93E-1-5(h) (2019) (granting the Appraisal Board the power to acquire real property); N.C. GEN. STAT. § 83A-3(c) (2019) (granting the Board of Architecture the power to acquire real property); N.C. GEN. STAT. § 85B-3.1(c) (2019)

boards own their own buildings, financed through conventional financing just like any other business.<sup>171</sup>

Advocates for eliminating occupational and professional licensing boards in favor of certification or registration by private, for-profit organizations fail to recognize the cost savings of the current system. Surely, the benefits of a receipt-supported state entity outweigh the claimed additional expense of licensure.

#### V. “ACTIVE STATE SUPERVISION”

Since the United States Supreme Court’s decision in *Dental Examiners*, there has been much debate as states across the nation have struggled to determine what constitutes “active state supervision.”<sup>172</sup> For the state of North Carolina, the primary focus herein, “active state supervision” already exists; it was just not presented in such a manner that it could be considered by the federal courts.<sup>173</sup>

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(granting the Auctioneers Commission the power to acquire real property); N.C. GEN. STAT. § 84-23(d) (2019) (granting the N.C. State Bar Council the power to acquire real property); N.C. GEN. STAT. § 87-9.1(a) (2019) (granting the Licensing Board for General Contractors the power to acquire real property); N.C. GEN. STAT. § 87-18 (2019) (granting the Board of Plumbing and Heating Contractors the power to acquire real property); N.C. GEN. STAT. § 87-42 (2019) (granting the Board of Examiners of Electrical Contractors the power to acquire real property); N.C. GEN. STAT. § 89C-10(i) (2019) (granting the Board of Examiners for Engineers and Surveyors the power to acquire real property); N.C. GEN. STAT. § 90-85.11A(a) (2019) (granting the Board of Pharmacy the power to acquire real property); N.C. GEN. STAT. § 90-171.23(b)(23) (2019) (granting the Board of Nursing the power to acquire real property); N.C. GEN. STAT. § 90-210.23(h1) (2019) (granting the Board of Funeral Services the power to acquire real property); N.C. GEN. STAT. § 93-12(c)(17) (2019) (granting the Board of Certified Public Accountant Examiners the power to acquire real property); N.C. GEN. STAT. § 93A-3(f) (2019) (granting the Real Estate Commission the power to acquire real property).

171. These boards are the Appraisal Board, Auctioneers, Attorneys, General Contractors, Nurses, and the Real Estate Commission.

172. For an excellent discussion of the topic, see Jabs, *supra* note 105, at 44. The holding by the United States Supreme Court in *Dental Examiners* is counter to holdings of various United States Circuit Courts on the issue of *Parker* immunity for independent state licensing boards. *Id.* at 56, n.118.

173. Why? As stated earlier, no one thought that the North Carolina State Board of Dental Examiners lacked *Parker* immunity. It is worth noting that at every opportunity during the litigation of that matter the FTC would drop the word “State” from the Board’s statutory name.

*A. Appointed with the power to remove*

The Governor of North Carolina makes the vast majority of appointments to state occupational licensing boards.<sup>174</sup> Even in those few instances where the members are chosen or elected by an outside group, such as a trade association, the Governor still makes the actual appointment.<sup>175</sup> This is no different than the Governor making hundreds of “mini-cabinet secretary” appointments. In both scenarios, the Governor is appointing persons he or she trusts to carry out the policies of the Executive Branch and ensure that the law is faithfully executed. And he or she has the power to remove, by statute or inherently, as the appointing authority.<sup>176</sup> This is the same authority a governor has over a cabinet secretary, or an employee in the actual Office of the Governor. The Governor’s appointments—all of them—are vetted by the Boards and Commissions staff within the Office of the Governor. Most often, they tend to come from within the same political party as the person appointing them and upon recommendation of supporters. My experience with boards for over two decades, with multiple changes in party affiliation between Governors and the leadership of our General Assembly, has been that the appointments by the Speaker and the President *Pro Tem* tend to be chosen in a similar manner; they choose from their own political party and from supporters (or the supporters of members of whichever body). And beyond just the appointment of a few members on select boards, the legislature has overtly exercised its oversight of these “independent” licensing boards, in addition to the Governor’s oversight.

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174. See N.C. GEN. STAT. § 147-12(a) (2019) (granting the Governor the powers and duties to “see that all offices are filled” and “[t]o make the appointments”).

175. It is worthy to note that elections for membership appear only in the medical or medically-related boards. See, e.g., N.C. GEN. STAT. § 90-2(a) (2019) (establishing the Medical Board, of which the Governor appoints eleven of thirteen members: six of his or her choosing (based on recommendations made by the Review Panel) and five upon recommendation of various groups); N.C. GEN. STAT. § 90-85.7(a) (2019) (describing selection of the Board of Pharmacy, which consists of six members with five elected then “commissioned” by the Governor and one public member appointed by the Governor); N.C. GEN. STAT. § 90-116 (2019) (establishing the Board of Examiners in Optometry, of which the Governor appoints all seven members by selecting two members of the public at large and five from lists provided by the State Optometric Society); N.C. GEN. STAT. § 90-238 (2019) (creating the Board of Opticians, of which the Governor appoints all seven members with five elected from the Board and two members of the public).

176. See N.C. GEN. STAT. § 90-2(d) (2019); N.C. GEN. STAT. § 90-85.7(a); N.C. GEN. STAT. § 90-116; N.C. GEN. STAT. § 90-238.

*B. Audit requirements*

While purportedly “independent” and receipt-supported, these occupational licensing boards do not lack oversight in any way when it comes to financial matters. Their financial oversight may likely exceed that of the more typical state agency. First, like all state agencies and institutions, the section 93B-1(2) occupational licensing boards are subject to audit by the State Auditor’s Office.<sup>177</sup> Additionally, “each occupational licensing board with a budget of at least . . . \$50,000.00 shall conduct an annual financial audit of its operations and provide a copy to the State Auditor.”<sup>178</sup> That is just the State Auditor’s oversight; by no means does it end there. By October thirty-first of each year, every occupational licensing board must file a financial report “with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Legislative Administrative Procedure Oversight Committee.”<sup>179</sup> These financial reports “include[] the source and amount of all funds credited to,” and disbursed by, the board.<sup>180</sup> There is even a sanction, the freezing of funds, for failure of a board to prepare and forward this report.<sup>181</sup>

Additionally, the active oversight of these boards extends well beyond mere financial reporting and audits. Chapter 93B contains additional and more exhaustive reporting requirements, well beyond those required of other Executive Branch agencies and institutions. Section 93B-2(a) of the North Carolina General Statutes requires an annual report containing seventeen specified categories of information from simple information (i.e., the name and address of each board member and number of licensees), to information on applicants, examination statistics, disciplinary actions, applicants with criminal convictions, the substance of any legislation that may be requested by the board in the upcoming session of the General Assembly, and the substance of any anticipated administrative rule adoptions or amendments.<sup>182</sup> Statutory provisions providing supervision and oversight of these boards and commissions extend beyond Chapter 93B of the North Carolina General Statutes, which regulates only occupational and state agency licensing boards.

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177. N.C. GEN. STAT. § 93B-4(a) (2019).

178. N.C. GEN. STAT. § 93B-4(b) (2019).

179. N.C. GEN. STAT. § 93B-2(b) (2019).

180. *Id.*

181. *Id.*

182. N.C. GEN. STAT. § 93B-2(a) (2019).

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- Comprehensive Annual Financial Report—Office of State Controller (OSC)—annually (July)<sup>183</sup>
  - Fee Information Report—OSBM—annually (December)<sup>184</sup>
  - Employment and Payroll Survey—US Department of Commerce—annually (April)<sup>185</sup>
  - Statement of Economic Interest (board members)—State Ethics Commission—upon appointment then every two years<sup>186</sup>
  - License/Fee Collection Report—North Carolina Department of Revenue—quarterly<sup>187</sup>
  - Lease Purchase and Installment Purchase Report—OSBM—annually (September)<sup>188</sup>
  - Notice of Board Meetings—SOS and Office of the Governor, Boards and Commissions—annually<sup>189</sup>
  - Records Retention and Disposition Schedule—Department of Cultural Resources, Division of Historical Records—updated as required<sup>190</sup>
  - Report on Economic Impact of Anticipated Rules—OSBM—annually (April)<sup>191</sup>

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183. OFF. OF THE STATE CONTROLLER, STATE OF NORTH CAROLINA COMPREHENSIVE ANNUAL FINANCIAL REPORT (2020), [https://files.nc.gov/ncosc/CAFR/2020/2020\\_Comprehensive\\_Annual\\_Financial\\_Report-Bookmarks.pdf](https://files.nc.gov/ncosc/CAFR/2020/2020_Comprehensive_Annual_Financial_Report-Bookmarks.pdf) [<https://perma.cc/B88H-BDVE>].

184. OFF. OF STATE BUDGET & MGMT., NORTH CAROLINA STATE GOVERNMENT FEE REPORT (2020), [https://files.nc.gov/ncosbm/documents/files/Fee-Report\\_2018-19Summary.pdf](https://files.nc.gov/ncosbm/documents/files/Fee-Report_2018-19Summary.pdf) [<https://perma.cc/56A5-VUFJ>].

185. U.S. CENSUS BUREAU, 2019 ANN. SURV. OF PUB. EMP. & PAYROLL, <https://www.census.gov/programs-surveys/apcs/data/datasetstables/2019.html> [<https://perma.cc/32SH-KMB5>].

186. *Statements of Economic Interest (SEIs)*, N.C. STATE ETHICS COMM'N, <https://ethics.nc.gov/seis> [<https://perma.cc/8KTY-J9W4>].

187. *Reports and Statistics*, N.C. DEP'T OF REVENUE, <https://www.ncdor.gov/reports-and-statistics> [<https://perma.cc/MBR6-CB68>].

188. OFF. OF STATE BUDGET & MGMT., LEASE PURCHASE AND INSTALLMENT PURCHASE ACTIVITY (2006), <https://files.nc.gov/ncosbm/documents/files/2-15-2006LeasePurchasefinal.pdf> [<https://perma.cc/2FY5-Z3DZ>].

189. N.C. SEC'Y OF STATE ELAINE F. MARSHALL, PUBLIC MEETINGS CALENDAR, [https://www.sosnc.gov/online\\_services/calendar/Search](https://www.sosnc.gov/online_services/calendar/Search) [<https://perma.cc/4LRF-YKR9>].

190. N.C. DEP'T OF NAT. & CULTURAL RES., RECORDS RETENTION AND DISPOSITION SCHEDULE (2019), [https://files.nc.gov/dncr-archives/documents/files/2019\\_local\\_standards.pdf](https://files.nc.gov/dncr-archives/documents/files/2019_local_standards.pdf) [<https://perma.cc/W7RS-UMHR>].

191. N.C. OFF. OF STATE BUDGET AND MGMT., NORTH CAROLINA RULES WITH ECONOMIC IMPACT (2019), [https://files.nc.gov/ncosbm/documents/files/Report\\_2019\\_NCRulesWithEconomicImpact.pdf](https://files.nc.gov/ncosbm/documents/files/Report_2019_NCRulesWithEconomicImpact.pdf) [<https://perma.cc/R35Y-LYZF>].

- Statewide Accounts Receivable Report—OSC—annually (September)<sup>192</sup>
- State Portal Report—Office of Information Technology Services—as required<sup>193</sup>

In addition to those required by various “outside sources,” some boards have additional reports or oversight requirements in their enabling statutes.<sup>194</sup>

It is clear that the amount of reporting the boards are required to do constitutes active supervision. Because of this supervision, it is impossible to say with any intellectual honesty that the occupational boards and commissions are running amuck in North Carolina, devoid of supervision or oversight as alleged by their detractors.

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192. N.C. OFF. OF STATE CONTROLLER, ACCOUNTS RECEIVABLE REPORT (2019), [https://files.nc.gov/ncosc/documents/AR\\_quarterly/2019\\_Accounts\\_Receivable\\_Repor.pdf](https://files.nc.gov/ncosc/documents/AR_quarterly/2019_Accounts_Receivable_Repor.pdf) [<https://perma.cc/9T32-CY8E>].

193. KEITH WERNER, N.C. DEP’T OF INFO. TECH., STATE PORTAL REPORT (2017), <https://files.nc.gov/ncdit/documents/files/State-Portal-Report-01-2017.pdf> [<https://perma.cc/C8T8-ZX53>]. This list is by no means exhaustive. In fact, I found thirteen other statutory reporting requirements not included within this list—more legislative oversight than many cabinet-level state agencies—however, at the behest of my editors, I have begrudgingly omitted them.

194. See N.C. GEN. STAT. § 86A-7(e) (2019) (requiring the Board of Barber Examiners to report annually to the Governor); N.C. GEN. STAT. § 87-8 (2019) (requiring the Board of General Contractors to report annually to the Governor); N.C. GEN. STAT. § 87-20 (2019) (requiring the Board of Plumbing and Heating Contractors to report annually to the Governor); N.C. GEN. STAT. § 89B-8 (2019) (requiring the Board of Foresters to report annually to the Governor); N.C. GEN. STAT. § 89C-12 (2019) (requiring the Board of Examiners for Engineers and Surveyors to report annually to the Governor); N.C. GEN. STAT. § 89D-15(14) (2019) (requiring the Landscape Contractors’ Licensing Board to maintain an annual report to be made available to licensees and other concerned parties); N.C. GEN. STAT. § 90-44 (2019) (requiring the Board of Dental Examiners to report annually to the Governor); N.C. GEN. STAT. § 90-85.9 (2019) (requiring the Board of Pharmacy to report annually to the Governor and the presiding officer of each house of the General Assembly); N.C. GEN. STAT. § 90-210.70(d) (2019) (requiring the Board of Funeral Services to present annually a report regarding preneed trusts to the General Assembly); N.C. GEN. STAT. § 90-270.10 (2019) (requiring the Psychology Board to report annually to the Governor); N.C. GEN. STAT. § 90-270.69(9) (2019) (requiring the Board of Occupational Therapy to report annually to the Governor and General Assembly); N.C. GEN. STAT. § 90-356(10) (2019) (requiring the Board of Dietetics/Nutrition to report annually to the Governor and General Assembly); N.C. GEN. STAT. § 90-652(10) (2019) (requiring the Respiratory Care Board to report annually to the Governor, General Assembly, N.C. Medical Board, N.C. Hospital Association and N.C. Society of Respiratory Care); N.C. GEN. STAT. § 93-12(13) (2019) (requiring the Board of Certified Public Accountant Examiners to report annually to the Governor).

*C. Additional existing oversight*

In any discussion of state agencies in North Carolina and oversight, it is impossible to ignore the substantial role played by a ten-member commission, appointed by the leaders of the House and Senate,<sup>195</sup> tasked with approving all administrative rules promulgated by state agencies—including occupational licensing boards—prior to them being finalized: the Rules Review Commission (RRC).<sup>196</sup>

While some agencies are exempt from rulemaking,<sup>197</sup> there is no exception for any type of licensing entity in North Carolina. In reviewing a board's rules, the standards or criteria applied by the RRC are:

1. Is the proposed rule within the authority delegated to the board by the General Assembly;
2. Is the rule clear and unambiguous;
3. Is the rule reasonably necessary to implement or interpret an enactment of the General Assembly, the United States Congress, or a regulation of a federal agency; and
4. Was the rule adopted in accordance with Part 2 of Article 2A of Chapter 150B?<sup>198</sup>

But the oversight does not end there. There are fiscal note requirements in certain instances,<sup>199</sup> as well as a procedure for legislative review if more than ten persons object to a proposed rule or amendment to a rule.<sup>200</sup>

Even Darren Bakst of the John Locke Foundation, in his policy report referred to the RRC as “much-needed;” two of his seven proposed reforms are very constructive suggestions for how to strengthen the RRC's

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195. The appointments to this body are also currently being contested by Governor Roy Cooper in Verified Complaint 2–4, *Cooper v. Berger*, 17CV006465 (Wake Cnty. Super. Ct. May 26, 2017). See also discussion *supra* note 149.

196. See N.C. GEN. STAT. § 143B-30.1 (2019) (creating the Rules Review Commission); N.C. GEN. STAT. §§ 150B-21.1 to -21.7 (2019) (containing the Administrative Procedures Act, describing the rulemaking process and procedures). Although the appointees are all legislative, the RRC clearly fulfills an Executive Branch function.

197. N.C. GEN. STAT. § 150B-1(c)–(d) (2019).

198. N.C. GEN. STAT. § 150B-21.9 (2019).

199. *Id.*

200. N.C. GEN. STAT. § 150B-21.3(b)(1)–(b)(2) (2019).

oversight.<sup>201</sup> Bakst goes on to observe that by delegating to state agencies, which include occupational licensing boards, the power to adopt administrative rules to address the specific subject matter of the regulated, it is a delegation of state authority, with the RRC serving as the overseer.<sup>202</sup> Although the RRC provides legislative oversight, it is oversight nonetheless.

## VI. SHORTCOMINGS ARE BEING ADDRESSED

As with any analysis of an issue or debate, positives typically result, and the analysis of occupational and professional licensing by its detractors is no different. One of the most legitimate, and truthfully pressing, was or is “mobility” or “portability” for licensees—the ability to physically move from one state to another and remain licensed without having to jump through new or additional hoops, or to engage in an interstate or multi-state practice, is important for all the reasons the detractors state. For reasons rooted in the tenants of state sovereignty and federalism there is no national license for anything.<sup>203</sup> Many boards and commissions, and other state entities that license vocations in North Carolina, have comity or reciprocity with other states, but admittedly it can be an onerous process. One of the areas of greatest concern is former military members and the spouses of active-duty military. North Carolina has a history of working hard to be a military friendly state, and its legislature has stepped up in this regard.

### A. Most boards already have reciprocity or comity

While the two terms tend to be used interchangeably, there is a difference between “reciprocity” and “comity” when it comes to licensing. Comity is recognition by one state of the license issued by another state. Comity typically comes with conditions, such as having been licensed for some period of years. Reciprocity means a state recognizes a license issued

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201. DAREN BAKST, REGULATING THE REGULATORS: SEVEN REFORMS FOR SENSIBLE REGULATORY POLICY IN NORTH CAROLINA 5 (2010), <http://www.johnlocke.org/acrobat/policyReports/regulatoryreforms.pdf> [<https://perma.cc/2FVZ-LAP8>].

202. *Id.* at 6.

203. *See* discussion *supra* Introduction subpart.D (discussing the state police power in connection with occupational licensing boards and the federal government). For instance, every state has its own driver’s license; each is just recognized in every other state. And each state has slightly different criteria—its own—to obtain that license. Albeit, for every occupation and profession I have represented for over 25 years, I have yet to be at a national meeting of the whatever association where there was not a discussion of a “national \_\_\_\_\_ license.” I quickly became unpopular by explaining it cannot happen—so I stopped. Now, the discussion is compact, a more viable option. *See* discussion *infra* VI.C.

by another state without any additional process. Typically, there is a condition in the licensing law that says the originating state's law cannot be less stringent than the accepting state's law. This is a pre-analysis in most cases and the occupational licensing board or state agency keeps a list of reciprocal states.

A majority of the fifty-four occupational licensing boards in North Carolina have either comity or reciprocity and have had for years.<sup>204</sup> This has provided an opportunity for mobility, portability, and interstate practice. It is very common in our border counties and municipalities for many persons—and not just the medical and medically related professions—to have a license in the adjoining state including attorneys, auctioneers, real estate brokers, all varieties of contractors, and CPAs.

### *B. Military and military spouses*

When the issue of shortcomings of occupational and professional licensing first arose, and the effect that moving from jurisdiction to jurisdiction has on former military and the spouses of active duty military who desire to hold, or hold a license, the North Carolina General Assembly responded. Aside from the gradual addition of oversight and reporting requirements, the amendment to Chapter 93B by the addition of subsection 15.1 in 2012 was the first major systemic change made in this state.<sup>205</sup>

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204. N.C. GEN. STAT. § 74F-8(a)–(b) (2019) (locksmiths; comity; “resides in this State and has at least three years’ experience;” reciprocity; “resides in a state that recognizes licenses issued by the Board”); N.C. GEN. STAT. § 84-4.1 (2019) (State Bar; attorneys, for pro hac vice status); N.C. GEN. STAT. § 85B-5(a) (auctioneers; reciprocity; “not more lenient”); N.C. GEN. STAT. § 86A-12(a) (2019) (barbers; comity; “the substantive equivalent”); N.C. GEN. STAT. § 87-50 (2019) (electrical contractors; reciprocity; “[t]o the extent that other states which provide for the licensing of electrical contractors provide for similar action”); N.C. GEN. STAT. § 89A-4(c) (2019) (landscape architects; reciprocity & comity); N.C. GEN. STAT. § 89E-11 (2019) (geologists; comity); N.C. GEN. STAT. § 89G-8 (2019) (irrigation contractors; reciprocity; “substantially equivalent”); N.C. GEN. STAT. § 90-36(a)–(b) (2019) (dentists; “credentialing” with specific provision for North Carolina’s four contiguous states); N.C. GEN. STAT. § 90C-33 (2019) (recreational therapists; reciprocity; “substantially equivalent or higher”); N.C. GEN. STAT. § 90-202.7 (2019) (podiatry; reciprocity); N.C. GEN. STAT. § 90-210.25(b) (2019) (funeral directors, embalmers and funeral service; comity); N.C. GEN. STAT. § 90D-9(a)–(b) (2019) (interpreters and translators; reciprocity resident of N.C.; “substantially equivalent;” and out-of-state if state recognizes N.C.); N.C. GEN. STAT. § 90-687 (2019) (perfusionist; reciprocity); N.C. GEN. STAT. § 90-655 (2019) (respiratory care; reciprocity; “substantially the same”); N.C. GEN. STAT. § 90-531 (2019) (athletic trainers; reciprocity; if other state recognizes). This list may not be exhaustive. Some boards, such as the Board of Funeral Service, have comity or reciprocity but do not call it that.

205. Act of July 2, 2012, ch. 196, sec. 1, 2012 N.C. Sess. Laws 955, 956 (codified as amended at N.C. GEN. STAT. § 93B-15.1).

Following a succession of amendments over the ensuing seven years, clarifying the process and expanding its scope, section 93B-15.1 of the North Carolina General Statutes is now entitled, “Licensure for individuals with military training and experience; proficiency examination; licensure by endorsement for military spouses; temporary license,” which accurately describes its intent.<sup>206</sup>

It would be very difficult to make a valid claim that currently in North Carolina former members of the military or the spouses of active-duty military personnel are hindered by our occupational and professional licensing laws.

### C. *Compacts*

Again, mobility or portability has been a persistent complaint used to justify abolishing licensing. However, the above-mentioned limitations of the United States Constitution has a workaround; the “compact.” Not a true contract between the states, but a cooperative agreement with benefits to all.

At first glance the United States Constitution appears to forbid compacts between the states: “No State shall, without Consent of Congress . . . enter into any Agreement or Compact with another State . . . .”<sup>207</sup> But “any” does not mean “all,” and the United States Supreme Court has held consent is not required unless the compact infringes on the federal supremacy.<sup>208</sup> Compacts have been used to resolve boundary disputes, to manage shared natural resources (such as water), and to create administrative agencies which have jurisdiction over a wide variety of state concerns including transportation (your driver’s license is subject to a compact), taxation, education, public safety, and licensure. It is estimated

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206. See Act of July 10, 2014, ch. 67, sec. 1, 2014 N.C. Sess. Laws 234, 234 (codified as amended at N.C. GEN. STAT. § 93B-15.1); Act of July 5, 2015, ch. 143, sec. 1, 2015 N.C. Sess. Laws 350, 350–52 (codified as amended at N.C. GEN. STAT. § 93B-15.1); Act of July 1, 2015, ch. 241, sec. 24.1.(r), 2015 N.C. Sess. Laws 996, 1001 (codified as amended at N.C. GEN. STAT. § 93B-15.1(c1)); Act of July 1, 2015, ch. 268, sec. 7.3.(a), 2015 N.C. Sess. Laws 1299, 1310 (codified as amended at N.C. GEN. STAT. § 93B-15.1); Act of June 8, 2017, ch. 28, sec. 3, 2017 N.C. Sess. Laws 179, 191 (codified as amended N.C. GEN. STAT. § 93B-15.1); Act of June 30, 2017, ch. 189, sec. 6.(a), 2017 N.C. Sess. Laws 1306, 1328 (codified as amended at N.C. GEN. STAT. § 93B-15.1(i)); Act of July 1, 2019, ch. 71, sec. 2.3, 2019 N.C. Sess. Laws 71 (codified as amended at N.C. GEN. STAT. § 93B-15.1(i)); Act of July 2, 2020, ch. 87, pt. 1, 2020 N.C. Sess. Laws 87 (codified as amended at N.C. GEN. STAT. § 93B-15.1).

207. U.S. CONST., art. 1, § 10, cl. 3.

208. U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 472 (1978).

there are 215 active interstate compacts today, and on average each state is a member of two dozen compacts.<sup>209</sup>

Beginning with the original Nurse Licensure Compact in 1998, the utilization of licensing compacts as a means to eliminate licensing barriers and enhance occupational license portability has grown steadily, and continues to grow between the states and territories of the United States. Currently the notable licensing compacts are:

- Enhanced Nurse Licensure Compact<sup>210</sup>—thirty-four states
- EMS Licensure Compact<sup>211</sup>—twenty states
- Interstate Medical Licensure Compact<sup>212</sup>—thirty-one states
- Physical Therapy Compact<sup>213</sup>—twenty-eight states
- Pyspact (psychologists)<sup>214</sup>—twelve states

In 2020, the North Carolina General Assembly approved a bill to establish the interstate compact for the practice of audiology and speech pathology.<sup>215</sup> Next up for the states nationally are occupational therapists, licensed professional counselors, and possibly physicians' assistants.<sup>216</sup>

The strongest voice for interstate licensing compacts is the Council of State Governments' compact incubator the National Center for Interstate Compacts. It describes the various compacts this way:

Occupational licensure compacts are typically operationalized by one of two methods: mutual recognition or expedited licensure. Under a mutual recognition model, a licensee receives a multistate license from the compact state in which the licensee has established residence or purchases a "privilege" from the compact. This multistate license or privilege authorizes the licensee to practice in any of the other states that have entered

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209. For a brief but succinct history of interstate compacts, see Crady deGolian, *The Evolution of Interstate Compacts*, in 44 THE BOOK OF THE STATES 61, 61–64 (2012 ed. 2012).

210. COUNCIL OF STATE GOV'TS, OCCUPATIONAL LICENSURE: INTERSTATE COMPACTS IN ACTION 6 (2019), [https://licensing.csg.org/wp-content/uploads/2019/07/OccupationalInterstateCompacts-InAction\\_Web.pdf](https://licensing.csg.org/wp-content/uploads/2019/07/OccupationalInterstateCompacts-InAction_Web.pdf) [<https://perma.cc/38AT-4467>].

211. *Id.* at 4 (2019). North Carolina is not a member of the EMS compact.

212. *Id.* at 8.

213. *Id.* at 5.

214. *Id.* at 9.

215. Act of July 2, 2020, ch. 87, pt. 2, 2020 N.C. Sess. Laws 1, 5 (codified as amended at N.C. GEN. STAT. § 93B-15.1). Currently, six states belong to this compact. Every compact has a threshold number before it can be viable. For the audiologists and speech pathologists, it is ten.

216. Telephone Interview with Nahale Freeland Kalfas, Of Counsel, The Council of State Gov'ts (Dec. 9, 2020).

the compact insofar as the licensee maintains residence in the state in which he or she is initially licensed. That is, under a mutual recognition approach, licensees typically must apply for a new license when they move or establish a principal place of business in another state. Generally, licensees are bound to the renewal and continuing education requirements of the state in which they reside. On the other hand, an expedited licensure approach calls for applicants to request an individual license from each state in which they intend to practice, but the compact makes the application process more efficient than it otherwise would be through data centralization and harmonized application requirements. Typically, the process begins when applicants provide their credentials to a central entity for storage and transfer. Administrative officials from the principal state of licensing then determine whether an applicant qualifies for expedited licensure. If qualified, applicants receive an expedited license in other member states. Expedited licensure has been described as the “check the box” approach where individuals are licensed in one state and can choose which other states in which they would also like to be licensed. An advantage of this approach is that it does not require licensees who move to another compact state to apply for a new license, provided they currently possess an expedited license in the new state. However, licensees would likely still have to change their state of principal licensure. A tradeoff with this approach is that licensees typically will have to bear the costs of licensure in multiple states, including renewal and continuing education requirements.<sup>217</sup>

While many of the detractors, including the Federal Trade Commission itself,<sup>218</sup> have the negative policy perspectives related in the introductory portions herein, such as reduced market participation, loss of competition, potentially higher prices, and possible wage reduction, there appears to be a consensus forming that compacts can alleviate some of these concerns.<sup>219</sup> Based upon the success of interstate compacts in increasing portability and reducing barriers, particularly for military spouses, the Department of Defense has allocated ten million dollars to the Council of State Governments to facilitate the development of more occupational licensing compacts between the states.<sup>220</sup> The utilization of interstate compacts can

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217. COUNCIL OF STATE GOV'TS, *supra* note 210, at 3.

218. KAREN A. GOLDMAN, OFF. OF POL'Y PLAN., FTC, POLICY PERSPECTIVES: OPTIONS TO ENHANCE OCCUPATIONAL LICENSE PORTABILITY 3–5 (2018), [https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license\\_portability\\_policy\\_paper\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf) [<https://perma.cc/CF23-Y6GN>].

219. See N.C. GEN. STAT. § 93B-4(a) (2019).

220. *New Grant Awarded: Developing Interstate Compacts for Occupational Licensure*, THE CURRENT STATE (Oct. 14, 2020), <https://web.csg.org/tcs/2020/10/14/new-grant-awarded-developing-interstate-compacts-for-occupational-licensure/> [<https://perma.cc/8R>].

also mitigate some of the believed antitrust litigation liability that will be brought about by the United States Supreme Court's *Dental Examiners* opinion.<sup>221</sup>

It should be noted that there is a substantial difference between compacts and the concept of "universal license recognition."<sup>222</sup> Universal license recognition is like reciprocity but with no rules or constraints as to similarity of any two states' licensing requirements; there is no uniformity, no connectivity, and no records or a database. It is again a solution offered by those that do not understand the complexity and nuances of occupational and professional licensing.

## VII. WHO'S FIGHTING BACK

In the early days of the scholarly journal articles and studies being presented, few in the licensing community took note—it was all conjecture. Occupational and professional licensing was so entrenched in state governments nationwide nobody seemed to believe opposition would take root. But take root it did, and it grew. All sides took notice and joined the chorus—Republicans, Democrats, Libertarians (with a capital "L" and a lowercase "l"), and members of the "Tea Party" when their movement surged. Legislation began being introduced with fervor.<sup>223</sup>

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WP-5KMJ]. According to Ms. Kalfas, the NCIC of the CSG is currently developing a teacher compact. Nursing and teachers are the two most prevalent occupations for military spouses. However, the unintended but positive consequence of this is that it assists all teachers. Telephone Interview with Nahale Freeland Kalfas, *supra* note 216.

221. For a more expansive presentation on how these compacts lessen the perceived liability, see Greenberg et al., *Multistate Occupational Licensing to Protect the Public While Minimizing Licensing Burdens*, NAT'L CTR. FOR INTERSTATE COMPACTS (Sept. 2018), [https://www.americanbar.org/content/dam/aba/events/administrative\\_law/2019-meetings/11/06-multistate-occupational-licensing.pdf](https://www.americanbar.org/content/dam/aba/events/administrative_law/2019-meetings/11/06-multistate-occupational-licensing.pdf) [<https://perma.cc/JUF5-BY9H>].

222. A universal license recognition act was introduced in the 2020 Session of the North Carolina General Assembly as Senate Bill 773. It was referred to the Senate Rules Committee where it died. *See* S.B. 773, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019).

223. North Carolina's experience exemplifies that of the other states. The first attempt at "reform" in our state was in 2010, when then Governor Bev Perdue, by Executive Order sought to eliminate "unnecessary" boards and commissions, as well as administrative rules. While dormant boards and commissions were abolished, occupational and professional licensing boards were unscathed. Next was the "Joint Regulatory Reform Committee," created by the legislature (S.L. 2011-17), that included town hall meetings around the state to gather feedback from the public. It, too, was focused on rules and went essentially nowhere. Following that was a study, based on surveys, by the Program Evaluation Division (PED) of the General Assembly to evaluate the structure, organization, and operation of the various occupational licensing boards. Regulatory Reform Act of 2013, ch. 413, sec. 10.(a), 2013 N.C. Sess. Laws 1752, 1759 (codified as amended at N.C. GEN. STAT. § 93B-1). The

*A. The voices on a national level*

Individually, boards began pushing back, as did the various associations representing the particular licensed profession. Uncoordinated efforts were made to educate legislators and other elected officials on the positive benefits of licensing, but usually only for the particular occupation, profession or vocation. Any major changes, at least in North Carolina, were staved off. National groups or associations of state licensing boards such as the Federation of Associations of Regulatory Boards (FARB) based in Schaumburg, IL, and the Council of Licensure, Enforcement and Regulation (CLEAR) based in Nicholasville, KY, began educating its members and sounding the alarm. The anti-regulatory movement was gaining traction. Aside from these two groups there was no one combating the misinformation nationally until recently.

*B. Alliance for Responsible Professional Licensing*

In July 2019, the American Institute for Certificated Public Accountants (AICPA); the National Council of Architectural Boards (NCARB), a national resource association for state licensing boards for architects; the Council of Landscape Architectural Boards (CLARB), a national resource association for state licensing boards for landscape architects; and the similar associations for engineering and for surveying teamed up to create the Alliance for Responsible Professional Licensing (ARPL).<sup>224</sup> ARPL began making the voice of the advanced professional heard. Its goal is to inject into the public discourse the licensing perspective

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PED's report, entitled, "Occupational Licensing Agencies Should Not be Centralized, but Stronger Oversight is Needed," was released on December 17, 2014. GEN. ASSEMBLY PROGRAM EVALUATION DIV., OCCUPATIONAL LICENSING AGENCIES SHOULD NOT BE CENTRALIZED, BUT STRONGER OVERSIGHT IS NEEDED, Gen. Assemb. 2014–15, 151st Sess. (N.C. 2014). That got everyone's attention and made O.L.B.s begin to look inward and rally to begin formulating a unified response. Then, Governor Pat McCrory's economic development group, the North Carolina Government Efficiency and Reform (NC GEAR) initiative, made its report to the legislature's Joint Legislative Committee on Government Operations on March 5, 2015, which among other recommendations recommended outright elimination of five O.L.B.s and studying the remainder. N.C. GOV'T EFFICIENCY & REFORM, REPORT TO THE JOINT LEGISLATIVE COMMISSION ON GOVERNMENT Operations, Gen. Assemb. 2015–16, 152d Sess., at 40 (N.C. 2015). Then came yet another, the PED's study in conjunction with the State Auditor's Office and the Office of State Controller, on improving financial and performance reporting for oversight of boards presented in May 2018.

224. See ALL. FOR RESP. PRO. LICENSING, <https://www.responsiblelicensing.org> [<https://perma.cc/25BA-Q74N>]. *Occupational Licensing Boards Oversight Reporting Work Group: Improving Financial and Performance Reporting for Oversight of Occupational Licensing Boards: Presentation to the Joint Legis. Admin. Proc. Oversight Comm.*, 2018 Leg. (N.C. May 1, 2018) (presentation by John Turcotte, Dir. Program Evaluation Div.).

and ensure professional licensing is present at the forums where the issue is being discussed and to provide research, messaging, tools and materials to individual state organizations to complement their individual activities to effectively communicate the importance of professional licensing.<sup>225</sup> FARB is now working with with ARPL.<sup>226</sup> Another group, although not a formal legal entity but calling itself the “Professional Licensing Coalition,” has formed solely to address the potential antitrust liability brought about by the U.S. Supreme Court’s opinion in *Dental Examiners*. ARPL and this Coalition share common membership.

As recently as October 2020, the member organizations of that Coalition wrote Congress in support of federal legislation to alleviate the threat of federal and private actors seeking to enjoin licensing boards on the grounds of anti-competitive behavior.<sup>227</sup>

In 2020 alone, over 250 bills were introduced nationwide that had some type of impact on licensing.<sup>228</sup> Many passed, but many more did not. And a few were like House Bill 1193 in Florida, less of a “deregulation” bill than a “modification” bill.<sup>229</sup> That bill passed and was signed by Governor Rick DeSantis on June 30, 2020.<sup>230</sup> Individually, national organizations have been monitoring these bills for a number of years, and ARPL has begun doing so collectively.<sup>231</sup>

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225. *Id.*

226. FARB is also involved in the national licensing compact efforts to confront the mobility/portability/migration shortcomings of state licensing.

227. Occupational Licensing Board Antitrust Damages Relief Act of 2020, H.R. 8680, 116th Cong. (2020). H.R. 8680 was introduced in the 116th Congress by Representative Mike Conaway (R., 11th Dist., TX), Jamie Raskin (D., 8th Dist., MD) and David Cicilline (R., 1st Dist., RI). It was to be reintroduced when the 117th Congress convened in February 2021. This is not the first time Congress has tried to step in to aid the various states in the legitimate attempt to exercise their police power to regulate occupations and professions to protect the public health, safety, and welfare since *Dental Examiners*. Previous attempts at legislation include H.R. 3466 in the 115th Congress in 2017, Restoring Board Immunity Act of 2017, H.R. 3446, 115th Cong. (2017), and H.R. 6515 in the 115th Congress in 2018, Occupational Licensing Board Antitrust Damages Relief Act of 2018, H.R. 6515, 115th Cong. (2018).

228. See Zach Herman, *The National Occupational Licensing Database*, NAT’L CONF. OF OCCUPATIONAL LICENSING (Mar. 24, 2020), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx> [https://perma.cc/63UA-NXTH] (scroll to “Database”; then click image to access database).

229. H.B. 1193, 2020 Leg., Reg. Sess. (Fla. 2020).

230. *Id.*

231. ALL. FOR RESP. PRO. LICENSING, *supra* note 224. Individual associations conducting nationwide legislative tracking include the National Association of State Boards of Accountancy, NAT’L ASSOC. OF STATE BDS. OF ACCT., <http://www.nasba.org> [https://perma.cc/6NRZ-UEJW], and the Council of Landscape Architectural Registration

If other states are experiencing the same as North Carolina, when these bills reach a hearing stage in the committee process, legislators begin to understand the pitfalls to be found in deregulating, or even the lessening of regulation with a lower form of regulation such as certification or registration. This may be borne out in the results of a study conducted by ARPL in 2019 and released in 2020.<sup>232</sup> ARPL engaged Benenson Strategy Group (BSG) to conduct a national study to understand public opinion regarding professional licensing.<sup>233</sup> BSG conducted interviews of over 900 “likely voters”—“individuals who are registered to vote and had voted in the 2016 or 2018 elections or indicated that they were likely to vote in the 2020 election.”<sup>234</sup> “This was a national opinion study with a diverse respondent pool—mix of gender, age, race, and political ideology.”<sup>235</sup> Research was conducted for roughly two weeks between October and November of 2019.<sup>236</sup>

The study found that the public overwhelmingly supported licensing regulations for “complex, highly technical professions that have a direct impact on public health, safety, and welfare.”<sup>237</sup> The results of the study indicated that 75% of voters believed it was important to ensure qualifications for certain professionals.<sup>238</sup> “And a majority of voters believe current professional licensing requirements protect the public and should not be reformed.”<sup>239</sup> However, the study also concluded that public was not entirely opposed to deregulating licensing standards for non-professional vocations, for instance the trades.<sup>240</sup> “Members of the public acknowledge that such reform initiatives may be warranted in some instances, but they are largely opposed to legislation that is not narrowly tailored to those ends.”<sup>241</sup> These members of the public are also “deeply concerned by overbroad licensing reform that would jeopardize licensing standards for

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Boards, COUNCIL OF LANDSCAPE ARCHITECTURAL REGISTRATION BDS., <http://www.clarb.org> [<https://perma.cc/MCR5-Z2RQ>].

232. ALL. FOR RESP. PRO. LICENSING, EXECUTIVE SUMMARY: EXPLORING PUBLIC OPINION OF PROFESSIONAL LICENSING (2020), <http://www.responsiblelicensing.org/wp-content/uploads/2020/01/ARPL-Public-Opinion-Research-Executive-Summary.pdf> [<https://perma.cc/ZR77-85PA>].

233. *Id.* at 1.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

highly complex, technical professions.”<sup>242</sup> In other words, the public expects professions handling their physical and financial wellbeing to be regulated.<sup>243</sup> “More than 70% of voters believe that regulating professionals in accounting, engineering, architecture, and related fields with high impact on public safety and welfare is important.”<sup>244</sup>

Moreover, licensing standards are the public’s preferred default position. 71% of voters believe professional licensing should be required unless it can be proven that eliminating licensing *will not* have a negative impact on public health and safety. The public is wary of the alternative approach: requiring licensing only when it is proven necessary for health and safety.

Professional licensing boards are also viewed favorably and are seen as critical regulatory entities. 67% of voters believe that consumers are best protected by a system that regulates education, examination, and experience standards—all of which are overseen by a professional licensing board. And the public intuitively understands what roles the boards play and why those roles are important.<sup>245</sup>

According to this poll, “a majority of the public believes that it is ‘very important’ that the boards oversee qualifications to enter a profession and regulate continuing education and certification standards.”<sup>246</sup> All of the licensing naysayers may be correct with their various economic theories and claims of antitrust violations, but if truth be known the American public may just want their government to protect them regardless.

#### CONCLUSION

If you read or listen to the echo chamber of the same studies being regurgitated, repackaged, and repeated again and again, that do no deep analysis of studies littered with words and phrases such as “may,” “could potentially,” and “tend to,” and that disregard hard facts that the regulation of occupations and professions does not actually do any of the things alleged, it is easy to conclude occupational licensing boards are bad—bad for the economy; bad for the working person; bad for people who want or need to move to another state for whatever reason.

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242. *Id.*

243. *Id.* at 1–2.

244. *Id.* at 2.

245. *Id.*

246. *Id.*

But what has been missing is the “other voice.” The factual voice of reason and practicality to interrupt the reverberations of the echo. The voice of those who “do,” not those who speculate. Board members, legal practitioners, even the regulated (i.e., licensees). Those who know firsthand that the conduct of these boards is not guild-like; they are not monopolistic; they are not restraining trade, creating rents, suppressing wages, or any of the other negative things leveled against them. They are public-spirited persons, interested in their chosen vocation, who are making a good faith attempt to protect the public health, safety, and welfare according to the dictates of the popularly elected members of their state legislature.