

Let Them Work: Alternatives to Kansas' Occupational Licensing Laws

The Institute for Justice
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Agenda:

- Institute for Justice's work
- Perspectives on occupational licensing
- *North Carolina State Board of Dental Examiners v. FTC*
- Solutions to restore *Parker* immunity.

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IJ's focus

- Free Speech
 - Campaign finance laws
 - Commercial speech regulations
- Property rights
 - Eminent domain
 - Civil forfeiture
- Economic liberty
 - Barriers to entry
- Defend educational choice programs
 - Vouchers and scholarships
 - Tax credits

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I. Occupational Licensing

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Occupational licensing is big

Biggest issue in labor economics today.

	<u>Nationwide</u>	<u>Kansas</u>
Licensing:	25%	15%
Unionism:	11%	9%
Minimum wage:	Less than 1% of workers	

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Occupational licensing is costly

- Increases unemployment by 0.5% - 1.0%
 - 2.85 million jobs nationwide
 - 7,500 jobs estimated in Kansas
- Increases consumer prices by 15% or more
 - \$200 billion annually higher prices paid annually by consumers nationwide.
 - More than \$1,000 per family
 - \$1.5 billion estimated in higher prices paid by Kansans.

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Regulatory problems

- Licensing is designed to be anti-competitive.
 - New Deal regulatory premise
 - Associations and unions lobby for licensing to benefit members by limiting competition.
 - They often ask for grandfathering.
- Licensing boards can be captured.
 - Licensees control boards.
 - Boards' funding comes from licensing fees.
 - Boards rarely revoke licenses.

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Arbitrary- Training Requirements

- Cosmetologists:
 - Iowa/Nebraska: 490 days
 - US average: 372 days
 - Kansas: 350 days
 - NY/Mass: 233 days
- Skincare Specialist:
 - Kansas: 233 days
 - US average: 149 days
 - PA/Mass: 70 days

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Arbitrary- Training Requirements

- Licensing varies for same occupation.
 - Only 10 of 102 middle-wage occupations IJ studied are licensed in 50 states.
 - Kansas and only 3 other states license psychiatric technicians.
 - Only 13 states license locksmiths. Kansas does not license.
 - IJ's landmark study: <http://ij.org/licensetowork>

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Arbitrary

- Licensing may not be tied to risks.
- Kansas requires 40 times more training
 - Athletic trainers 1,460 days
 - EMTs 35 days.

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Licensing is unjust

- **Reverse Robin Hood:** Transfer income from consumers to workers who are usually better off than consumers.
- **Elitism:** Rewards people who have access to formal education—punishes those who don't.
- **Inflexible:** Inhibits individuals, particularly women, from returning to work or making mid-life career changes.
- **Blocks interstate mobility.** Mrs. Obama recognizes problems occupational licensing presents to military personnel's spouses.
- **Counter to religious tradition:** "The obligation to earn one's bread presumes the right to do so. A society that denies this right cannot be justified, nor can it attain social peace." (*Centesimus Annus* #43).
- **Paternalistic:** Defenders point to unidentified individuals experiencing hypothetical harms.

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Few benefits to consumers

- Licensing offers no incremental consumer protection over a competitive labor market.
- Real consumer protection comes from competition, reputation and legal remedies.

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Policy summary

- Licensing is a high cost/low benefit policy for workers and consumers.
- Regulatory Problems
- Arbitrary
- Unjust

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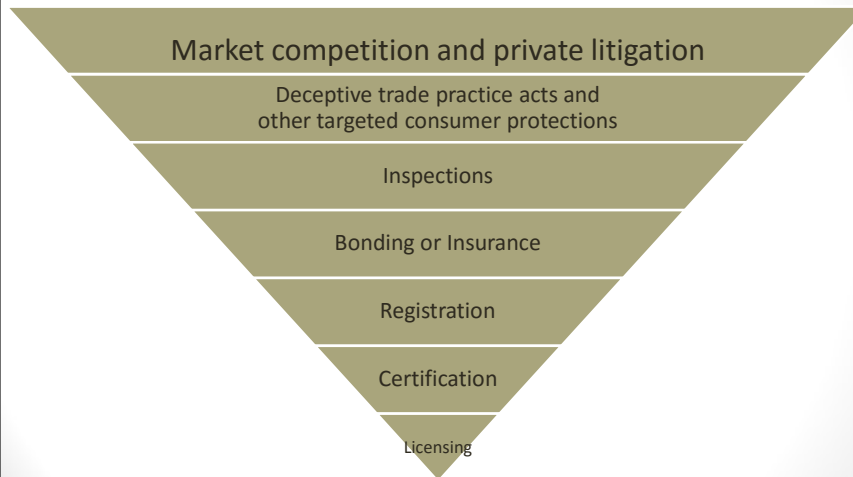
Political

- Licensing ≠ Free markets
- Licensing ≠ Limited government
- Licensing ≠ Economic liberty
- Licensing ≠ Social justice

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Takeaway 1:

Policy: Use least restrictive form of regulation



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Policy: Use least restrictive form of regulation

<u>Consumer Concern</u>	<u>Legislative Response</u>
• Fraud	• Deceptive Trade Practice
• Cleanliness	• Inspections
• Third-party injuries	• Bonding/insurance
• Fly-by-night providers	• Registration
• Asymmetrical information/ insurance reimbursement	• Certification

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Takeaway 2: Legislative Actions

- Sunrise and sunset provisions;
- Satisfy existing licensing requirements through additional means including apprenticeships, on-the-job experience, and military service;
- Exempt specialty services from existing licenses;
- Reduce personal qualifications in existing licenses;
- Increase reciprocity/recognition of licenses from other states;
- Convert licenses to less restrictive regulations in pyramid;
- Repeal licensing laws; and
- Enact IJ's model act in response to *NC State Dental Board v. FTC*.

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Video

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II. *North Carolina State Board of Dental Examiners v. FTC*

135 S.Ct. 1101

February 25, 2015

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NC Dental Board v. FTC

- Did the licensing board's members violate the Sherman Act?
- When do board members have immunity from antitrust litigation under *Parker v. Brown*?
 - *Parker* confers immunity on anticompetitive conduct by the states when acting in their sovereign capacity.
 - *Parker* recognizes federalism principle that the States possess a significant measure of sovereignty under U.S. Constitution.

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NC Dental Board: Facts

- Dentists in North Carolina started whitening teeth in the 1990's.
- Many of those who did so, including 8 of the Board's 10 members, earned large fees.
- By 2003, non-dentists starting working and charging lower prices.
- Dentists began to complain to the NC Dental Board about new competitors.
- Few complaints warned of harm to consumers. Most expressed concern about low prices.
- Board issued 47 cease-and-desist letters to non-dentists starting in 2006.
- These actions had the intended result. Non-dentists ceased offering services in N.C.

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NC Dental Board: Holding

- FTC wins.
- Non-sovereign actor controlled by active market participants enjoys *Parker* state-action immunity from federal antitrust liability for anticompetitive conduct only if:
 - restraint on competition imposed by non-sovereign actor is one clearly articulated and affirmatively expressed as state policy; and
 - policy is actively supervised by the state

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NC Dental Board: Holding

When state use licensees on boards states must have both:

- “Clear articulation”
 - Displacement of competition must be the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature to the non-sovereign actor.
- “Active supervision”
 - State officials must have and exercise power to review particular anticompetitive acts of the non-sovereign actor and disapprove those acts that fail to accord with state policy.

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NC Dental Board: Holding

- State agencies are not simply by their governmental character sovereign actors entitled to *Parker* immunity from federal antitrust liability.
- *Parker* immunity requires more than a mere facade of state involvement to ensure the states accept political accountability for anticompetitive conduct they permit.

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NC Dental Board: Vulnerabilities

- Stand-alone boards captured by industry
 - Licenses enforced by state agencies such as the Departments of Commerce or Health are less vulnerably.
- Non-core services
 - Not explicitly in the text.
 - Innovations or sub-specialties at the margin of the practice act.
 - Low-risk services that require little training.
- Boards focused on protecting licensees
 - Many boards issue more threats to non-licensed competitors than they revoke licenses.

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III. Legislative Response to *North Carolina State Board of Dental Examiners v. FTC*

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Legislation to Restore Immunity

- Adopt pro-competition policy
 - “Where the State finds it is necessary to displace competition, it will
 - use the least restrictive regulation
 - to protect consumers
 - from present, significant and substantiated harms
 - that threaten public health and safety.”

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Legislation to Restore Immunity - II

- Oversight by the Legislature
 - Sunrise/Sunset process
- Oversight by the Executive Branch
 - Active supervision
 - Department of Consumer Affairs, Department of Commerce,
 - Secretary of State or Attorney General's office
 - Three functions
 - Promulgation of rules and policies
 - Disciplining licensees
 - Disciplining non-licensees

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Legislation to Restore Immunity - III

- Active Supervision
 - “Play a substantial role in the development of an occupational board’s rules and policies to ensure they benefit consumers and not serve private interests of providers of goods and services who the board regulates;
 - Exercise control over each of the boards by reviewing and affirmatively approving only rules, policies and enforcement actions that are consistent with (state policy).”

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IV. Conclusion

- Occupational licensing’s size and shortcomings are increasingly being identified.
- Increasing access to information about provider’s reputation offers opportunity to reduce anticompetitive regulations without sacrificing consumer protection.
- Litigation vulnerabilities exposed by *NC Bd. of Dental Examiners* must and can be managed.

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Appendix: Certification

Certification is a voluntary type of occupational regulation in which the government grants nontransferable recognition to an individual based on meeting certain personal qualifications.

Upon approval, the individual may use “certified” as a designated title or as part of a designated title.

A non-certified individual may also perform the lawful occupation for compensation but may not use the title “certified.”

The term certification is not synonymous with an “occupational license.”

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Appendix: Occupational Licensing

Occupational license is a type of occupational regulation that requires an individual to meet certain personal qualifications in order to perform a lawful occupation for compensation.

An occupational license is nontransferable.

It is illegal for an individual who does not possess an occupational license to perform the occupation for compensation.

Occupational licensing is the most restrictive type of occupational regulation.

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Appendix: Model Definition of Active Supervision

Active supervision. (a) “Active supervision” means the attorney general or designee will independently:

1. play a substantial role in the development of an occupational board’s rules and policies to ensure they benefit consumers and not serve private interests of providers of goods and services who the board regulates;
2. disapprove the use of any board rule or policy and terminate any enforcement action outstanding at the time of this act’s enactment and subsequently that fails to accord with section 100.01;
3. exercise control over each of the boards by reviewing and affirmatively approving only rules, policies and enforcement actions that are consistent with section 100.01; and
4. use the nonpartisan research staff’s analysis in section 100.06 and conduct reasonable investigations to gain additional information, including about less restrictive regulatory approaches, to reduce exposure to antitrust litigation.

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Takeaway: State Attorneys under current roles and laws

- Promote recognition that licensing is the worst/bad type of regulation.
- Change approach of attorneys assigned to licensing boards:
 - Statutory Interpretation:
 - Constrict the scope of licensing laws to the intended services that are dangerous, taught and tested.
 - Use AG letters to narrowly interpret licensing laws in light of costs/benefits.
 - Enforcement:
 - Protect consumers, not competitors.
 - Require evidence of harm before issuing threatening letters.
 - Require attorney approval of all correspondence.
 - Counsel:
 - Base recommendations on evidence of actual harm.

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Appendix: Model Definition of Least Restrictive Regulation

“Least restrictive regulation” means, from least to most restrictive,

1. market competition,
2. private certification,
3. a specific private civil cause of action to remedy consumer harm,
4. a deceptive trade practice act,
5. a regulation of the process of providing the specific goods or services to consumers,
6. inspection,
7. bonding or insurance,
8. registration,
9. government certification, and
10. occupational license.

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IV. Right to Earn an Honest Living

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Right to earn an honest living

- “At the common law, no man could be prohibited from working in any lawful trade.” *Case of the Tailors of Ipswich* (1615).
- “The right to work for a living in the common occupations of the community is the very essence of the opportunity and freedom that was the purpose of the 14th Amendment to secure.” *Truax v. Raich* (1915)
- “Naked economic preferences are impermissible.” *St. Joseph Abbey v. Louisiana*, U.S. Court of Appeals for the 5th Circuit. (2013)

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Federal and state constitutional claims

- Substantive due process
 - Loose means-end fit.
 - Requirements that are unrelated to consumer protection.
- Equal protection
 - Laws regulating different occupations the same.
 - Requirements that are unnecessary for consumer protection.
- Delegation
 - Laws the out-source power to restrict entry to private firms.

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