

U.S. Licensing System

By Adam Parfitt

The current economic cost of professional and occupational regulation directly impacts one quarter¹ of the working population in the U.S. The number of professions or occupations requiring a government license is nearly one quarter² of the current working population. The majority³ of this increase has been the result of the increasing number of professions or occupations requiring a license. Recent domestic evidence also shows that states vary dramatically in their rates of licensure, ranging from 12 percent to 33 percent.

Professional and occupational regulation is predominantly a state function, undertaken and protected under Article X of the U.S. Constitution. Article X grants states the authority to regulate activities affecting the health, safety and welfare of their citizens. Practitioner disciplinary matters follow each state's administrative procedures act. Exceptions to this state oversight are the growing numbers of municipal-level licensing and professionals employed by the federal government to work within state borders.

Recent Scrutiny

Research suggests that nearly one quarter⁴ of the working population in the U.S. requires a government license for their profession or occupation, a number that has risen from 5 percent in the 1950s. The vast majority⁵ of this increase has been the result of the increasing number of professions or occupations requiring a license. Meanwhile, economists suggest that the wage effect of professional and occupational licensing can be as high as 15 percent.⁶ Little wonder, then, that close attention is being paid to this policy lever, its implications and implementation.

Indicative of the higher profile enjoyed by professional and occupational regulation, a recent White House press release⁷ called for reforms to the existing system, stating:

“While licensing can offer important health and safety protections to consumers, as well as benefits to workers, the current system often requires unnecessary training, lengthy delays, or high fees. This can in turn artificially create higher costs for consumers and prohibit skilled American workers like florists or hairdressers from entering jobs in which they could otherwise excel.”

Recent developments have focused upon the following perceived shortcomings within the system:

- The scale and growth in the number of professions and occupations affected by professional or occupational regulation, in addition to the disparity in approaches across the states;
- Perceived attendant restrictions on professional mobility, affecting both civilian populations and military families (the latter disproportionately affected by deployments to military bases in different jurisdictions);
- Applicability related to new working patterns (including telework and telepractice);
- Issues of fairness, related particularly to those with qualifications from foreign institutions, as well as those with a criminal record;
- The availability of consumer information about providers and practitioners; and
- Issues related to oversight and broader governance.

Scale and Growth of Professional and Occupational Regulation

A recently published list of licensing best practices⁸ provides a guide to the focus of future reforms in the field:

Ensure that Licensing Restrictions are Closely Targeted to Protecting Public Health and Safety, and are Not Overly Broad or Burdensome

1. In cases where public health and safety concerns are mild, consider using alternative systems that are less restrictive than licensing, such as voluntary state certification (“right-to-title”) or registration (filing basic information with a state registry).

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2. Make sure that substantive requirements of licensing (e.g., education and experience requirements) are closely tied to public health and safety concerns.
3. Minimize procedural burdens of acquiring a license, in terms of fees, complexity of requirements, processing time and paperwork.
4. Where licensure is deemed appropriate, allow all licensed professionals to provide services fully of their current competency, even if this means that multiple professions provide overlapping services.
5. Review licensing requirements for the formerly incarcerated, immigrants and veterans to ensure that licensing laws do not prevent qualified individuals from securing employment opportunities, while still providing appropriate protections for consumers.

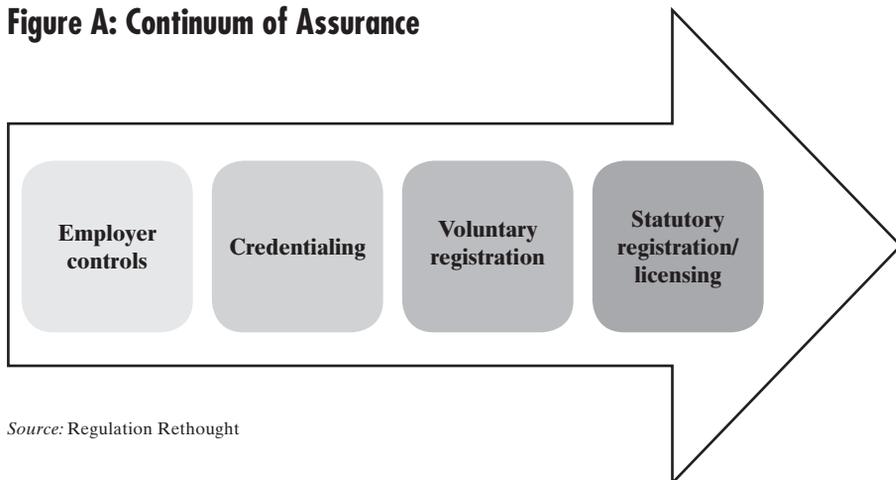
The desire to ensure that regulation is proportionate and reflective of the risk to the public is echoed elsewhere, notably in a recent report⁹ from the Professional Standards Authority in the U.K., which developed a “continuum of assurance” as part of efforts to provide “a methodology for assessing and assuring occupational risk of harm.”¹⁰

The Professional Standards Authority’s model contains two stages: profiling the risk of harm that results from the practice of a profession; and determining the external risk factors that may exist. The latter includes the numbers of practitio-

ners and potential clients, methods by which the risk can be managed (including through the use of technology), the economic cost (including effects on cost and supply), innovation, perceived risk and unintended consequences.

Having been encouraged to consider alternative policy levers, some states have attempted to deregulate, or de-license, existing professions and occupations. Research suggests¹¹ however, that such initiatives are rarely successful. A recent Bureau of Labor Statistics report commented that “In nearly every instance that we analyzed, de-licensing and de-licensing attempts have been met not only with stiff resistance but also usually (when successful) with a movement to reinstitute licensing. Clearly, these results reflect the lobbying power of the occupations in question and their professional associations.”¹² The report goes on to suggest additional reasons for such resistance, including the likelihood that the costs (of de-licensing) to members of licensed practitioners is high, at the same time as the benefits to the public are arguably widespread, but limited. Other possibilities include the unwillingness of state legislatures to deny the states a source of revenue, given that most regulatory boards are, at a minimum, self-sustaining. While sunset laws exist in a variety of states, historically many appear reluctant to recommend de-licensure, or find legislatures reluctant to act upon such recommendations.

Figure A: Continuum of Assurance



Source: Regulation Rethought

Concerns about the economic cost of professional and occupational regulation are not confined to domestic governments and think tanks. Recent years have seen the Organization for Economic Cooperation and Development, or OECD, produce significant work related to this topic. Among the initiatives has been the development of a Services Trade Restrictiveness Index,¹³ which “provides policy makers and negotiators with information and measurement tools to open up international trade in services and negotiate international trade agreements. The STRI indices take the value from 0 to 1, where 0 is completely open and 1 is completely closed.”

State Variations in Regulatory Practice

Recent domestic evidence also shows that states vary dramatically in their rates of licensure, ranging from a low of 12 percent of workers in South Carolina to 33 percent in Iowa. Such significant

differences in licensing prevalence are frequently cited by opponents of licensure, who suggest that jurisdictions are not treating occupations equivalently, to the detriment of both market participants and consumers. A Reason Foundation report¹⁴ from 2007 tabulated each state’s licensing requirements by occupation. The report found that on average, states require licenses for 92 occupations. A separate report by Institute for Justice compared licensing requirements for low and moderate-income occupations that are licensed in at least one state. This report found that 15 occupations were licensed in 40 states or more, with the average occupation being licensed in only 22 states.¹⁵

This variation is further demonstrated in Table A, indicating the percentage of workers licensed in each state. While a large number of states fall within the 20 to 25 percent range, three states license in excess of 30 percent of their workforce, while five states license fewer than 15 percent.

Table A: Share of Workforce Licensed or Certified, by State

State	Share of workforce licensed (percent)	Share of workforce certified (percent)	State	Share of workforce licensed (percent)	Share of workforce certified (percent)
Alabama	20.9	6.9	Maine	22.3	9.9
Alaska	25.5	7.3	Maryland	20.7	7.8
Arizona	22.3	8.7	Massachusetts	17.2	4.8
Arkansas	20.2	5.3	Michigan	21.3	3.9
California	20.7	6.1	Minnesota	20.6	3.3
Colorado	17.2	7.4	Mississippi	15.0	3.4
Connecticut	24.7	8.8	Missouri	23.1	7.2
Delaware	15.3	3.5	Montana	21.3	5.4
Dist. of Columbia	19.7	6.9	Nebraska	24.6	8.3
Florida	28.7	4.2	Nevada	30.7	5.4
Hawaii	15.7	5.9	New Hampshire	14.7	4.1
Idaho	26.6	11.3	New Jersey	20.7	11.3
Illinois	22.8	8.4	New Mexico	25.9	7.3
Indiana	24.7	5.0	New York	20.7	5.5
Iowa	14.9	10.8	North Carolina	22.0	8.4
Kansas	33.3	5.1	North Dakota	26.6	2.6
Kentucky	14.9	5.6	Ohio	18.1	7.5
Louisiana	27.8	10.7	Oklahoma	25.0	7.2

Table A: Share of Workforce Licensed or Certified, by State — Continued

State	Share of workforce licensed (percent)	Share of workforce certified (percent)
Oregon	26.1	3.8
Pennsylvania	20.2	7.6
Rhode Island	14.5	11.9
South Carolina	12.4	3.5
South Dakota	21.8	5.6
Tennessee	23.1	4.2
Texas	24.1	3.7
Utah	23.8	5.9
Vermont	16.8	6.5
Virginia	17.2	3.7
Washington	30.5	7.2
West Virginia	25.8	12.3
Wisconsin	18.4	1.9
Wyoming	21.2	10.1

Source: Kleiner and Vorotnikov (2015), Harris data.

Supreme Court Case: *North Carolina State Board of Dental Examiners v. Federal Trade Commission*

The implications of a recent Supreme Court case¹⁶ are slowly becoming evident with occupational regulators considering the potential need to make likely significant changes to their regulatory arrangements, such as:

- Requiring public member majorities on regulatory boards
- Multi-party board membership
- Providing umbrella boards with policy oversight
- Establishing an independent review board to oversee rulemaking
- Creating majority public review bodies for scope of practice actions
- Making boards advisory only
- Expanding the powers of sunrise/sunset review
- Giving attorneys general additional oversight powers.¹⁷

Former California Attorney General Kamala Harris summarized the Supreme Court case as follows:

The North Carolina Board of Dental Examiners was established under North Carolina law and charged with administering a licensing system for dentists. A majority of the members of the board are themselves practicing dentists. North Carolina statutes delegate authority to the dental board to regulate the practice of dentistry, but did not expressly provide that teeth whitening was within the scope of the practice of dentistry. Following complaints by dentists that non-dentists were performing teeth-whitening services for low prices, the dental board conducted an investigation. The board subsequently issued cease and desist letters to dozens of teeth-whitening outfits, as well as to some owners of shopping malls where teeth-whiteners operated. The effect on the teeth-whitening market in North Carolina was dramatic, and the Federal Trade Commission took action. In defense to antitrust charges, the dental board argues that, as a state agency, it was immune from liability under the federal anti-trust laws. The Supreme Court rejected that argument, holding that a state board on which a controlling number of decision-makers are active market participants must show that it is subject to “active supervision” in order to claim immunity.¹⁸

In response, states have taken a variety of steps:

- California’s attorney general provided guidance¹⁹ about what should be considered “active supervision” for the purposes of the state action immunity doctrine, and identified measures that could be taken to guard against antitrust liability for board members. The opinion identified possible steps, including changing the composition of boards, adding additional supervision by state officials, reducing exposure for damages claims, and ensuring board members receive legal indemnification and antitrust training.
- In Oklahoma, an executive order was issued²⁰ which required those state boards with a majority of members who are active market participants in the occupation or profession directly or indirectly controlled by the board, to submit each non-rulemaking action to the Office of the Attorney General for review and analysis. Where the attorney general concludes the board action may violate law, the board must defer or reconsider the proposed action.²¹

- In North Carolina, the General Assembly’s Program Evaluation Division, or PED, reviewed both structure and operation of the 55 independent occupational licensing boards. The ensuing report²² stated that there was insufficient state-level oversight to ensure efficient and effective public protection, recommending a legislative review of several occupational licensing boards’ authority and the consolidation of several others.
- Massachusetts Gov. Charlie Baker issued an executive order²³ directing the review of any acts, rules, regulations or policies (proposed by independent licensing boards) with the potential to limit competition in a relevant market for professional services. The review evaluates whether the proposed act, rules, regulations or policies advance the goal of ensuring the health, safety and welfare of the public sufficiently, so that it should be permitted regardless of any potential anticompetitive impact. Several types of acts warrant particular attention, including scope-of-practice rules, and territorial restrictions.
- Activity has also been recorded in Iowa, Maine and West Virginia, in addition to other jurisdictions.

The Supreme Court decision has also raised concerns that individual board members may be liable for damages for antitrust liability related to their service. Indeed, some organizations have called for legislation that “indemnifies state boards and members from any damages or litigation fees related to claims against them to which the immunity applies.”²⁴

Some states, such as Massachusetts and Rhode Island, clearly provide immunity and indemnification to at least some of their boards via statutory language. Other states, such as Illinois, Michigan, New Jersey, New York, Oklahoma and Texas, have indemnification statutes that may protect state agencies, but legislation here offers less clarity about whether indemnification extends to professional board members.

Private litigation has followed the Supreme Court ruling, most notably in the cases of *Teladoc Inc. v. Texas Medical Board*²⁵, and *Henry v. North Carolina Acupuncture Licensing Board*.²⁶ In the former case, Teladoc, a provider of telehealth services, filed suit after the Texas Medical Board enacted a 2015 rule requiring face-to-face contact between an individual and a doctor before a

prescription is issued. Teladoc claimed that rules placing limits on video consultations violate the Sherman Act. A district court ruling denied the medical board’s motion to dismiss the complaint, finding that the board was not actively supervised by the state.

The latter case saw several licensed physical therapists and patients sue the North Carolina

Acupuncture Licensing Board for sending cease-and-desist letters to physical therapists who offered “dry needling” services. The physical therapists in receipt of the letter were accused of engaging in the illegal practice of acupuncture. The plaintiffs maintain that the board’s efforts violate federal antitrust law and a bid to dismiss the lawsuit against the board has been unsuccessful to date.

Conclusion

The recent award of a substantial U.S. Department of Labor grant²⁷ to “Identify licensing criteria to ensure that existing and new licensing requirements are not overly broad or burdensome and don’t create unnecessary barriers to labor market entry; and improve portability for selected occupational licenses across state lines,” should ensure that interesting developments follow in this fascinating, and often under-reported field.

Notes

¹ Occupational Licensing: A Framework for Policymakers, Department of the Treasury, Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor (2015), p.3.

² Occupational Licensing: A Framework for Policymakers, Department of the Treasury, Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor (2015), p.3.

³ Ibid.

⁴ Occupational Licensing: A Framework for Policymakers, Department of the Treasury, Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor (2015), p.3.

⁵ Ibid.

⁶ Ibid, p.4.

⁷ <https://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting>.

⁸ https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (p.42).

⁹ Right-touch assurance: a methodology for assessing and assuring occupational risk of harm (<http://www.professionalstandards.org.uk/docs/default-source/publications/right-touch-assurance---a-methodology-for-assessing-and-assuring-occupational-risk-of-harm.pdf?sfvrsn=0>). CHECK – this was actually rethinking regulation in 2015.

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¹⁰ *Right-touch assurance: a methodology for assessing and assuring occupational risk of harm*, p.1.

¹¹ <https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm>.

¹² *Ibid.*

¹³ <http://www.oecd.org/tad/services-trade/services-trade-restrictiveness-index.htm>.

¹⁴ Summers, A. (2007). *Occupational licensing: Ranking the states and exploring alternatives*. Los Angeles: Reason Foundation.

¹⁵ Carpenter D., Knepper L., Erickson A. and Ross J. (2012), *License to Work, A National Study of Burdens from Occupational Licensing*. Institute for Justice, p.5.

¹⁶ *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (https://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf).

¹⁷ Citizen Advocacy Center, *Addressing the Supreme Court's North Carolina Decision: Options for the States*.

¹⁸ California Attorney General Opinion 15-402, issued 9/10/15.

¹⁹ Opinion of Kamala D. Harris, Attorney General, and Susan Duncan Lee, Deputy Attorney General, No. 15-402 (Sept. 10, 2016), 98 Ops.Cal.Atty.Gen. available at https://oag.ca.gov/system/files/opinions/pdfs/15-402_0.pdf.

²⁰ State of Oklahoma Executive Department, Executive Order 2015-33 (July 17, 2016).

²¹ *Ibid.*

²² North Carolina General Assembly Program Evaluation Division, "Occupational Licensing Agencies Should Not be Centralized, but Stronger Oversight is Needed," Final Report to the Joint Legislative Program Evaluation Oversight Committee, Report No. 2014-15 (Dec. 17, 2014), available at http://www.ncleg.net/PED/Reports/documents/OccLic/OccLic_Report.pdf.

²³ Office of the Governor of the Commonwealth of Massachusetts, "To Ensure Proper Review of the Regulation of Professional Licensing by Independent Boards," Executive Order No. 567 (March 28, 2016), available at <http://www.mass.gov/governor/legislationexecorder/execorders/executive-order-no-567.html>.

²⁴ AICPA - <https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Memo-NC-Dental-Supreme-Court-Decision-August-2016.pdf>.

²⁵ *Teladoc, Inc., et al. v. Texas Medical Board*, et al., No. 1:15-cv-00343 (W.D.Texas, Apr. 29, 2015).

²⁶ *Henry, et al. v. North Carolina Acupuncture Licensing Bd.*, et al., No. 15-831 (M.D.N.C. Oct. 7, 2015).

²⁷ <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/us-labor-department-awards-75m-fund-research-improving-geographic>.

About the Author

Adam Parfitt is Executive Director of the Council on Licensure, Enforcement and Regulation (CLEAR), a position he has held for the last ten years. Previously he served as the organization's Director of International Relations. Prior to his time with CLEAR, Adam worked with several associations of state government officials.