

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA





2018 Forum Agenda

THURSDAY, JANUARY 25, 2018

2:00 pm - 6:30 pm Early Registration

-----THURSDAY OPTIONAL SESSION-----

3:00 pm – 7:30 pm Comprehensive Regulatory Training (CRT) Mark Brengelman (KY)
 Mai Lin Noffke (IL)
 Amy Richardson (IL)

FRIDAY, JANUARY 26, 2018

7:30 am - 5:15 pm Registration Open

7:30 am – 8:15 am Breakfast

8:15 am - 8:30 am FARB Updates Dale Atkinson, FARB Executive Director

8:30 am - 8:45 am Welcoming Remarks Joel Albizo, FARB President
 FARB Strategic Action Team Update (Portfolio, Story & Future) FARB Executive Board

8:45 am - 9:45 am (1) Promoting Competition in Regulated Occupations: Tara Koslov (DC)
 FTC Perspectives

9:45am – 10:30 am (.75) The Economic and Structural Effects of Occupational Licensure Beth Redbird (IL)

10:30 am - 10:45 am BREAK

10:45am – 11:30 am (.75) Executive Orders: Jennifer Semko (DC)
Where Executive Branch Authority Starts and Stops

11:30 am – 12:15 pm (.75) New Legislation Affecting the Regulatory Community: Amy Richardson (IL)
Right to earn a living, RBI Act, Antitrust Immunity

12:15 pm – 1:30pm Lunch

1:30 pm – 2:15 pm (.75) Think Differently: Veronica Meadows (VA)
Reducing Friction in the Licensure Process

2:15 pm – 2:25 pm Move to Assigned Breakout Room
 A: *Mobility/Portability (.75)* Mary de Sousa/Mary Jo Monahan
 B: *Board Structure (.75)* Jim Penrod/Debra Persinger
 C: *United We Stand: Intrastate Communications (.75)* Josh Bolin/ Margo Adams Larsen

Green Work Group Schedule Room: Commodore A 2:25 pm – 3:15 pm: Session A 3:25 pm – 4:15 pm: Session B 4:25 pm – 5:15 pm: Session C	Purple Work Group Schedule Room: Commodore B 2:25 pm – 3:15 pm: Session B 3:25 pm – 4:15 pm: Sessions C 4:25 pm – 5:15 pm: Sessions A	Orange Work Group Schedule Room: Commodore C,D,E 2:25 pm – 3:15 pm: Session C 3:25 pm – 4:15 pm: Session A 4:25 pm – 5:15 pm: Session B
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5:15 pm RECESS & FARB RECEPTION

FRIDAY CLE = 6.25



2018 Forum Agenda

SATURDAY, JANUARY 27, 2018

7:30 am - 12:15 pm Registration Open

7:30 am - 8:15 am BREAKFAST

8:15 am - 9:00 am Friday Breakout Group Sessions: Veronica Meadows (VA)
Findings & Take Home Points

A: Mary de Sousa/Mary Jo Monahan
B: Jim Penrod/Debra Persinger
C: Josh Bolin/Margo Adams Larsen

9:00 am - 9:30 am (.5) Addressing the Legislature: Can Boards Politic? Joshua Batkin (DC)

9:30 am - 10:15 am (.75) Open Records: What not to do Robin Jenkins (DC)
Panravee Vongjaroenrat (DC)

10:15 am - 10:30 am BREAK

10:30 am - 11:15 am (.75) Website Accessibility: What Boards Need to Know Mai Lin Noffke (IL)
Tom Gallego (CA)
Tyler Ross (CA)

11:15 am - 12:15 pm (1) Top Regulatory Cases (TRC) Dale Atkinson (IL)

12:15 pm RECESS

SATURDAY CLE = 3

SUNDAY, JANUARY 28, 2018

7:30 am - 8:30 am BREAKFAST

8:30 am – 10:30 am **Mock Board Meeting:** Do's and Don'ts Dale Atkinson (IL)
What is a Well-Run Board Meeting
Statutory Navigation Mark Brengelman (KY)
Proactive Risk Management Cheryl Lalonde (KY)

10:30 am - 10:45 am BREAK

10:45 am – 11:15 am (.5) Regulation in the News Joel Albizo (VA)

11:15 am RECESS

Sunday CLE = 2.5

Total Forum CLE = 11.75

Total Forum CLE with CRT = 15.75

Promoting Competition in Regulated Occupations: FTC Perspectives

Tara Isa Koslov*

Acting Director, Office of Policy Planning
Federal Trade Commission

42nd Annual FARB Forum
Federation of Associations of Regulatory Boards
Coronado, California

** The views expressed today are my own, not necessarily those of
the Federal Trade Commission or any individual Commissioner.*

January 26, 2018
Federal Trade Commission

Overview

- Shared values
- The state of the state action doctrine
- FTC enforcement and (especially) advocacy
- Economic Liberty Task Force
- How to engage with the FTC
- Next steps / Q&A



FTC & Regulatory Boards: What Do We Have In Common?

Values	FTC Members & Staff	Board Members & Staff
Commitment to public service	✓	✓
Protect consumers / public interest	✓	✓
Respect for rule of law, including principles of federalism	✓	✓
Belief that some regulation is good for society, including occupational licensing	✓	✓
Promote competition	✓	?



Competition is Important!

- Competition benefits consumers, especially in markets undergoing evolution and restructuring
 - Lowers prices
 - Expands supply / improves access
 - Improves quality
 - Promotes innovation in service delivery, business models, efficiency, and other aspects of value
 - Usually generates broader range of choices



Boards and Competition

- Board members all over the country volunteer their time and expertise to serve the public interest
- But board actions *may* restrict entry or restrain rivalry
- Having a private stake may create conflict of interest and thereby increase risk of harm, even without anticompetitive intent (see *NC Dental*)
- Risk is mitigated by requiring active supervision to achieve state action immunity
 - Protects board members, competition, and the public



State Action: The World After *NC Dental*

- Clarified (sort of) which entities need active supervision to obtain state action immunity
- Did not change the substantive law on what constitutes sufficient active supervision
- October 2015 FTC staff guidance reflects best attempt to interpret these points
 - The law will continue to evolve (with the FTC's help)
 - Highly fact-specific, case-by-case approach

We recognize this is a challenging time for boards, their members, and their counsel



FTC Enforcement Activity Since *NC Dental*

- Louisiana Real Estate Appraisers Board
 - May 2017 administrative complaint
 - Pending in Part 3 administrative litigation
- Texas Medical Board
 - June 2017 closing statement
 - Problem solved by clarifying legislation
 - (Aside: telehealth and hurricanes)
- A couple of other early-stage, non-public investigations

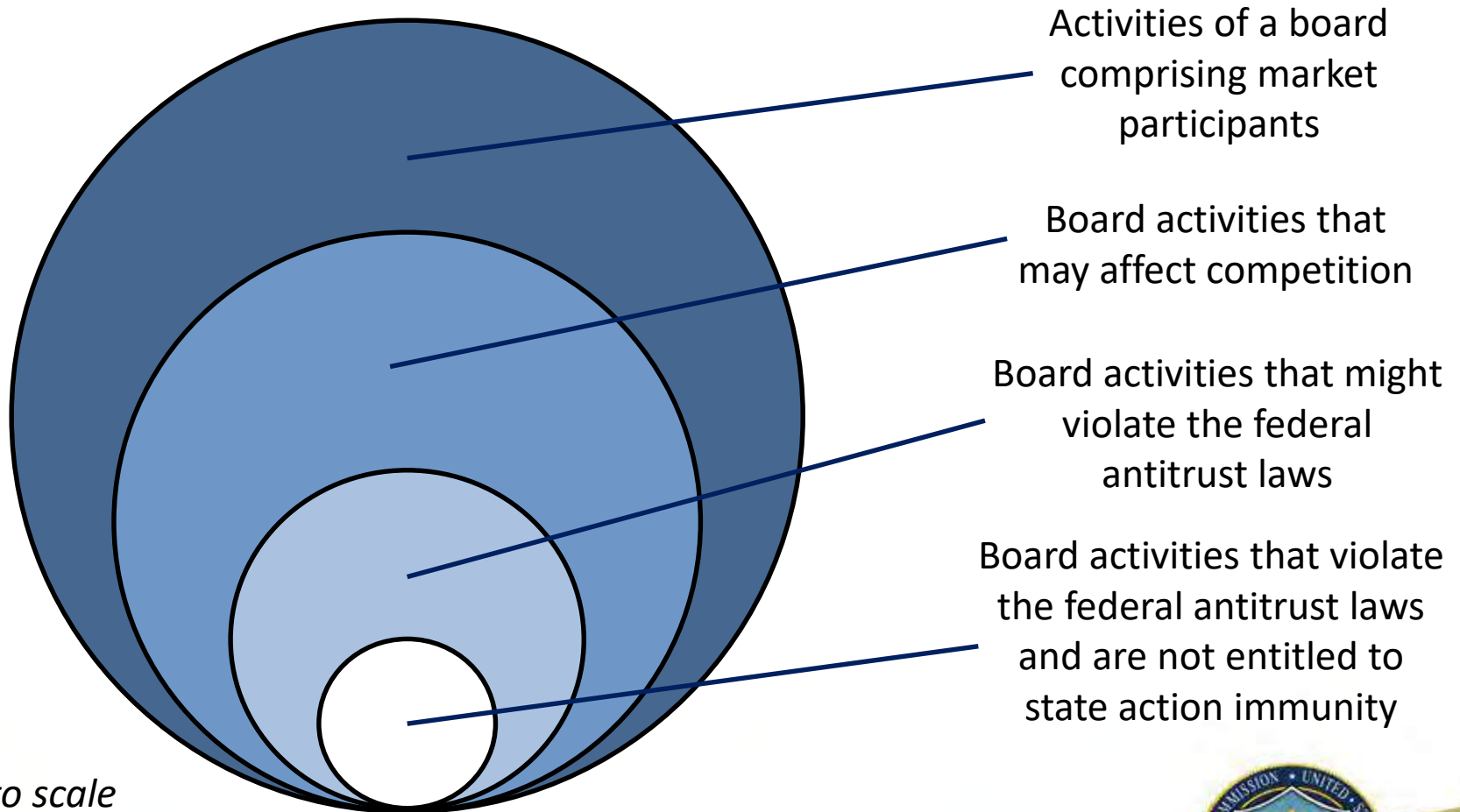


No Avalanche of FTC Cases

- We field a steady stream of complaints about boards and their activities
- Most of these complaints are not pursued
 - Conduct clearly authorized by statute
 - Routine disciplinary actions
 - Harm to competitor(s) vs. harm to competition
 - See, e.g., FTC staff guidance re: disciplinary actions



Context for Case Evaluation*



* not to scale



State Action and Federalism

- There are multiple ways to “do” active supervision (legislative, executive, etc.)
- Each state gets to balance policy goals, resources, risk tolerance
 - Substantive reform of occupational licensure
 - More bureaucratic “rubber stamp” approach
 - Or (as FTC staff guidance notes) choose to use federal antitrust oversight, rather than opting out of it



FTC Competition Advocacy

- FTC's "institutional DNA" provides a range of policy tools under Section 6 of the FTC Act
 - Research/scholarship, reports, advocacy
- Competition advocacy may complement, supplement, or forestall enforcement investigations and/or actions
 - Advocacy typically is more efficient, as well

www.ftc.gov/policy/advocacy



What is Competition Advocacy?

- Public entities (including regulatory boards) face the challenge of weighing various public policy objectives
- Sometimes, their choices affect competition
- Provide a framework that supports and promotes competition principles
- Educate policymakers and the public about the benefits of competition
 - Competition IS consumer protection!



Framework for Competition Analysis of Regulations

- What is the likely competitive impact?
- How will this affect consumers?
- Are there legitimate justifications to restrict competition?
 - Health, safety, related consumer protection goals
 - Other public policy objectives
- If so, are less restrictive alternatives available?



The FTC's New(ish) Economic Liberty Task Force

- Convened by Acting Chairman Ohlhausen
- Primary focus = excessive occupational licensing as a barrier to economic opportunity
 - Some licensing is necessary, but not all of it
- Continuation and amplification of longstanding, bipartisan FTC efforts across many professions
- Robust agenda of issues and projects
- “Coalition of the willing”



Selected Task Force Activities

- July 27, 2017 roundtable: “Streamlining Licensing Across State Lines: Initiatives to Enhance Occupational License Portability”
- November 7, 2017 roundtable: “The Effects of Occupational Licensure on Competition, Consumers, and the Workforce: Empirical Research and Results”
- Just released: “Voices of Liberty” video project
- Stay tuned for more developments



How To Engage With the FTC

- FTC policy team is always happy to talk to you!
 - Calls, meetings, etc.
- Advocacy process and tips
- Support for occupational licensing reform efforts in your state
- We welcome your ideas for productive collaboration



Q&A





FEDERAL TRADE COMMISSION

FOR • THE • CONSUMER

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opp@ftc.gov

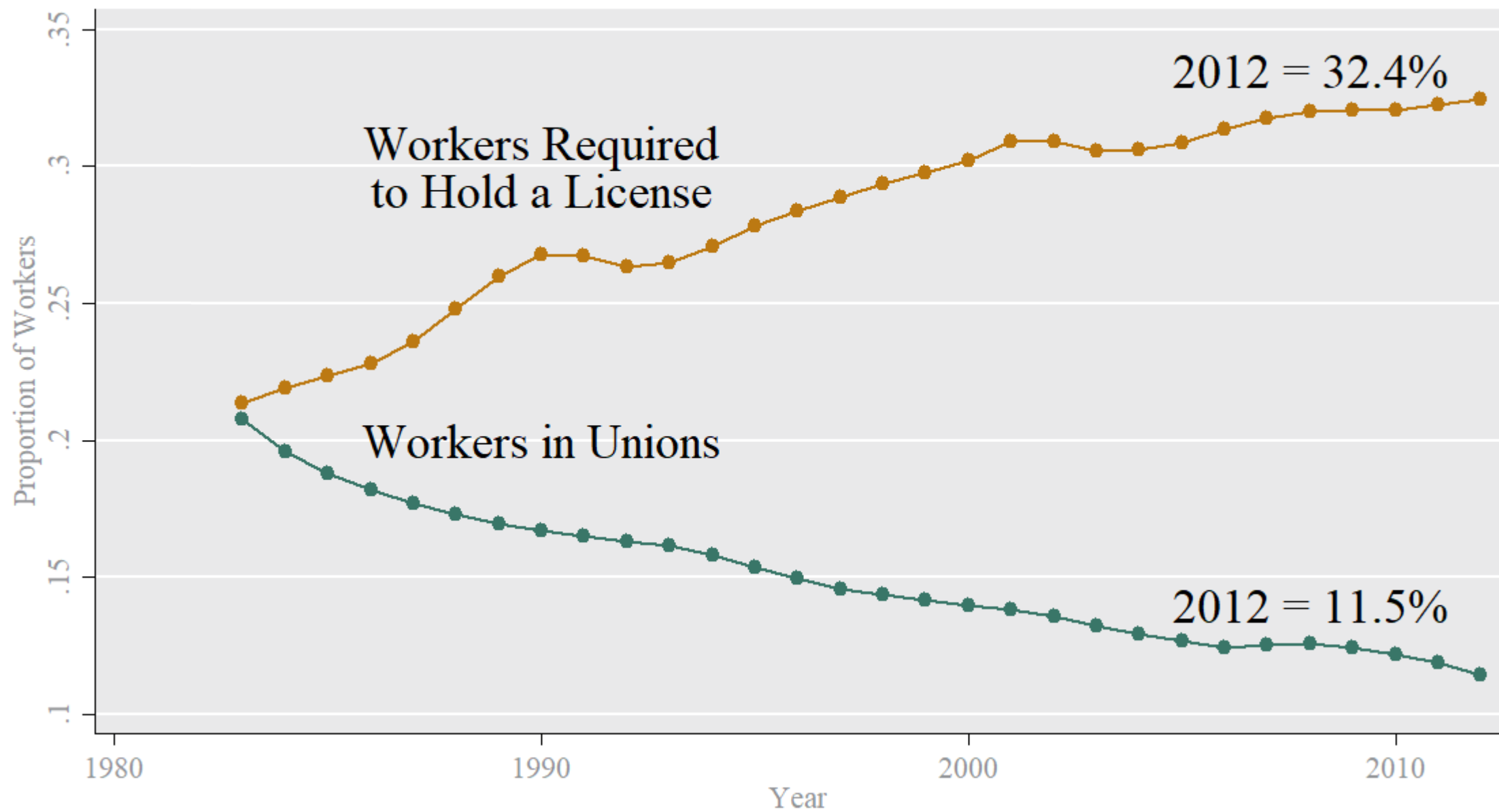
The Economic and Structural Effects of Occupational Licensure

Beth Redbird, PhD

Assistant Professor

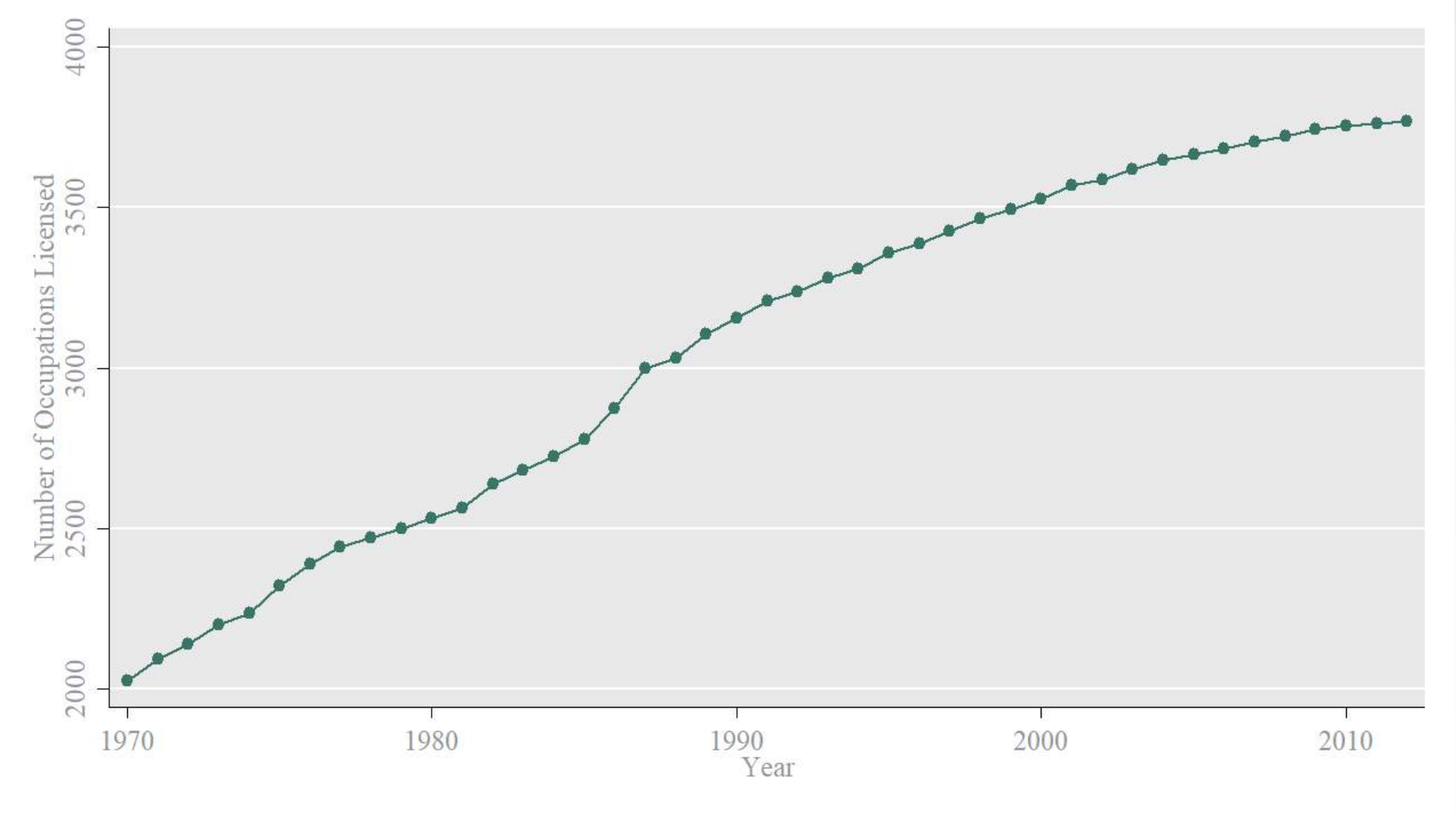
NORTHWESTERN UNIVERSITY

Good or Bad?

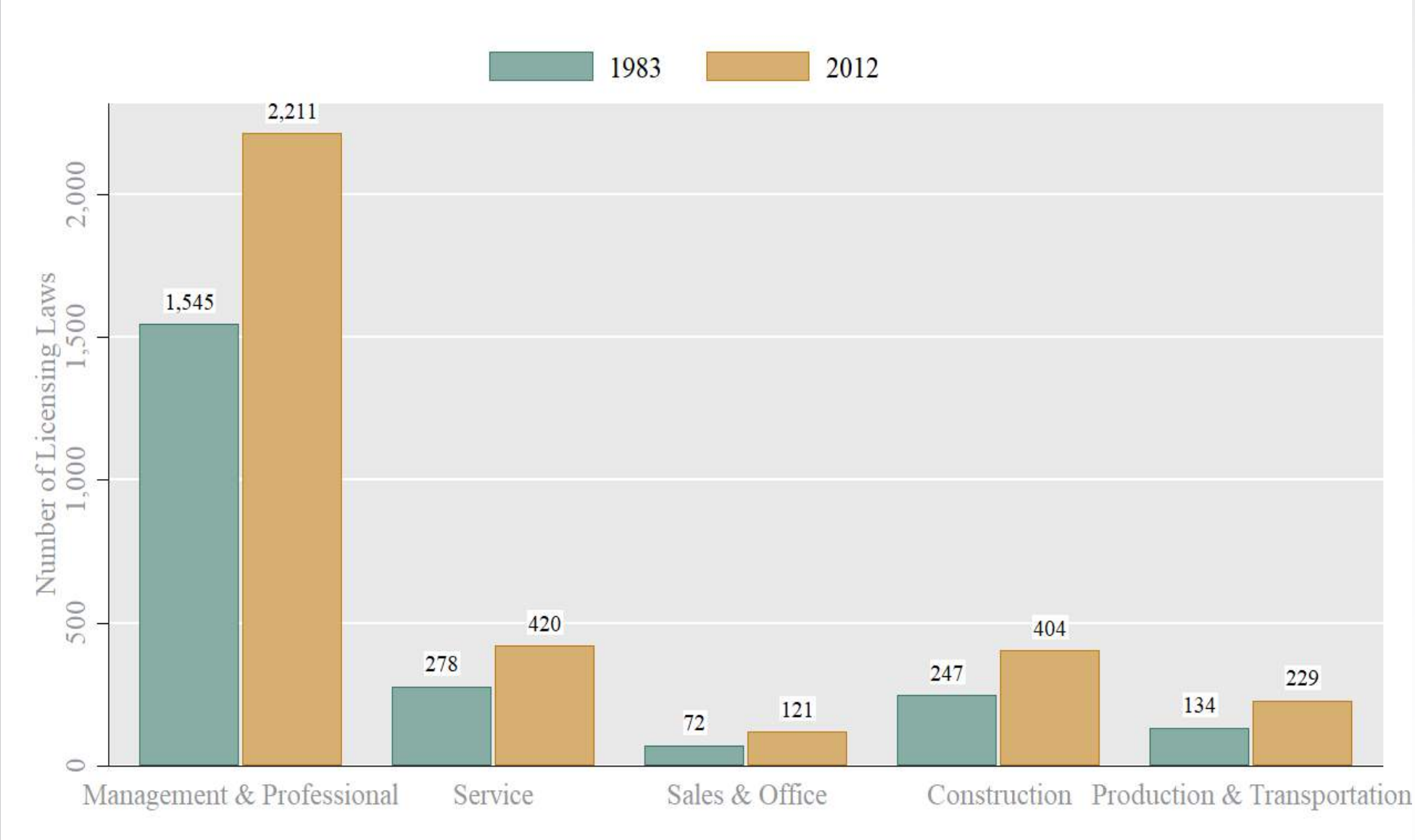


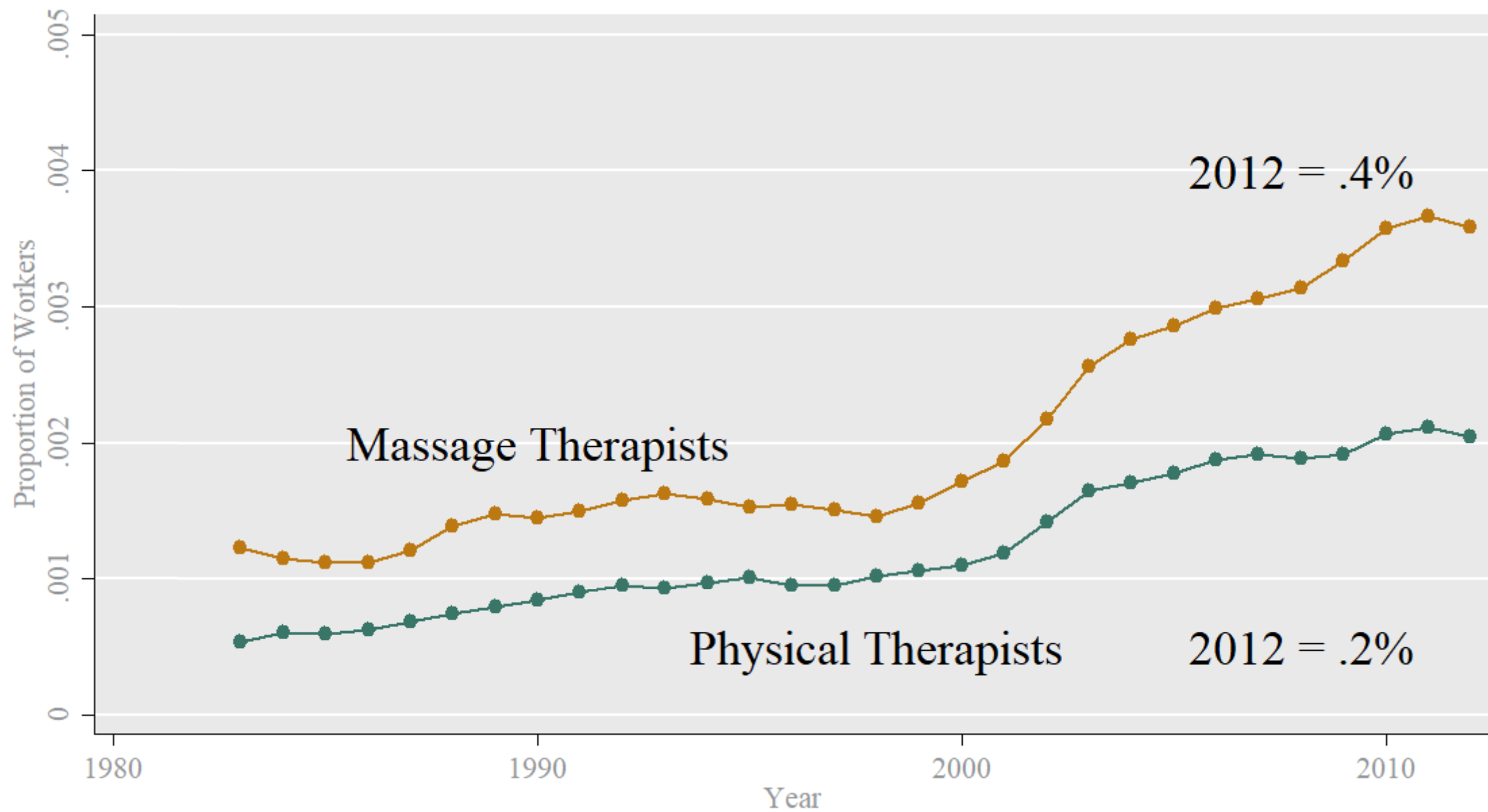


Growth in Licensing Laws



Laws by Occupation Type





This Study

340 Occupations

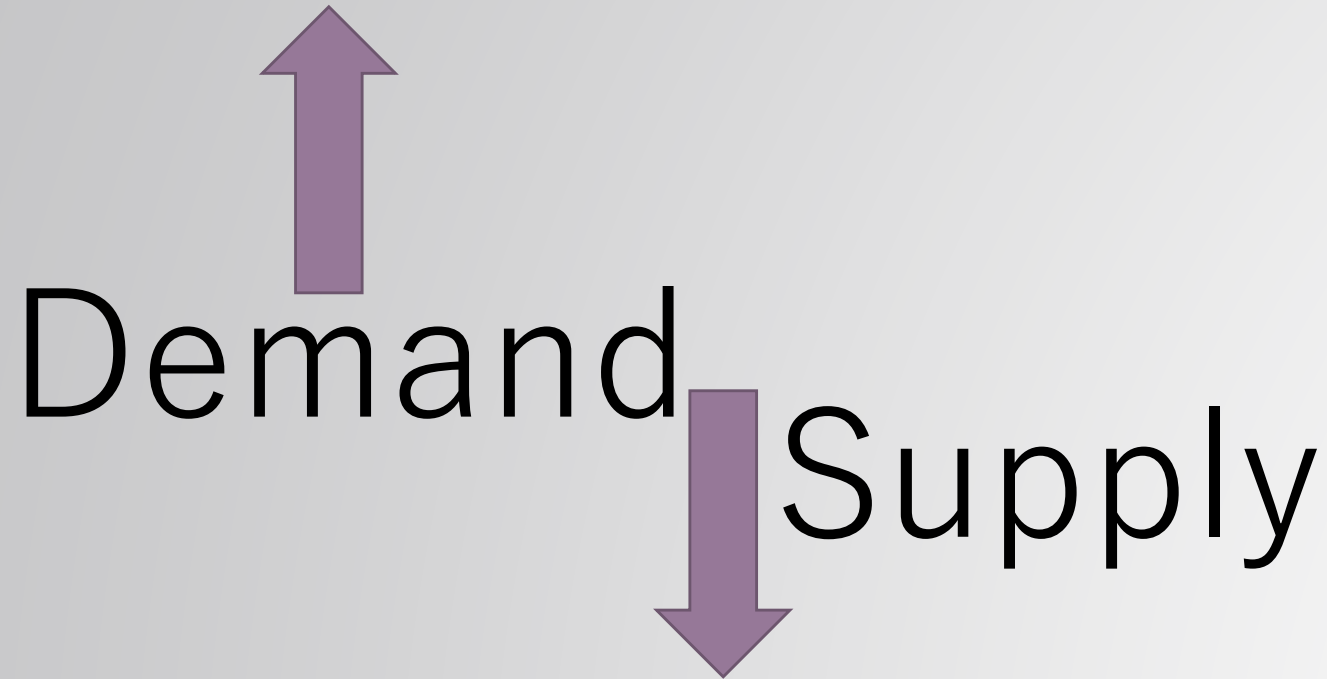
1,741 New Laws

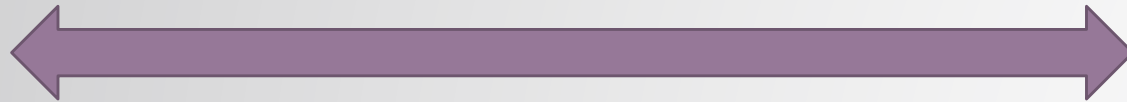
50 States

1970-2012

Wage Premium

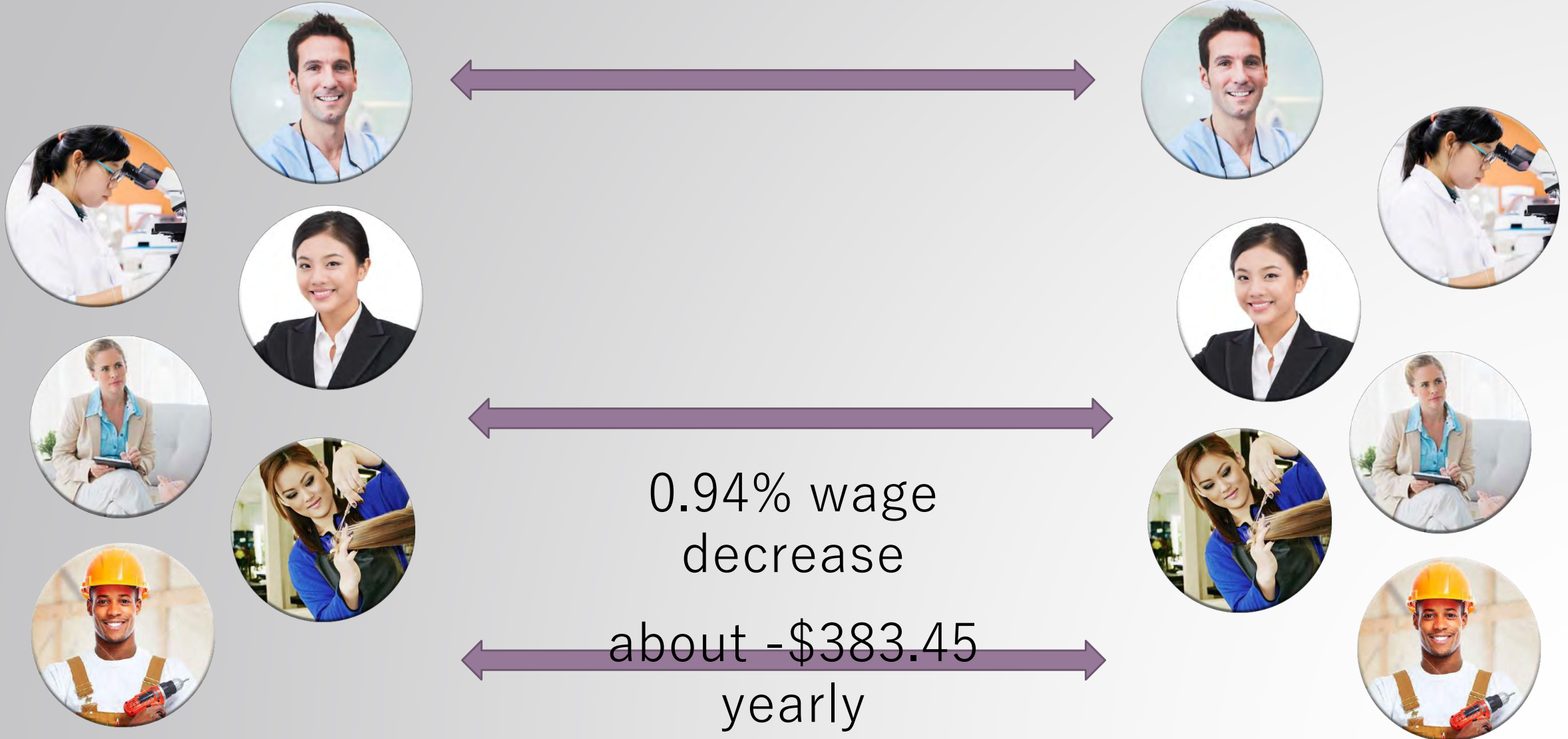
Licensing raises wages



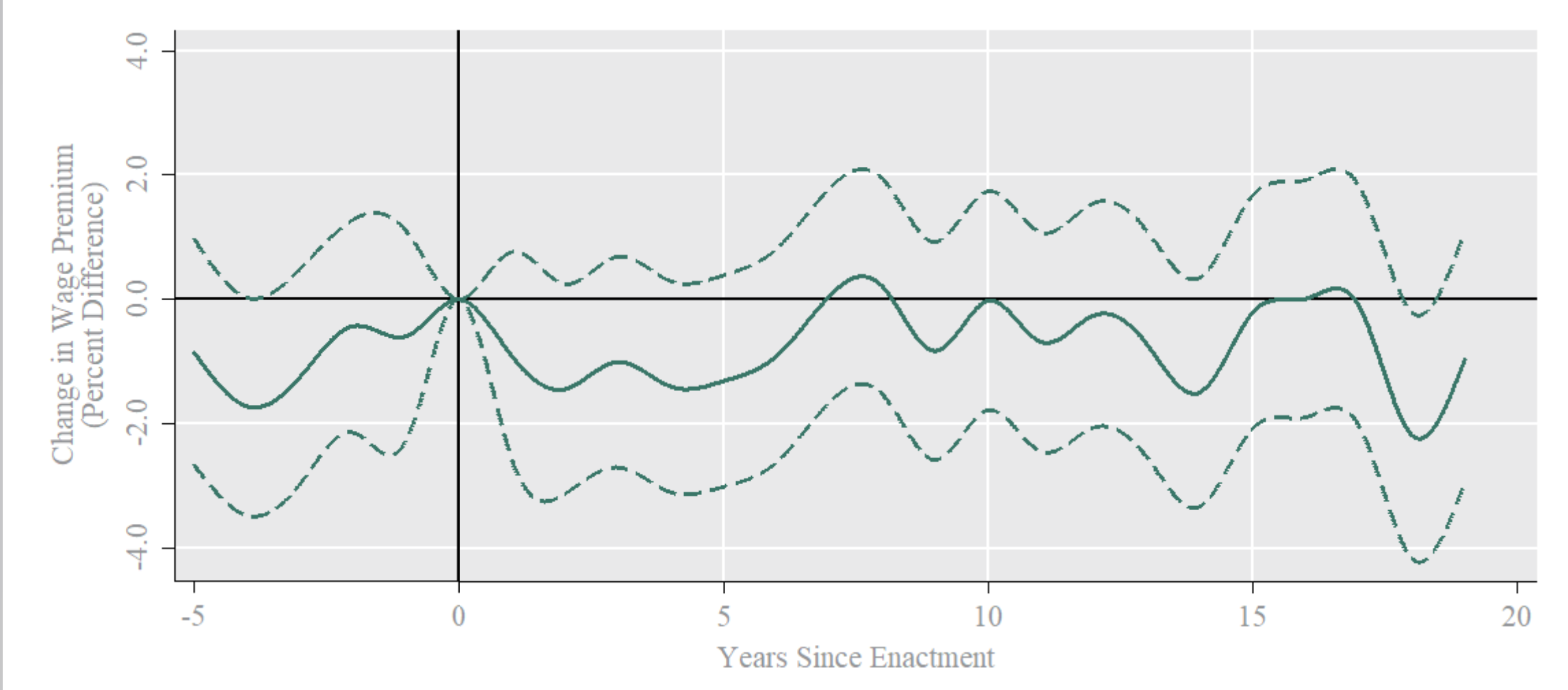


Unlicensed

Licensed

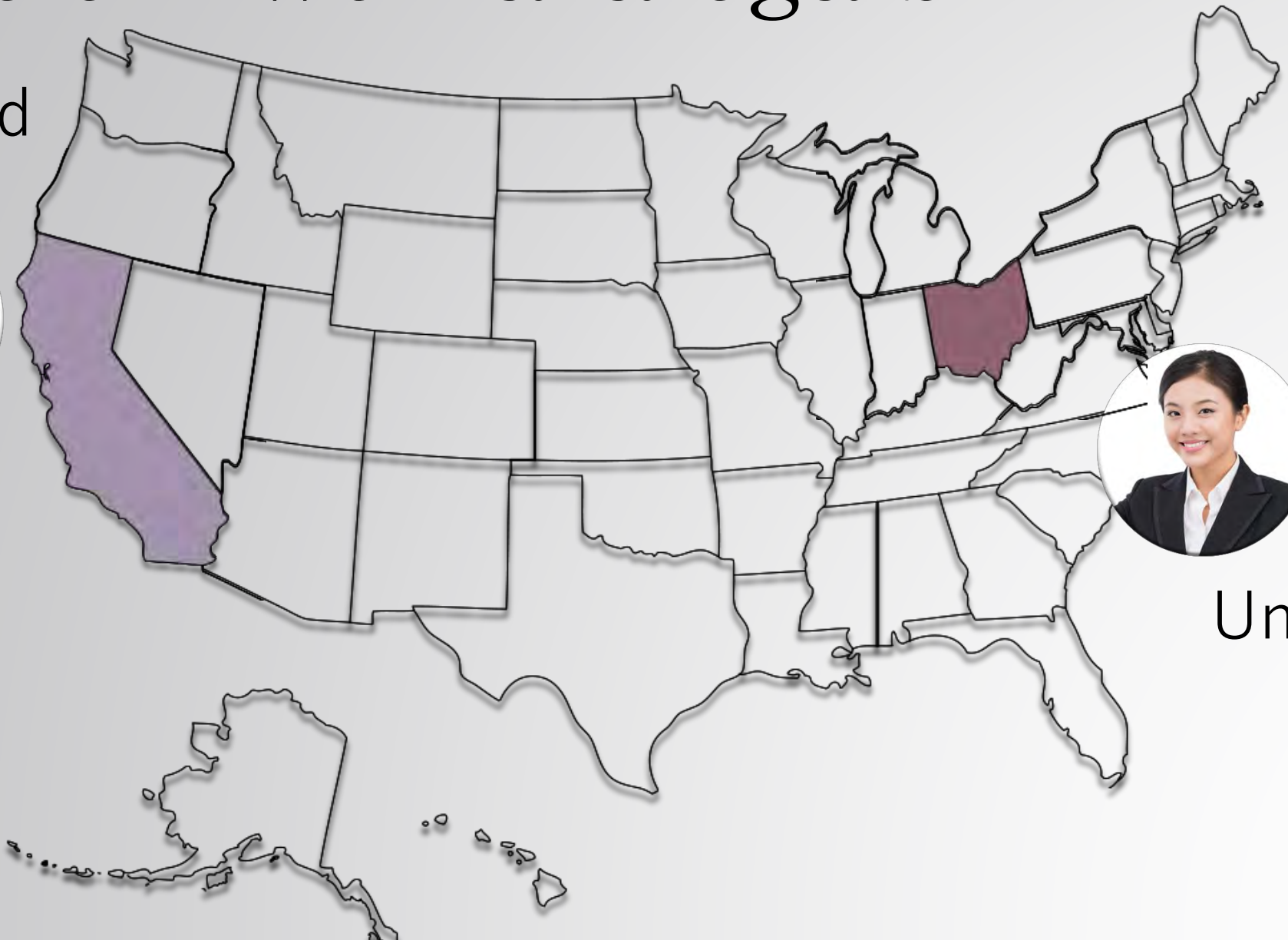


Wages After Enactment



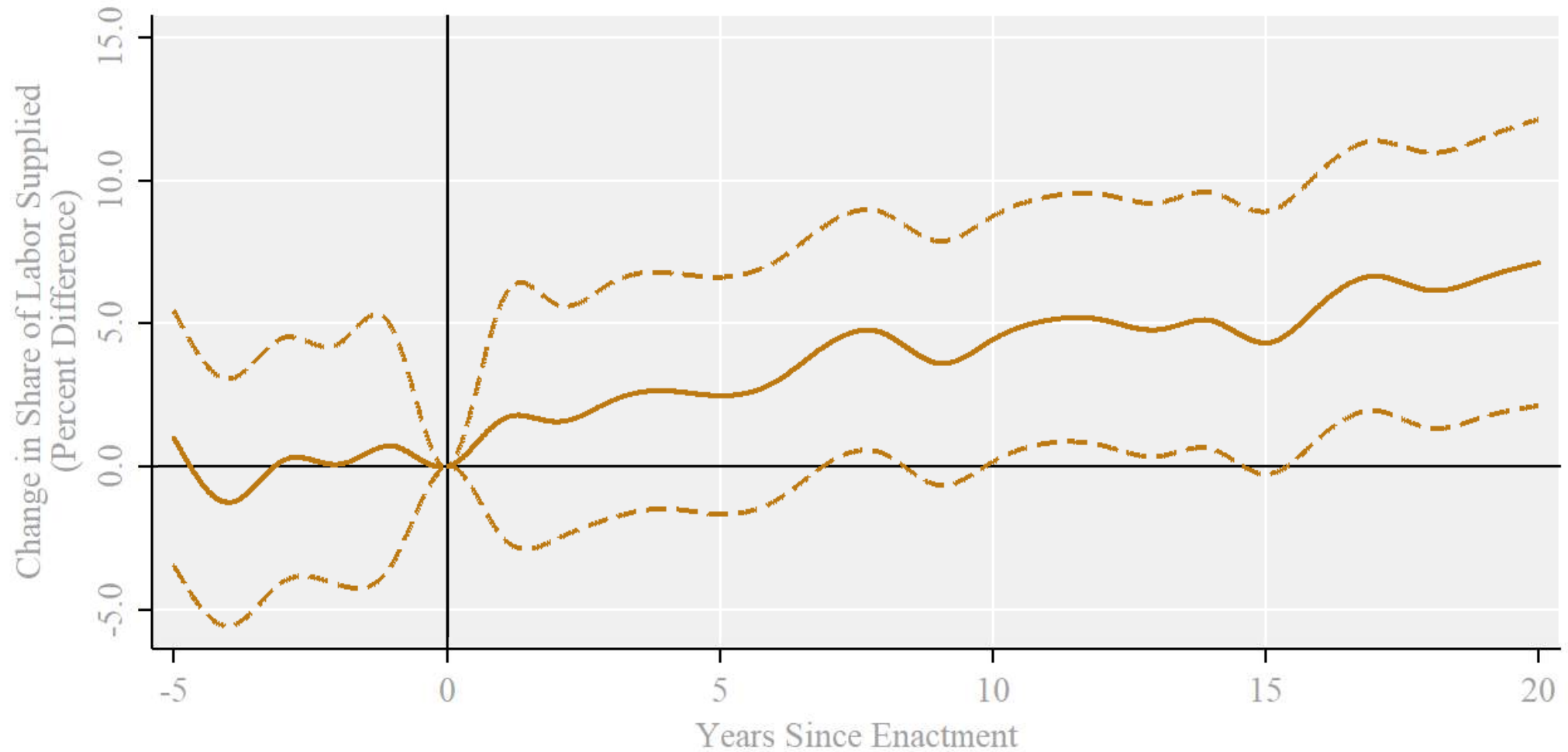
A Tale of Two Paralegals

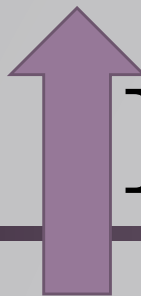
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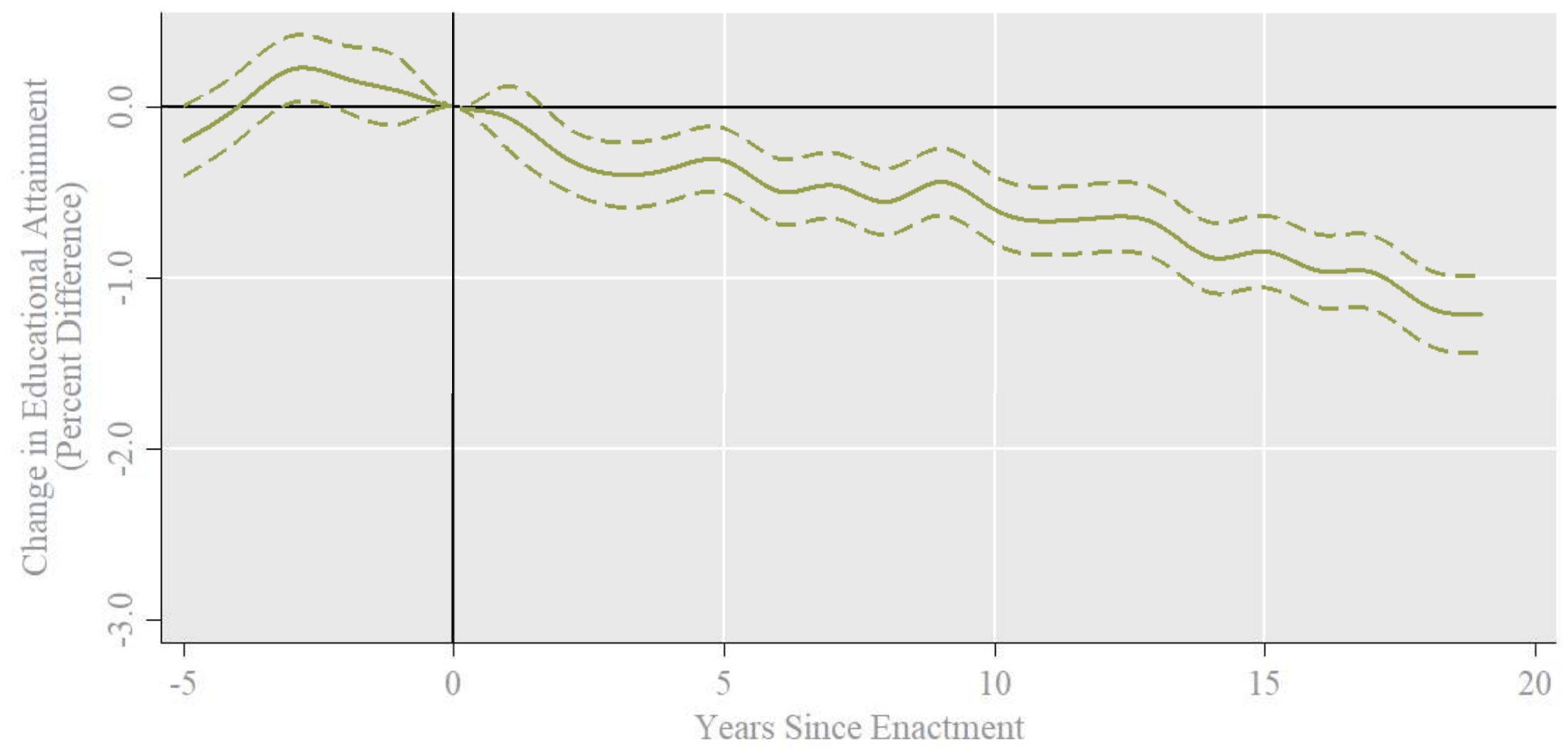
Unlicensed

Decrease Supply?

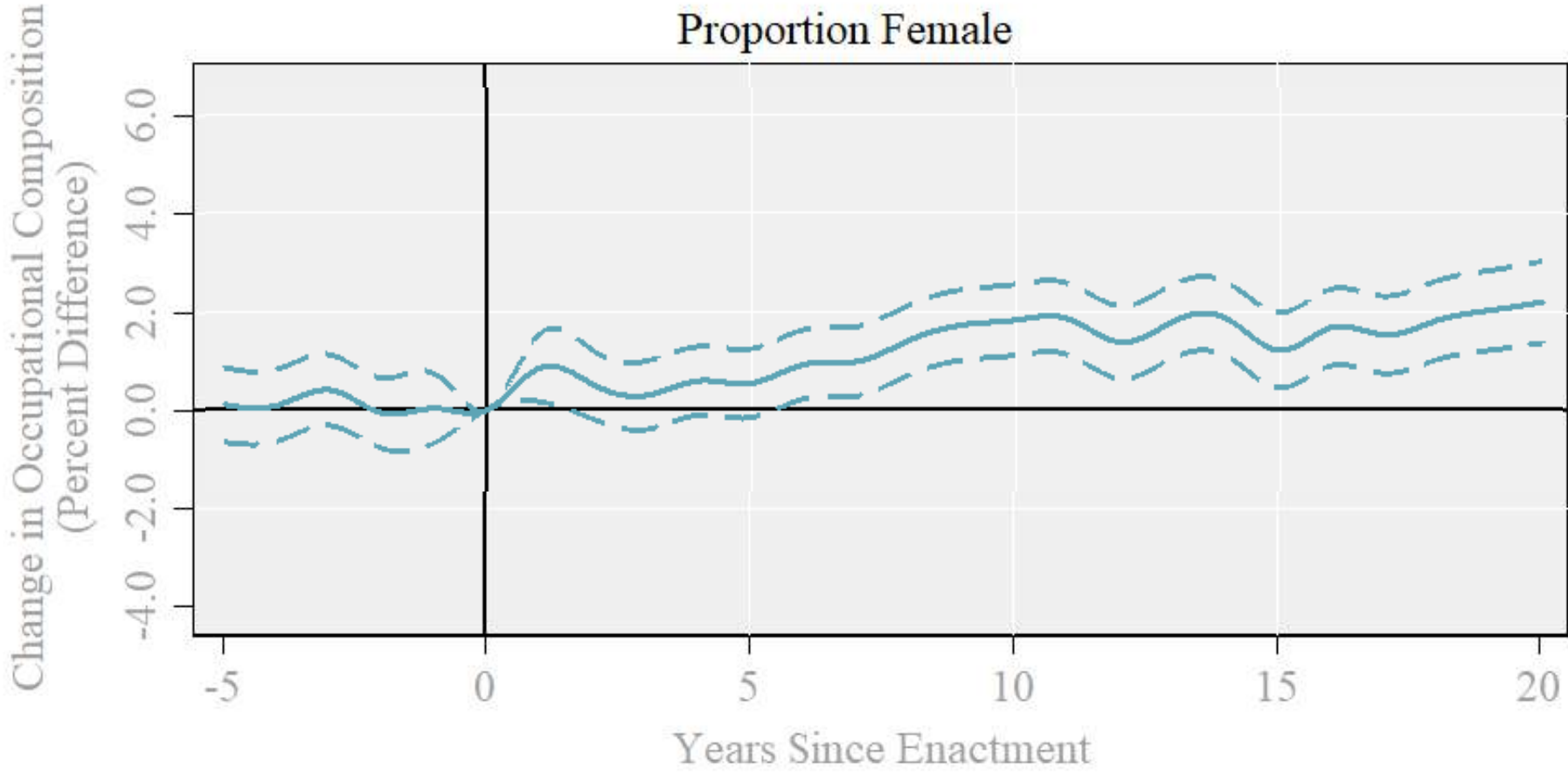




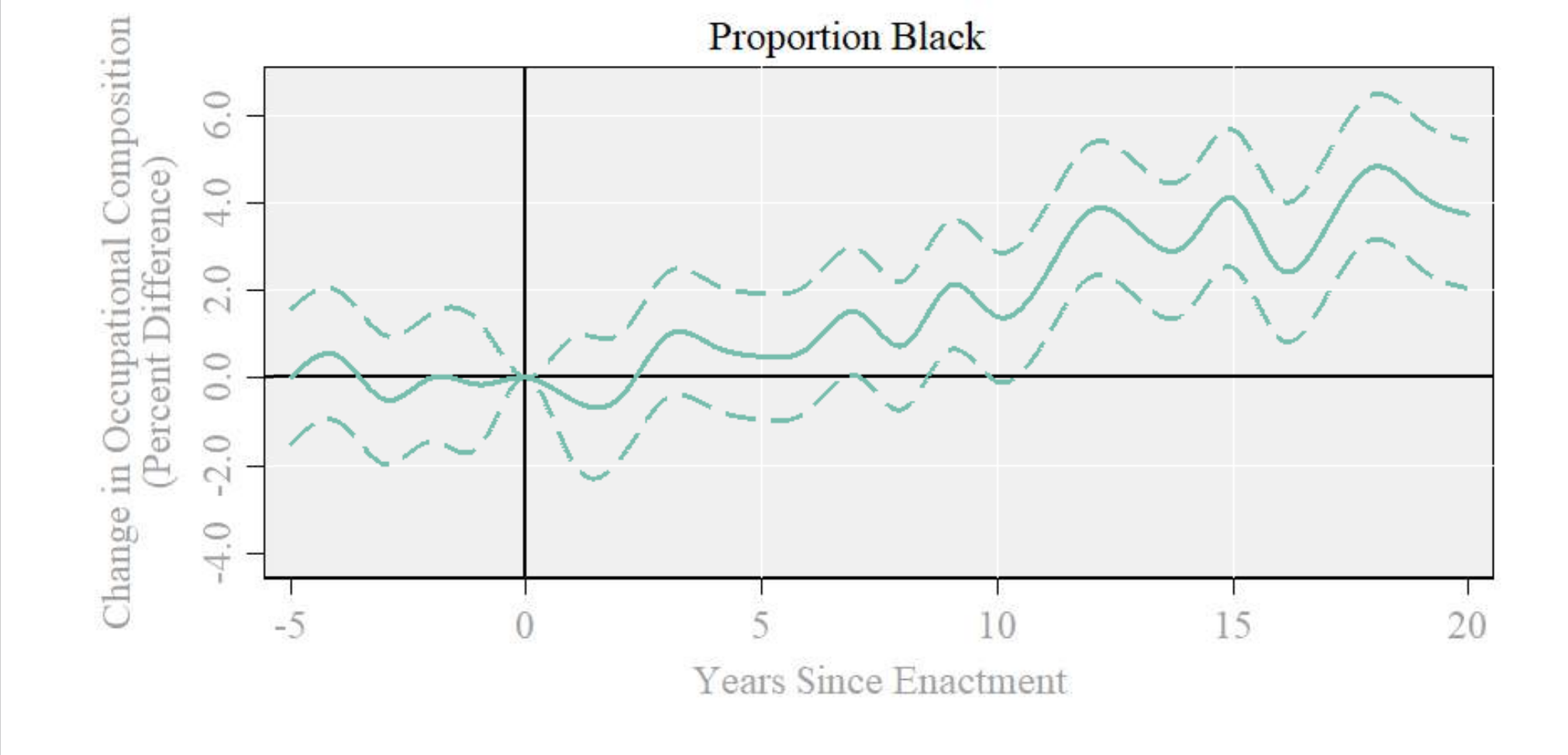
Increase Quality?



Increased Access



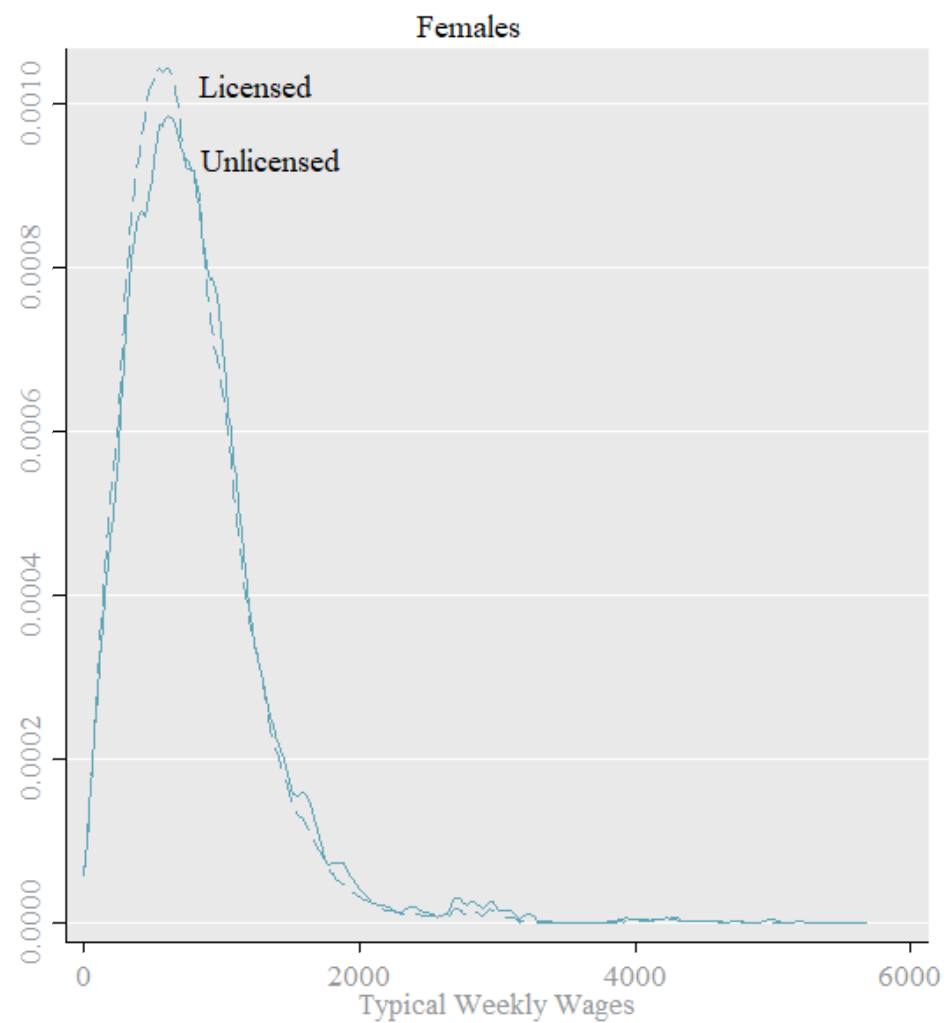
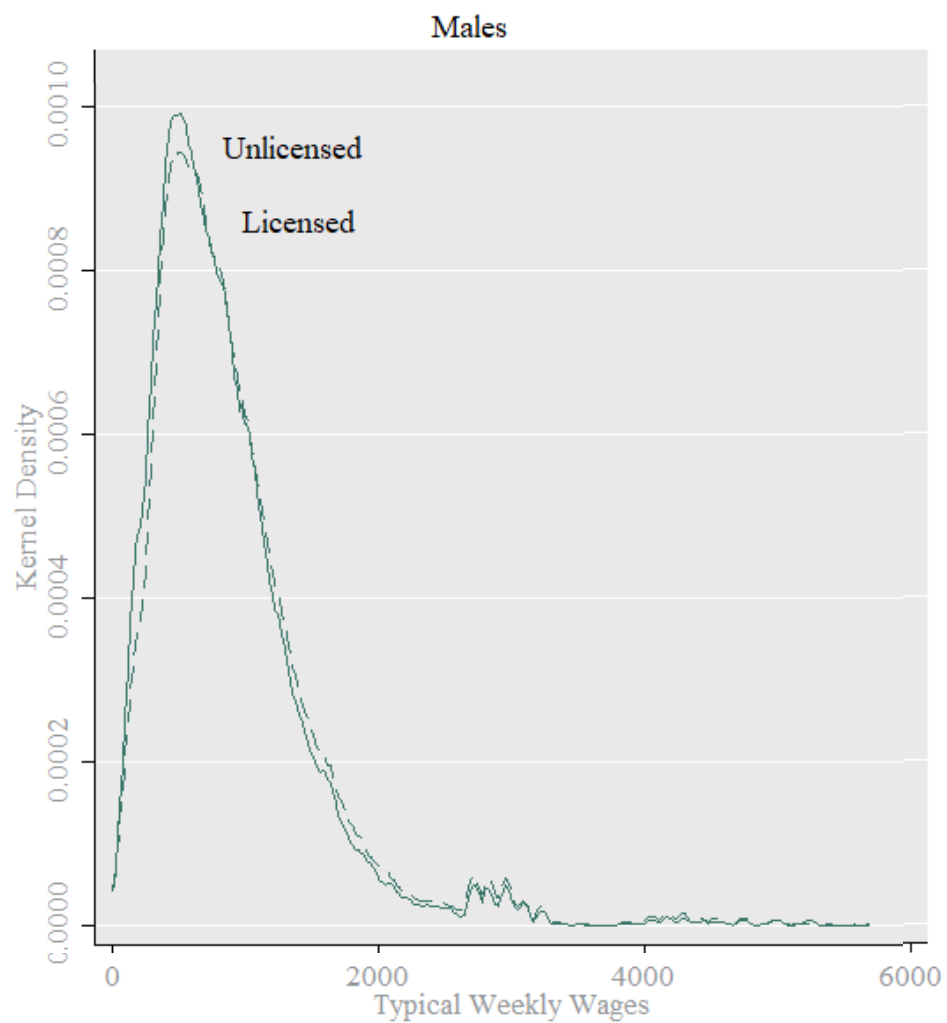
Increased Access



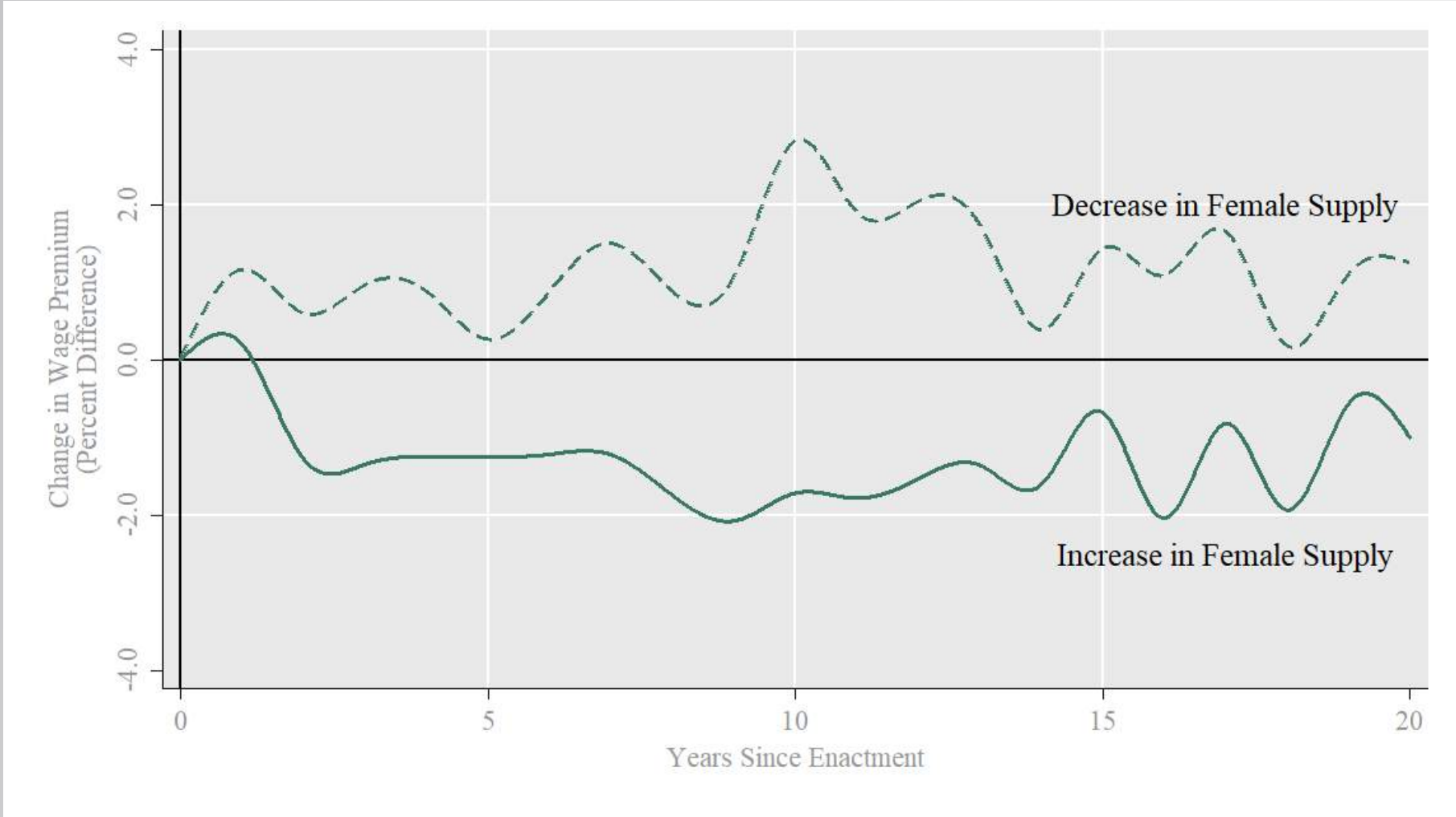
Other Effects



What Happened?

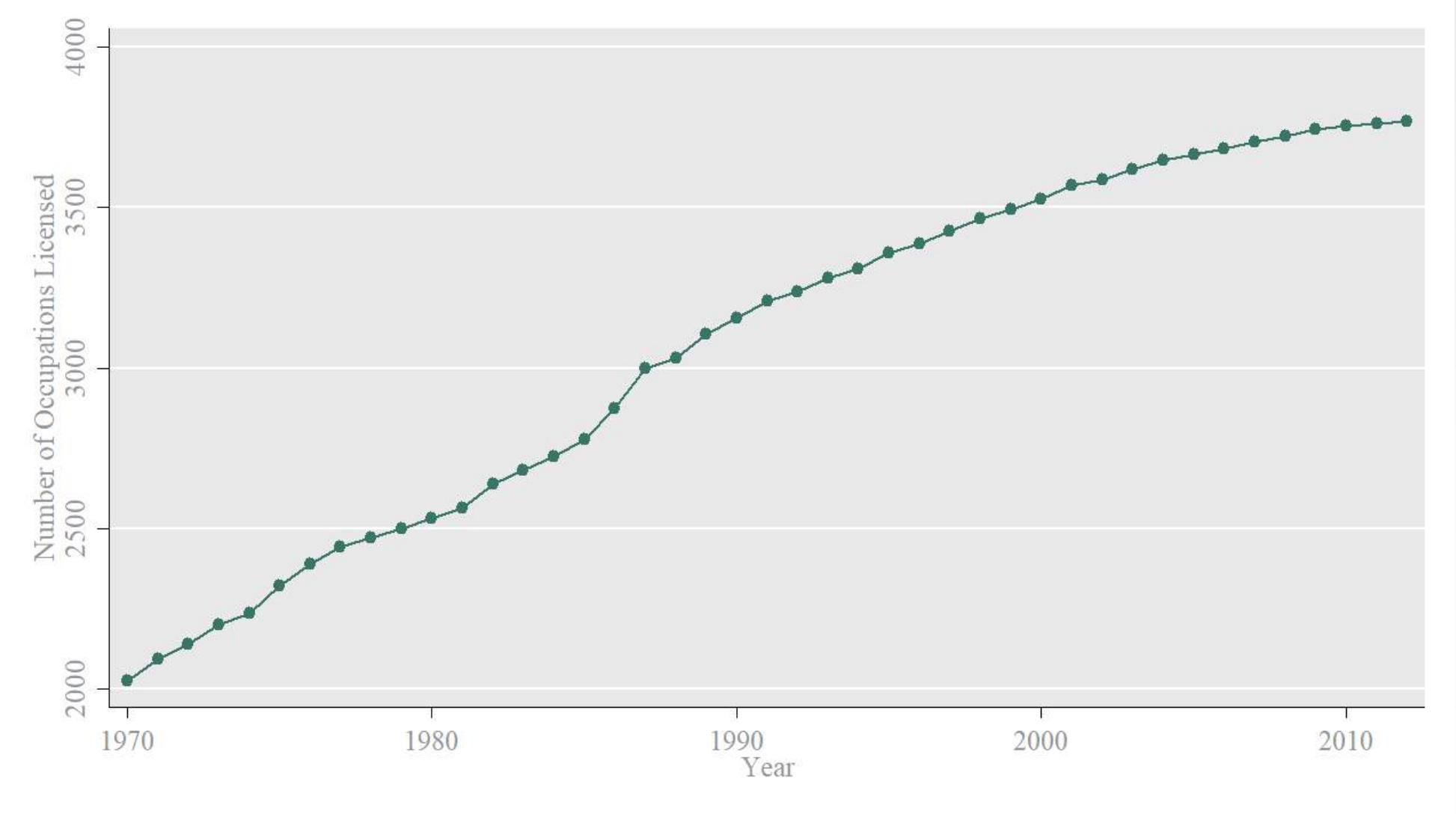


What Happened?



Promoting Safety and Competence?

Growth in Licensing Laws



Why does licensing appear?

- Occupations want it (control or money)
- Employers do not want it (money)
- States and public interest
- It is something to do. . . .

Where does licensing appear?

Characteristics of the occupation

1,734 New Licensing Laws (1970-2016)

Things that increase licensing:

Occupational skill

Working directly with customers

Dangerous or hazardous occupations

Lower wages

Donating to winning executive branch candidates

Where does licensing appear?

Characteristics of
employers

1,734 New Licensing Laws (1970-2016)

Things that increase licensing:

Smaller firms

NOT donating to candidates

Where does licensing appear?

Characteristics of the state

1,734 New Licensing Laws (1970-2016)

Things that increase licensing:

Lower taxes

More Democratic control of legislature

More revenue from licenses

If other states license it

Questions?

Thank you.

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Executive Orders: Where Executive Branch Authority Starts and Stops

Jennifer Ancona Semko, Esq. (Baker McKenzie LLP)

Friday, January 26, 2018

10:45 – 11:30 am

Discussion Overview

- Why this should matter to you (hint: teeth whitening)
- Civics refresher (How much do you remember from 8th grade?)
- Can the Governor do that? (Ask Kentucky)
- Other notable Executive Orders and state actions

Why this matters: *NC State Dental Board*

What's that case about again?



February 2015 US Supreme Court Ruling

“If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity . . . is to be invoked.”



Background of the case

- NC Board reviewed practice act
 - Concluded act permitted only dentists to whiten teeth
 - Sent cease-and-desist letters to teeth whiteners and others
- FTC opened investigation in 2008
- June 2010: FTC concluded board's actions were anticompetitive and brought administrative complaint



Board defense: State Action Immunity

- NC Board defense: exempt from federal antitrust laws because authorized by the state and protected by **state-action immunity**
- FTC argued NC Board is a **private actor** and must therefore meet highest standard to receive immunity
 - clearly articulated policy to displace competition *and*
 - active supervision by the state
- Primary reason: Board is “**a regulatory body that is controlled by participants in the very industry it purports to regulate**”

Supreme Court ruling and fallout

- **Majority's Conclusion:** Because a “controlling number” of the Board’s decision makers are “active market participants in the occupation the Board regulates,” the Board is treated as a private actor and must show active supervision by the State
- How much state supervision is required? (1) supervisor must review substance, not merely procedures; (2) must have power to veto/modify; (3) mere potential for supervision not enough; and (4) supervisor can’t be active market participant
- But many unanswered questions . . .

What does this mean for state boards?



“You’re just going to feel a little pinch, then a horrific burning pain, your eyes will roll back into your head, you will drool uncontrollably...”

Civics Refresher: Separation of Powers

Three branches of government:

- Legislative: makes the law
 - Executive: enforces the law
 - Judicial: interprets the law
-
- Intent: prevent the concentration of power and provide for checks and balances



Federal Executive Power

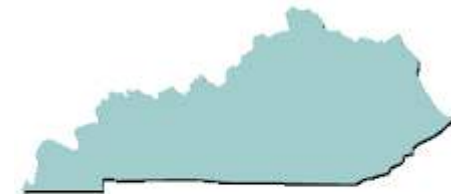
- Vesting clause in Article II of the US Constitution places no limits on the Executive branch (“The Executive Power shall be vested in a President of the United States of America.”)
- **Executive order:** issued toward officers and agencies
 - US Constitution does not mention “executive orders,” but gives President power to “take care that the laws are faithfully executed”
 - Every President (save one) has used/issued them
 - Most famous: Emancipation Proclamation
 - Infamous: Japanese-American internment

State agencies

- Generally creatures of statute; powers often are circumscribed by the legislative branch
- Have powers provided by statute, often including the power to promulgate rules and regulations
- Governors often have power to appoint members of regulatory boards; sometimes power to remove
- Some consider agencies a “fourth” branch of government with legislative, executive and judicial powers

Executive Orders after *NC State Dental*

- States have dealt with the “active supervision” requirement in a variety of ways
- Since agencies are creatures of statute, a logical way to create missing “active supervision” is through legislation
- But in some states, change has occurred through an act of the governor, via Executive Order
- Most dramatic? Kentucky . . .



Bluegrass Battle

- Kentucky AG Andy Beshear v. Governor Matthew Bevin
- Multiple lawsuits following governor's attempts to reorganize state boards via Executive Order



Bluegrass Battle

- **ROUND ONE:** Governor Bevin issues an Executive Order eliminating and then replacing the state board overseeing the University of Louisville. AG Beshear files suit.
- **ROUND TWO:** Governor Bevin issues Executive Order eliminating and then replacing the state board overseeing the State Retirement Systems. AG files suit.
- **ROUND THREE:** Governor Bevin issues Executive Order eliminating and then replacing the state board overseeing seven state education boards. AG files suit.

Bluegrass Battle



- Retirement System suit: dismissed early January 2018
- Judge: Although suit “raised valid legal questions,” legislation passed in 2017 ratified most of the governor’s reorganization, making lawsuit moot
- Univ of Louisville suit dismissed for same reason in Sept 2017

Bluegrass Battle

- In June 2017, Governor put on hold plans to reorganize approximately 40 medical and professional licensing boards, after AG announced he would bring legal challenge
- Education Boards suit is pending
 - Survived motion to dismiss in lower court in August 2017
 - Headed to Kentucky Supreme Court
- Governor relies on Kentucky Statute 12.028, which gives him the power to “temporarily” create, alter or abolish any organizational unit or governmental body “between sessions of the General Assembly”

Kentucky Education Board suit: A closer look

- Education Professional Standards Board—created by statute, but Executive Order:
 - Abolishes board; all members’ terms “expire and cease to exist”
 - Reduces number of members from 17 to 15; re-creates board with largely same powers/duties
 - Changes requirements for those who must be appointed
 - Takes power to appoint Exec Director from Board and gives to Governor
 - Takes away teachers’ statutory right to immediate “court” appeal of adverse administrative decisions; appeal goes to Board of Education

Kentucky Education Board suit: A closer look

- Governor takes similar actions regarding other boards, including: no staggered terms, power to remove members for missing meetings, changing number of members appointed by Governor
- Attorney General's arguments:
 - Governor cannot suspend laws
 - Governor has no authority to make a law
 - Governor has to faithfully execute the law
 - Violation of separation of powers
 - Governor's actions cannot be justified under KRS 12.028

Other post-*NC State Dental* Executive Orders

Alabama: Executive Order Number 7 (June 23, 2015)

- Voluntary program whereby boards controlled by active market participants can submit “actions and/or rules” for review
- Creates Alabama Office for Regulatory Oversight of Boards
- Board is authorized to ensure that “Submitted Actions” are based upon clear state authority and to veto or modify Submitted Actions “as the Secretary deems necessary”

Other post-NC State Dental Executive Orders

- **Arizona:** Executive Order 2017-03 (March 29, 2017).
Apparently is precursor to reducing number of licensing boards by seeking information about “onerous licensing requirements”
 - Identify licensure requirements, as well as “requirements in excess of the national average for that license”
 - If fewer than 24 states license that profession, justify the potential harm created by non-licensure
- Governor also signed act restricting boards from issuing regs that limit entry to a profession/trade unless necessary for health and safety

Other post-*NC State Dental* Executive Orders

- **Delaware:** Executive Order No. 60 (April 20, 2016)
 - Creates Professional Licensing Review Committee
 - . . . to conduct a comprehensive analysis of composition, licensing requirements and state oversight of all professional boards
 - Committee to report to Governor and General Assembly and make recommendations to remove overly burdensome licensing requirements and for actions that will alleviate antitrust risk

Other post-*NC State Dental* Executive Orders

- **Massachusetts:** Executive Order No. 567 (March 28, 2016)
 - Instructs Director of Public Licensure and Commissioner of Public Health to disapprove of any rule with an anti-competitive effect that doesn't further an important policy goal
 - And to consider anti-competitive consequences of acts relating to scope of practice, licensing requirements, pricing, etc.
 - And to provide a public report of rules approved/disapproved

Other post-*NC State Dental* Executive Orders

- Massachusetts Executive Order was followed by House Bill 4188
 - Provides for approval/disapproval of rules/regulations by commissioner of public health and by director of professional licensure
 - Provides for other changes in approval of educational requirements for covered professional boards

Other post-*NC State Dental* Executive Orders

- **Michigan:** Executive Order No. 2017-3 (April 17, 2017)
 - Transfers functions, powers, and duties of six boards to the Department of Regulatory affairs
 - Nominally a change “in the organization of the Executive Branch of government.”
 - Invokes constitutional authority for governor to make changes in executive branch or in assignment of functions among its units.
 - Boards thereafter give “recommendations and advice.”

Other post-*NC State Dental* Executive Orders

- **Oklahoma:** Executive Order 2015-33 (July 17, 2015)
 - Re boards with a majority membership of market participants:
 - Determines that “**rulemaking**” has sufficient oversight/active supervision by governor and legislature.
 - Not so for “**licensure or prohibition actions.**”
 - All “non-rulemaking” actions must be **submitted to the AG** for review and written analysis of possible violation of law.

A Different Executive Action Approach

- **Ohio's Executive Budget** through FY 2019:
 - Proposed multiple consolidations of professional licensing boards:
 - Budget proposes to “merge the functions and duties of the State Board of Psychology into the State Behavioral Health and Social Work Board” in January, 2018.
 - Budget also mentions creation of this Board by consolidating Chemical Dependency, Counselor/Social Worker, Psychology, and Marriage/Family Therapist Boards via proposed legislation.

Legislative Action Example

- **Mississippi HB 1425 (effective July 1, 2017):**
 - “Occupational Board Compliance Act of 2017”; passed in response to the *Dental Board* case: anti-trust concerns.
 - Creates Occupational Licensing Review Commission: the Governor, Secretary of State, and Attorney General or their designees.
 - Responsible for active supervision of executive branch occupational licensing boards – other than individual disciplinary actions.
 - Boards must submit proposed rule to the Commission before filing/effective for “approve, disapprove, disapprove with suggested amendment or withdraw” determination.

Any questions?

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New Legislation Affecting the Regulatory Community

Amy H. Richardson, Esq.

Friday, Jan. 26, 2017

11:30am – 12:15pm

Amy H. Richardson

Attorney

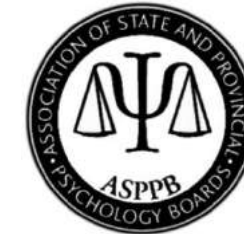
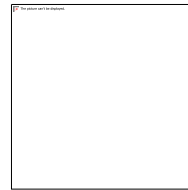
Atkinson & Atkinson, LLC

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847-714-0070

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Federation of Chiropractic Licensing Boards



Federal Legislation

- Restoring Board Immunity Act
- Professional Licensing Consortium – new LGAA
- ALLOW Act
- Veterans E-Health & Telemedicine Support Act
- New HOPE Act
- Concealed Carry Reciprocity Act
- Collateral Consequences Reduction Act Model Legislation
- Right to Earn an Living Model Legislation

Restoring Board Immunity Act (RBIA)

- Proposed in the House (by Issa) and Senate (by Lee)
- Provides boards with antitrust immunity IF state adopts one of two reform frameworks:
 - Meaningful active supervision OR
 - Meaningful judicial review

HB3446 and SB1649 currently in committees

- **Section 4 - Immunity**

- Board members would be immune from private actions and from claims for damages for anti-competitive conduct. Claims limited to injunctive relief.
- Section 4(d)- Board members would continue to be subject to antitrust liability (including treble damages) for non-licensure related anticompetitive conduct--conduct unrelated to the vetting of qualifications of entrants to the occupation--e.g., minimum pricing or residency requirements.

- **Section 5 - Active Supervision**

- Clearly articulated state policy – Board actions must be authorized by non-frivolous interpretation of licensing laws
- Licensing use permitted only where less restrictive regulatory approaches are not sufficient
- Create State Office of Supervision of Occupational Boards
- Create statutory affirmative defense; burden shifting and intermediate scrutiny
- Create sunrise and periodic sunset reviews of licensing laws

- **Section 6 - Judicial Review**

- Clearly articulated state policy and licensing is least restrictive means (same as in Section 5)
- Implement Judicial Review Legislation
 - Increase standard of review to intermediate scrutiny (from rational basis): “**substantially** related to achievement of an **important** government interest in protecting against **real, substantial** threats to public health, safety or welfare”
 - Create statutory affirmative defense (same as Section 5)
 - Create statutory award of costs and attorney fees to any person successfully challenging the enforcement of a licensing law (*unclear whether this section applies to defending the law as well such that boards may recover*)
- Faithful Application of Intermediate Scrutiny – no hypothetical risks to justify law; **no deference to board factual determinations of legislature or board or attorney general** – court must exercise independent review

Antitrust Immunity Draft Legislation

- **Professional Licensing Coalition - draft legislation with Judiciary Committees in House and Senate.**
- Intent: to eliminate potential for antitrust treble damage liability against boards and their members, while permitting injunctive relief by government enforcers and private parties.
- Type of legislation is not unprecedented - see Local Government Antitrust Act of 1984 - applies to municipalities.

Federal ALLOW Act

- **Alternatives to Licensing that Lower Obstacles to Work Act of 2016**

- Authorizes individual to engage in an occupation on a military installation located on federally-owned land
- Endorses occupational licenses and certifications granted by a state (including DC), regardless of whether the installation is located in the issuing state or DC

Conditions:

- license or certification is not expired, revoked, or suspended by the issuing state; and
- no outstanding licensure enforcement actions by board or certifying authority

in Committee on Homeland Security and Governmental Affairs

Federal New HOPE Act

- **New Hope and Opportunity through the Power of Employment Act (New HOPE Act)**
 - Would allow governors to use existing federal funds for technical education “to identify and eliminate excessive occupational licensure.”
 - Amends federal law allotting money to states for use in technical education to say: “The State leadership activities described in subsection (a) shall include ... *consulting and coordinating with other State agencies for the identification, consolidation, or elimination of licenses or certifications which pose an unnecessary barrier to entry for aspiring workers and provide limited consumer protection.*”

HR2155 in House Committee on Education and the Workforce

Veterans E-Health & Telemedicine Support Act

- **Nov. 2017 – HB2123 passed**

- Allows “covered health care professional” to practice in any state when using telemedicine.
- VA regulations already allowed providers licensed in good standing in one state to see patients in person in any other state, but not re: telehealth
- Currently: patients can receive care via telemedicine only when in the state where telemedicine provider is licensed.
- Requires VA to submit a report on the effectiveness of telemedicine w.in year of enactment

Veterans Community Care and Access Act of 2017 – SB2184 in Committee on Veterans Affairs

Telepractice in Texas

- **Texas SB 1107 – New Telemedicine Regulations**

- Last state to allow physicians to connect with new patients via telehealth, rather than in-person
- Law also establishes that telemedicine visits have to be held to the same standards of care as in-person visits
- Signed by Governor Abbott in May 2017
- Puts an end to two year legal battle between Teladoc and Texas medical Board
- FTC also closed its investigation in June 2017

Model Legislation Right to Earn a Living Act

- **Model legislation:**

- Entry into a profession “shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.”
- Individuals may challenge a regulation – court must find by preponderance of the evidence that reg. burdens entry into an occupation and that state failed (by same standard) that the reg. is “necessary to specifically fulfill a public health, safety, or welfare concern.”
- TN and AZ have both enacted...

Model Legislation – Collateral Consequences

- **Sept. 2017: American Legislative Exchange Council (ALEC) developed the “Collateral Consequences Reduction Act Model Legislation” as proposed bills for 2017.**
 - Model law: regulatory boards may only disqualify individuals from licensure if the criminal record at issue includes a conviction for a *felony or violent misdemeanor*, the type of crime is expressly codified in the statute as a disqualifying offense, and *“the board concludes the state has an important interest in protecting public safety that is superior to the individual’s right.”*

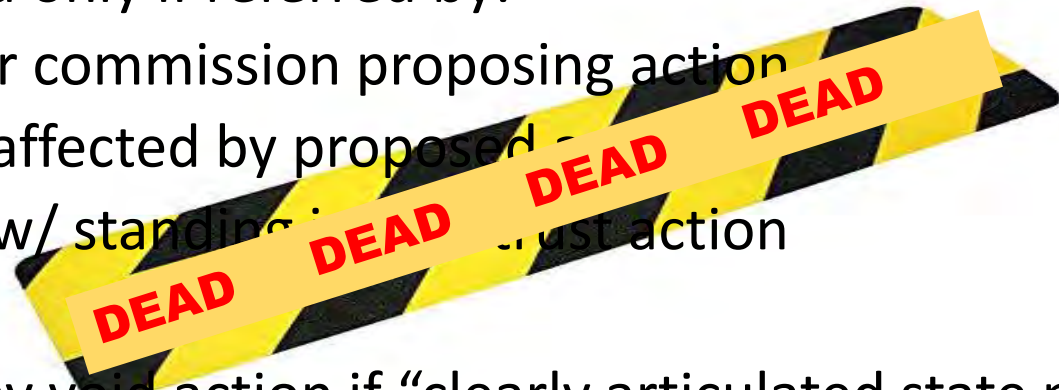
Licensing Reform

- **Board Consolidation**
 - Ohio
 - Kansas
- **Licensing Reforms**
 - Mississippi
 - Connecticut
 - West Virginia
 - Michigan
 - Washington
 - Wisconsin
 - S. Dakota

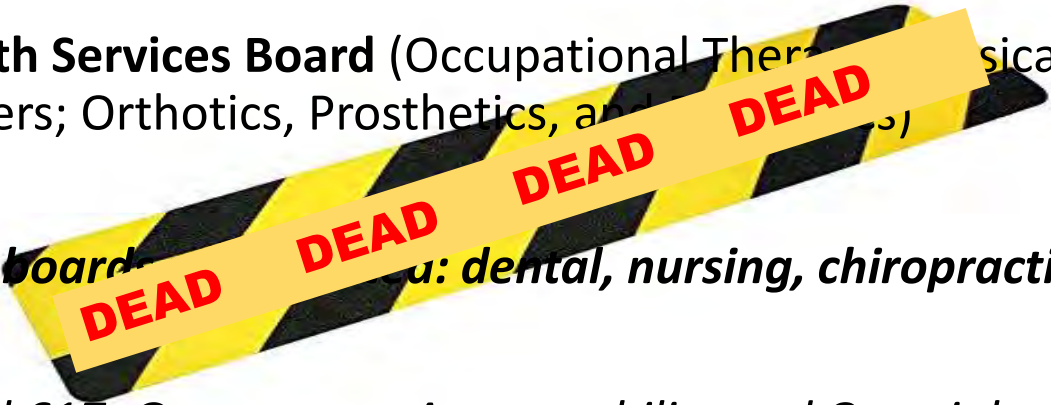
Update: Consolidation of Boards - Ohio

- **November 2016: Proposed Bills to Consolidate Health Boards**

- Director of DAS would review actions that trigger anti-trust scrutiny and only if referred by:
 - board or commission proposing action
 - person affected by proposed action
 - person w/ standing to bring anti-trust action
- Director may void action if “clearly articulated state policy” determined to be pretext for anti-competitive conduct



Update: Consolidation of Boards - Ohio

- **Vision and Hearing Professionals Board** (Optometry; Optical Dispensers; Hearing Aid Fitters & Dealers; Speech-Language Pathology and Audiology)
 - **Behavioral Health Professionals Board** (Chemical Dependency Professionals; Counselor, Social Worker, & Marriage and Family Therapist; Psychology)
 - **Physical Health Services Board** (Occupational Therapists; Physical Therapy & Athletic Trainers; Orthotics, Prosthetics, and Podiatry)
 - **Only medical board** (Dentistry: dental, nursing, chiropractic)
- 
- *House Bill 617: Government Accountability and Oversight Committee*
 - *Senate Bill 366: State and Local Govt Committee*

Consolidation of Boards - Kansas

- **Kansas legislature formed special committee responding to 2015 private efficiency study**
 - Considered 3 umbrellas: general industry, public health, financial industry
 - Opposition from majority of boards to be affected (incl. optometry, nursing, pharmacy, dental, cosmetology, etc)
 - 1 change recommended: moving board of hearing aid examiners under Dept for Aging and Disability Services (also houses Board of Audiologists and Speech Pathologists)

Licensing Reform - Mississippi

- **April 2017: MS law provides oversight of regulatory boards**
 - HB1425 creates panel led by Governor to vet regulations proposed by boards - Occupational Licensing Review Commission.
 - Proposed regs must be submitted to Comm'n for approval; Comm'n supervision does not include individual disciplinary actions.
 - Boards not composed primarily of active market participants not affected
 - Law narrows definition of the “harm” against which occupational licensing is designed to protect consumers. Now refers to “present, significant and substantiated harms that threaten public health and safety.”

Licensing Reform – Connecticut

- **June 2017: CT eliminated licensure or certification for 5 occupations**
 - SB191 tasked Dept. of Consumer Protection & Occupational Licensing with review of licensing requirements and make recommendations
 - Eliminated: swimming pool assembler's license, athlete agent registration, shorthand reporter license, itinerant vendor license, liquor wholesaler's salesman certificate.

On the Docket: W. Va May Eliminate Funeral Board

- **Jan. 2018 Legislative Auditor report: Board protected licensee over public.**
 - Delays in pursuing action against licensee convicted of numerous racketeering charges
 - Report recommended terminating Board and moving functions to Sec. of State
 - Joint Gov't Organization approved bill for introduction

On the Docket – More Deregulation

- **MI HB 4608: exempts painters and decorators from the list of trades authorized under a residential maintenance and alteration contractor license.**
 - “specialty contractor” may execute a contract involving the performance of the craft or trade *for which the license specifies* and one or more other crafts or trades as long as the performance of that other craft or trade is incidental and supplemental to the work performed under the contractor's license.
 - Painters and decorators would no longer need M&A Contractor license.

Passed House; currently in Senate Committee on Regulatory Reform

Licensing Reform - Washington

- **HB 1361 looks to online rating systems as substitute for regulation**
 - Proposes to use “public feedback structure” to replace state-based regulation for seven professions.
 - Animal massage, auctioneers, boxing announcers, fishing guides, landscape architecture, manicurists, equine dentistry
 - Department of Licensing to create website for public comment and reviews
 - Those working in the seven fields required to register with the website or face ban on its use or civil penalty
 - Links on website to “enforcement actions” taken by Dept.

in House Committee on Business & Financial Services

Licensing Reform - Wisconsin

- **WI bills being considered:**

- SB288: creates Occupational License Review Council - makes policy recommendations to legislature by 12/18
- SB296: pathway for self-certification for certain occupations incl. dietitians, landscape architects, private detectives, sign language interpreters, etc.
 - “License” includes “the inclusion by the department of safety and professional services of an individual in the self-certification registry
 - “State-approved supporting organizations”

Compacts – Wisconsin

- **Nov. 2017 - Became 27th state to join Enhanced Nurse Licensure Compact.**
 - Appears to have had overwhelming support of licensees and state board
 - Support gained momentum with recent disasters – Texas, Florida, other states
 - Report: TX issued 600 temp. license to nurses from non-compact states

Compacts – South Dakota

- Governor's Bill – draft legislation provided to SD licensing boards in Nov. 2017
 - Grants 18 month temporary license (24 mos. for military spouses) to anyone with “valid, full, unrestricted license issued by a member state” and whose license is in “good standing” in every state where licensed.
 - License must be issued within 30 days of application
 - Result of reported consensus at Western Governors Association meeting and drafted with help from U.S. Dept. of Labor

Criminal Convictions

Criminal Convictions – Restrictions on Use

- **Illinois – SB 42 – Health Care Worker Waiver**

- Allows those with forcible felonies on their records (other than sexual offenses) to seek waivers from the state to obtain health care worker licenses
- Convictions had to have occurred more than five years prior to applying for a waiver.
- Dept. has discretion to deny if other evidence demonstrates that indiv. Is not fully rehabilitated.

Criminal Convictions – Restrictions on Use

- **Illinois - HB 5973 – Occupational Licensing and Criminal Convictions**
 - Prohibits the Illinois Department of Financial and Professional Regulation from barring former offenders from working in a variety of fields unless they've been convicted of a crime “directly related to the occupation.”
 - Applies to barbers, cosmetologists, hair braiders, estheticians, nail technicians, roofing business owners and funeral directors.

Criminal Convictions – Restrictions on Use

- **Kentucky SB 120**

- Signed by Governor April 2017
- The bill allows occupational licensing boards the freedom to decide whether a prior offense should preclude an individual from obtaining a license. Denials no longer automatic and a fair appeals process established.

- **Nebraska LB 299**

- Occupational Board Reform Act (follows Governor Ricketts' Executive Order)
- Still pending in Govt., Military, & Veterans Affairs Committee

New Licensing Initiatives

New Licensing – Massage Therapists

- **Oklahoma – Effective May 1, 2017**

- State Board of Cosmetology and Barbering is enforcing the Massage Practice Act
- Statewide license instead of local and municipal licenses
- \$25 initial fee; \$50 renewal every two years
- https://www.ok.gov/cosmo/Massage_Therapy/index.html

On the Docket – Music Therapy

- **NC HB 192: Creates the state Recreational and Music Therapy Licensure Board.**
 - Licensure for both music therapists and their assistants
 - Specialized education requirements; pass exam approved by Board or be certified by the National Council for Therapeutic Recreation
 - Reciprocity provisions – 10 states regulate profession

Passed the house, currently in Senate Committee on Rules & Operations

On the Docket: Occupational Health & Safety

- **The Board of Canadian Registered Safety Professionals calling for regulation of occupational health and safety professionals**
 - Indivs. administer OHS in the workplace and at the scene of workplace accidents.
 - Currently no provincial regulation of individuals, although licensure is required for those working on federal projects.

On the Docket: Dental Anesthesia

- **Alberta Dental Assoc. & College investigating death of young girl after receiving anesthesia in Alberta dental office**
 - Alberta recently enacted law prohibiting a dentist from dual roles: administering general anesthesia and performing related dental procedure. – joins all but one province.
 - The Royal College of Dental Surgeons of Ontario - currently reviewing standards to determine if a separate operator is needed.

Other Issues

Safe Harbor Exam Score Invalidation – Connecticut

- **Public Act 17-146 – Section 24** (Effective October 1, 2017)
 - Board SHALL not take disciplinary action against a licensee who received notification on or before October 1, 2017, that their score on the national board examination was invalidated if the licensee re-takes and passes the exam on or before October 1, 2018.
 - A licensee who fails to pass the exam upon re-take shall have his or her license annulled.
 - Arose out of an exam security breach involving hundreds of students/test-takers

Scope of Practice

- **British Columbia: unregulated counsellors cannot provide services to refugees**
 - Interim Federal Health Program: refugees to Canada can receive up to 10 sessions with a psychologist, psychotherapist or counselling therapist within their first year of arrival.
 - Reimbursement requires that providers be registered or licensed – in B.C. they are not.
 - Federation of Associations for Counselling Therapists in B.C. is pushing for regulation

Scope of Practice

- **Illinois Nurse Practice Act – HB 313** (September 2017)
 - Provides APRNs additional autonomy to accept and treat patients, make referrals and enable them to prescribe certain medications
 - Eliminates need for APRNs collaborative agreement with physicians under specific conditions (certain education/training) (full practice authority)
 - Will assist with affordability and access to healthcare in underserved rural with physician shortages

State of Emergency Assistance

- **Pharmacy boards issue guidelines for licensees where declared states of emergency exist**
 - FL Exec. Order: pharmacists could refill 30-day prescriptions early for maintenance meds
 - AL Exec. Order: time frame for emergency refills extended from 72 hours to 30 days
 - GA Board: Temporary recognition of non-resident licensees and temporary pharmacy facilities
 - Others...

Uniform Applications

- **OK Medical Board first state to use uniform application for Physician Assistants**
 - Developed by Fed. Of State Medical Boards & American Acad. of PAs
 - Form can be used in numerous jurisdictions
 - Data repository stores info permanently

THANK YOU!

Please forward new legislation to:

FARB@FARB.org

- or -

amy@atkinsonfirm.com

-or-

mailin@atkinsonfirm.com

Atkinson & Atkinson, LLC

1466 Techny Rd.

Northbrook, IL 60062

Tel. 847-714-0070

Reducing Friction in the Licensure Process

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA



Reducing Friction in the Licensure Process

Veronica L. Meadows, CAE

Friday, January 26, 2018

1:15 p.m. – 2:00 p.m.

What is
“Friction”?

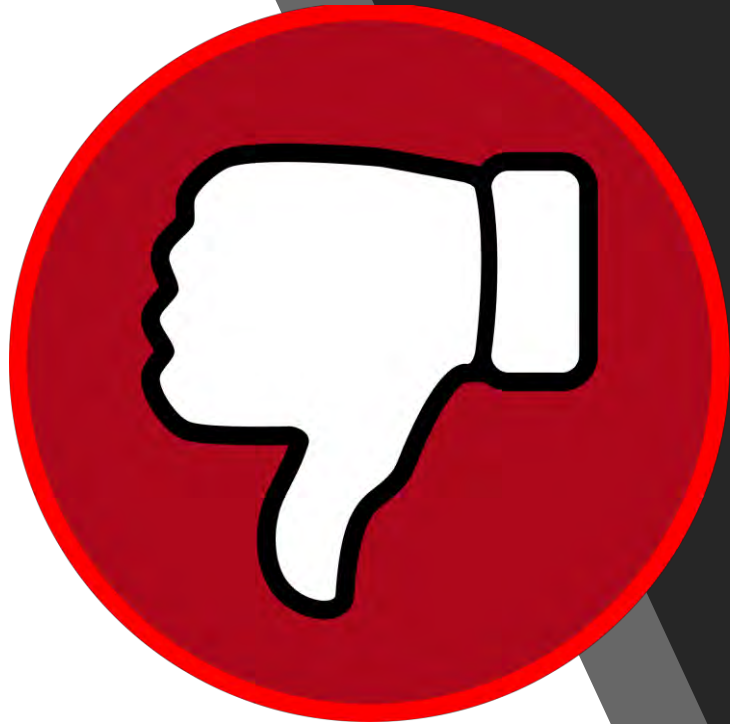




Why Barriers are Necessary?

Protection of public health, safety and welfare

Scrutiny of Occupational Licensure



- Time consuming, laborious and lengthy process
- Costly to licensees, consumers and state governments
- Inefficient licensing processes
- Outdated and obsolete procedures



Joel Albizo

@JoelAlbizo

Following



Dr. Malcolm Sparrow [@NCARB](#): Distinguish between outcome and process quality. Don't budge on outcome (HSW) but work on process. [#NCARB17](#)

6:16 AM - 23 Jun 2017

2 Retweets 3 Likes



CLARB



2



3



Friction for Licensees

- Confusion
- Complexity
- Variation
- Redundancy
- Time
- Cost



Friction for Boards

- Lack of resources
- Manual processes
- Outdated technology
- Restrictive laws, rules and/or regulations
- Limitations on ability to educate policy makers (real or perceived)

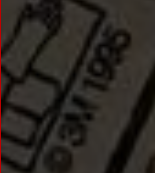
Are we adding unnecessary friction to the licensure process?

ALUMINUM DIOXIDE
ALUMINUM
ALUMINIO



© 3M 1995

60



© 3M 1995

Why Reduce or Eliminate Friction?

It's the *right* thing to do

CLARB

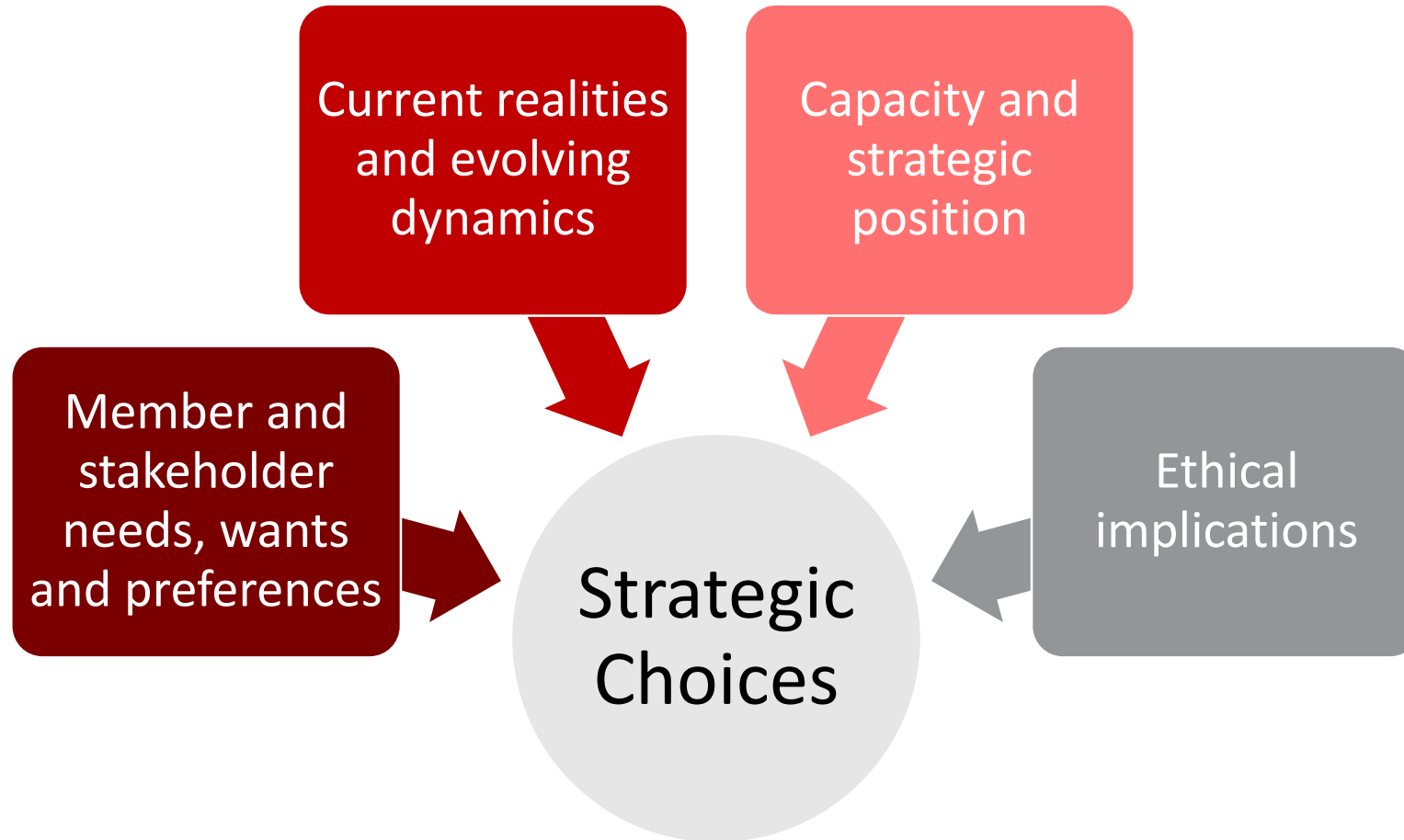
Case Study: What One Organization is Doing

Background

In response to the increasingly more complex regulatory environment, the CLARB Board of Directors tackled the following strategic question:

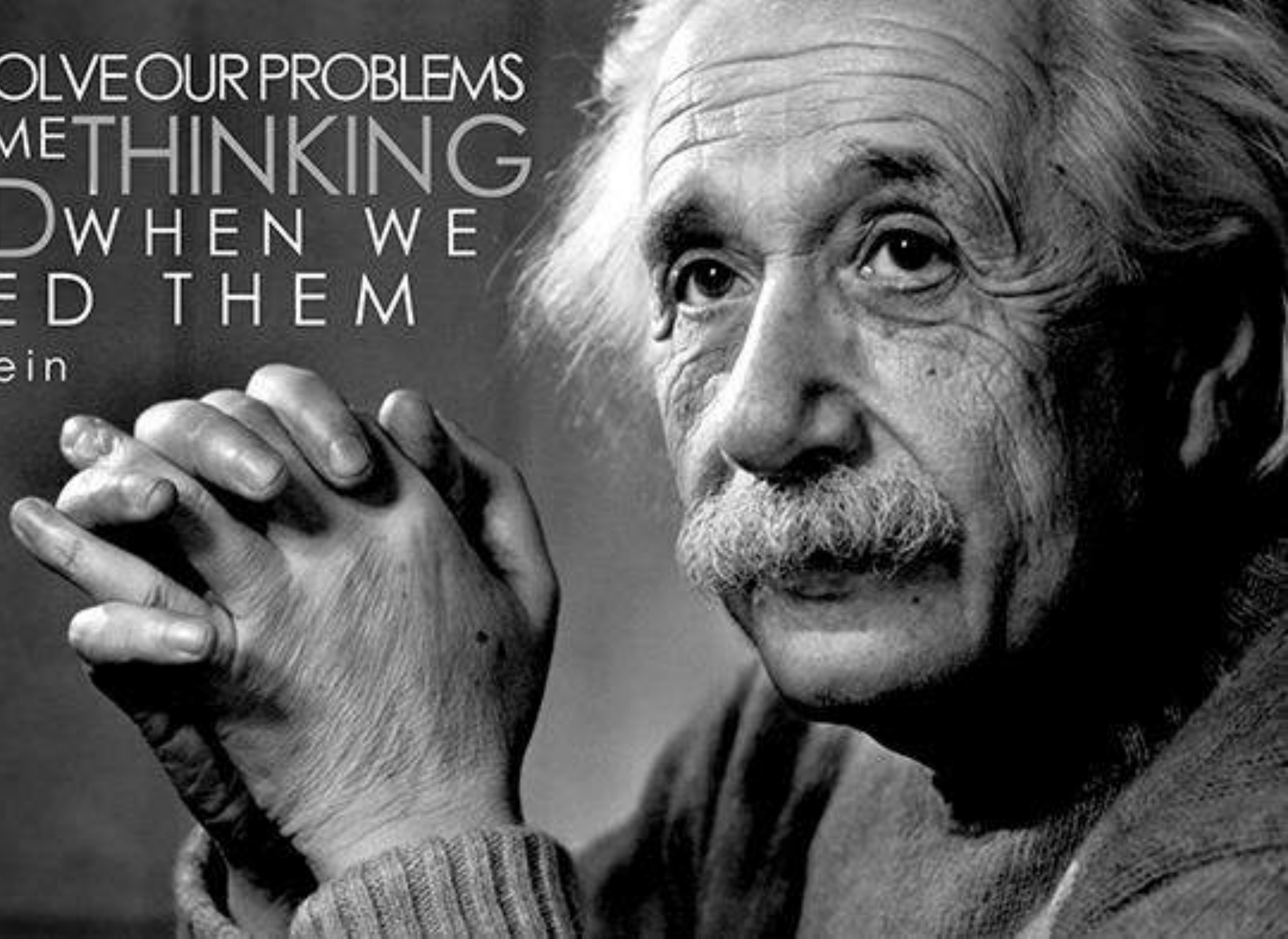
“What can and should CLARB do to defend the integrity of regulation to protect the public?”

What We Considered



WE CANNOT SOLVE OUR PROBLEMS
WITH THE SAME THINKING
WE USED WHEN WE
CREATED THEM

-Albert Einstein





Strategy

Two-Part Approach:

- Prepare for and defend against threats (tactical)
- Rethink the licensure framework (strategic)



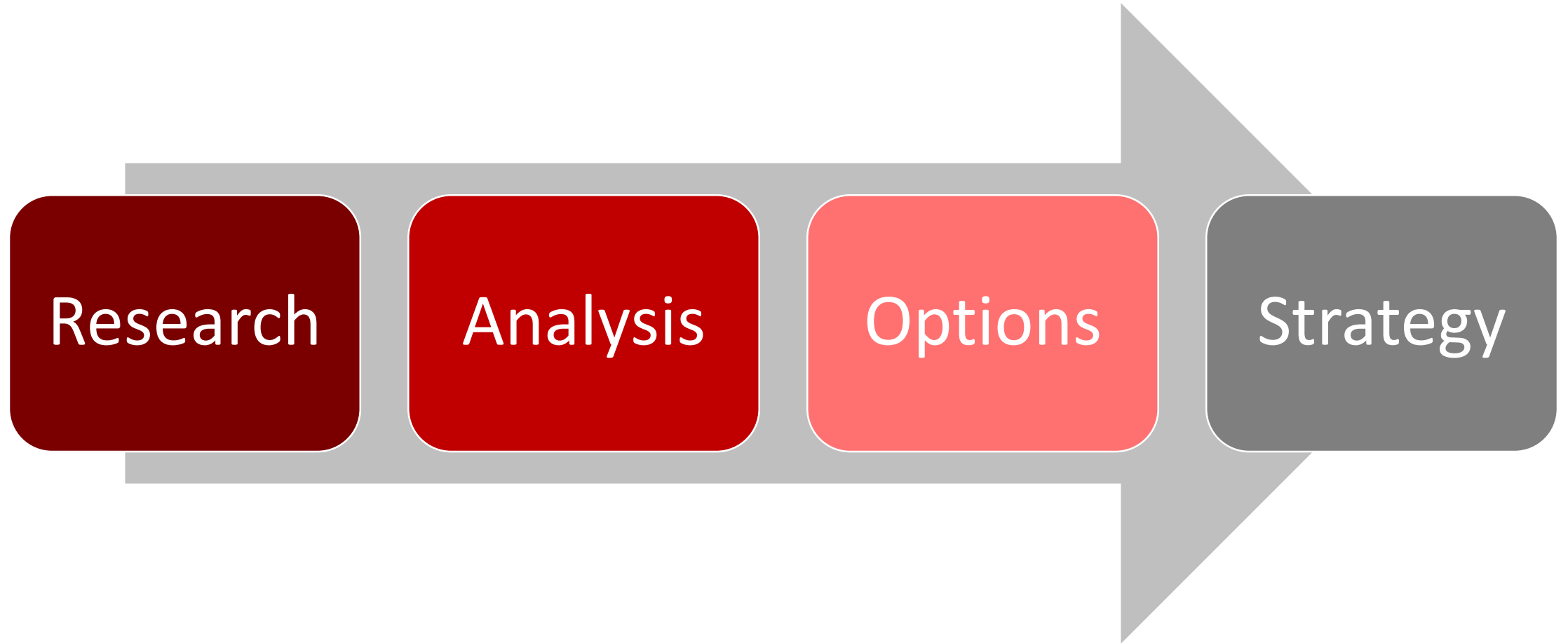
How do we evolve our processes?



Design a simpler, more frictionless framework and complementary process for licensure resulting in enhanced experience, improved credibility and confidence of the stakeholders of landscape architectural licensure



Our Process





WORK SESSION

Research – Identify *Friction* Points and *ROI* to make a positive change in your regulatory world

Mobility &
Portability

Board Structure

Intrastate
Communication
& Collaboration

A hand is shown placing a red puzzle piece into a larger puzzle. The red piece has the word "RESEARCH" written on it in white capital letters. The puzzle is made of white pieces, and the background is a light gray color. The hand is positioned in the upper right corner, with the thumb and index finger visible, holding the red piece. The puzzle pieces are interlocking, and the red piece is being placed into a specific spot. The overall scene suggests a process of problem-solving or research.

Table-top Discussion

To get ready for the group discussions:

Identify FRICTION POINTS in your current regulatory world that prevent or slow positive changes

A person in a dark hoodie stands on a rooftop, looking out over a city skyline at sunset. The sky is a deep red, and the city lights are visible in the distance. The text 'NEXT STEPS' is overlaid in white, bold, sans-serif font.

NEXT STEPS

Rotating Sessions: Friction Analysis

- Take your worksheet with you to your work sessions:
- First 10 Minutes:
Facilitators will explain the topic & options for Models for Best Practices
- Next 20 minutes:
Discuss/reach **TABLE CONSENSUS** of a Best Practices Model
- Next 10 minutes:
Discuss/reach **TABLE CONSENSUS** which Quadrant to place the Model
- Final 10 minutes:
Use MODEL to create a list of **FRICION POINTS** and ROI's to achieve

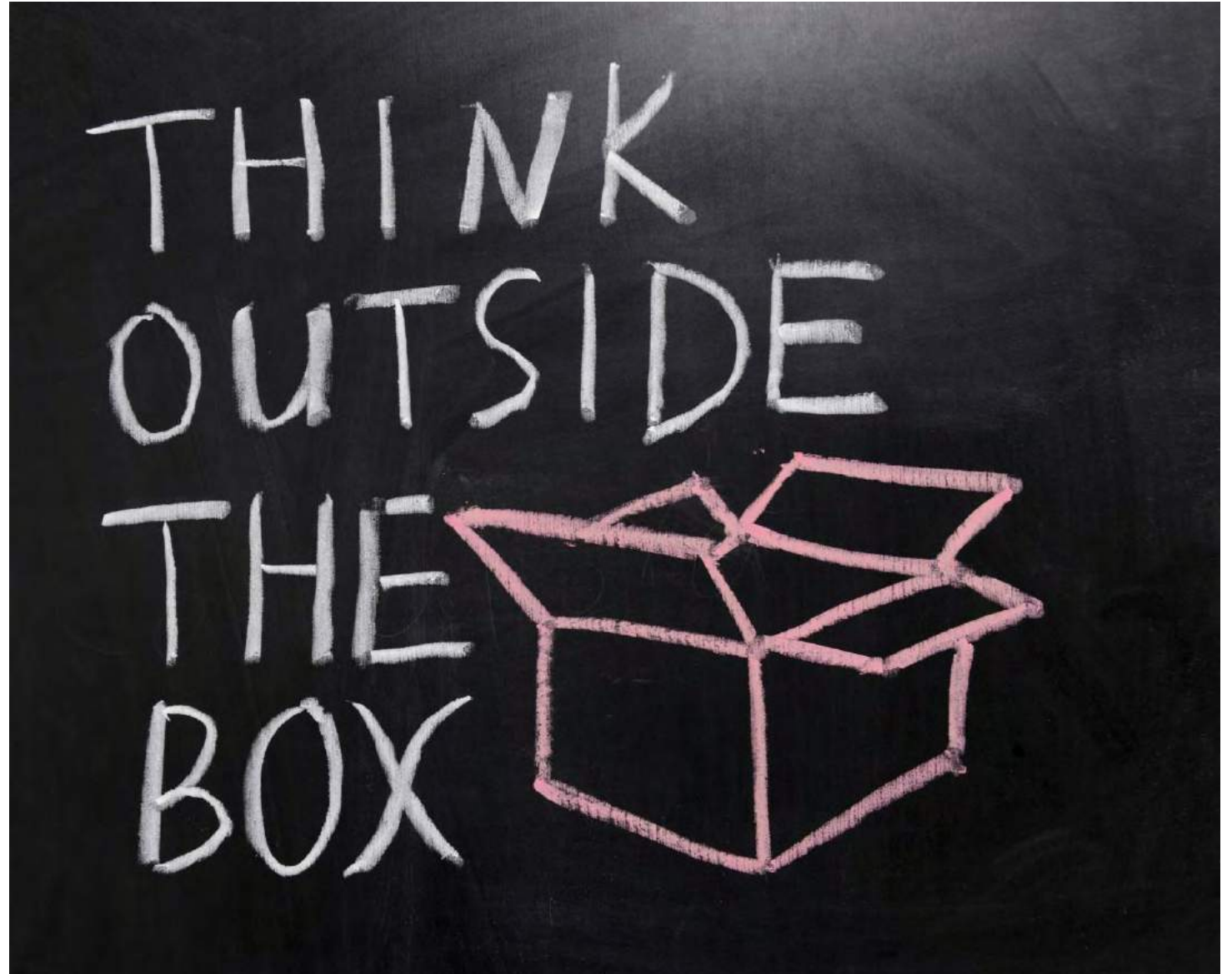
ROI – Return on Investment to achieve Model of Best Practice

	Low	High
FRICION	High	High
	<p><i>High effort to reduce Friction for Low ROI:</i></p> <p><u>F HIGH R LOW</u></p>	<p><i>High effort to reduce Friction for High ROI:</i></p> <p><u>F HIGH R HIGH</u></p>
	Low	High
Low	Low	High
	<p><i>Low effort to reduce Friction for Low ROI:</i></p> <p><u>F LOW R LOW</u></p>	<p><i>Low effort to reduce Friction for High ROI:</i></p> <p><u>F LOW R HIGH</u></p>

Rotating Sessions: Explore Options

Consider options for reducing or eliminating friction points that have low or no impact on public protection.

Don't be bound by today's realities, think as if you are creating the process from scratch.



Report Out





2018 FARB Forum Work Group Sessions

Friday, January 26, 2018

Green Work Group Schedule

Room: Commodore A

2:15 pm – 2:25 pm

Move to Assigned Breakout Groups Sessions

2:25 pm – 3:15 pm

Work Group Sessions A - Mobility/Portability

Facilitators - Mary de Sousa and Mary Jo Monahan

3:25 pm – 4:15 pm

Work Group Sessions B - Board Structure

Facilitators - Jim Penrod and Debra Persinger

4:25 pm – 5:15 pm

Work Group Sessions C - United We Stand: Intrastate Communications

Facilitators - Josh Bolin and Margo Larsen



2018 FARB Forum Work Group Sessions

Friday, January 26, 2018

Purple Work Group Schedule

Room: Commodore B

2:15 pm – 2:25 pm

Move to Assigned Breakout Groups Sessions

2:25 pm – 3:15 pm

Work Group Sessions B - Board Structure

Facilitators - Jim Penrod and Debra Persinger

3:25 pm – 4:15 pm

Work Group Sessions C - United We Stand: Intrastate Communications

Facilitators - Josh Bolin and Margo Larsen

4:25 pm – 5:15 pm

Work Group Sessions A - Mobility/Portability

Facilitators - Mary de Sousa and Mary Jo Monahan



2018 FARB Forum Work Group Sessions

Friday, January 26, 2018

Orange Work Group Schedule

Room: Commodore C,D,E

2:15 pm – 2:25 pm

Move to Assigned Breakout Groups Sessions

2:25 pm – 3:15 pm

Work Group Sessions C - United We Stand: Intrastate Communications

Facilitators - Josh Bolin and Margo Larsen

3:25 pm – 4:15 pm

Work Group Sessions A - Mobility/Portability

Facilitators - Mary de Sousa and Mary Jo Monahan

4:25 pm – 5:15 pm

Work Group Sessions B - Board Structure

Facilitators - Jim Penrod and Debra Persinger

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA



Open Meetings: The Good, The Bad, and The Ugly

Robin Jenkins, Executive Director – Allied & Behavioral Health Boards, DC Department of Health

Panravee Vongjaroenrat, Assistant General Counsel – DC Department of Health

January 26, 2018

9:30- 10:15 AM

Government in the Sunshine!!!

- What is sunshine?
- Open records vs. open meetings
- Key = public access
 - Open meetings law requires that a public body conducts its meetings openly, allowing the public to attend (includes providing notice to the public – e.g. meeting notices, agendas, recordings, and minutes)
 - Open records law requires that the public may obtain copies of government documents (usually referred to as FOIA = Freedom of Information Act)

Government in the Sunshine!!!

- All 50 states and DC have open meetings and open records laws
- Federal government also has open meetings and open records laws
- Must examine the actual statutory provisions to determine:
 - What “body” is covered (i.e. groups that must open their meetings)
 - What constitutes “meeting”
 - What “exemptions/exceptions” there are to permit the closure of a meeting

Examples of Entities Subject to Open Meetings Laws

- The Federal Government and Multi-Member Federal Agencies
- The State and Statewide Public Entities
- State Commissions
- State Educational Institutions
- State Professional Licensing Bodies
- State Boards and Authorities
- Districts and Other Regional Public Entities
- Cities and Towns
- Counties, Boroughs and Parishes
- Local Commissions
- Local Boards
- Other Local Public Bodies

“Meeting”

- Any gathering of a **quorum** of the members of a **public body**, at which the members consider, conduct, or advise on public business
- Includes:
 - Hearings
 - Roundtables (whether formal or informal, regular, special, or emergency)
 - Activities where the following occurs (regardless whether held in person, by telephone, electronically, or by other means of communication):
 - gathering information
 - taking testimony
 - discussing
 - deliberating
 - recommending
 - voting

DC Open Meetings Law

Codified at Chapter 5 (Administrative Procedure) of Title 2 of the DC Code.

- A meeting **SHALL BE OPEN TO THE PUBLIC**
- “Meeting” is defined as “any gathering of a **quorum** of the members of a **public body**... whether formal or informal...at which the members consider, conduct, or advise on public business...regardless whether held in person...or by other means of communication.”
- A meeting is **OPEN** if the public or the press is permitted to be physically present or if it is televised
 - Publication of the meeting notice or announcement is an important element
 - Before a meeting may be closed, it occur in an open session
 - To close a meeting, the public body must vote to do so and the chair or presiding officer must make a statement providing reason(s) for the closure including citation to the relevant provisions allowing the closure

Permissible Reasons for Closing a Meeting

- To consult with and obtain legal advice from the attorney representing the body
- To discuss disciplinary matters
- To deliberate upon a decision in an adjudication action
- To plan, discuss, or hear reports concerning ongoing or planned investigations if disclosure to the public would harm the investigation

WHEN IN DOUBT.....

The law

“shall be construed narrowly and shall permit closure of meetings only as authorized by this chapter.” D.C. Official Code § 2-573.

Unwritten Rule – Privacy Protection

- Not usually written into the sunshine laws but must watch out for privacy interest of individuals
- DO NOT discuss information that affects any person's private or confidential information in an open session
- Because of this requirement, when a board reviews a license application, the applicant's right to privacy prevents the board from publicly discussing the person's qualifications (or shortcomings)
- Consequently, discussions and decisions to license (or not) should occur in a closed executive session

Details to Remember

- Watch out for specific requirements such as allowing closed discussion of issues but requiring that decisions be made in public.
- Some while boards may discuss a matter in a closed session, they must take a vote on the matter in an open session.
 - The boards must return from a closed session into an open public meeting to accept a motion and vote on it.
 - In this case, observe that privacy rights require protection – e.g. redacting names or private information
- Find out what the enforcement provisions are in your state law. In DC, the Office of Open Government has been invested with the authority to take broad actions such as assessing a fine on both boards and members, seeking court sanctions

DC Office of Open Government (OOG)

An independent office under the Board of Ethics and Government Accountability charged with enforcement of the Open Government Act

- **CHARGE**

- Ensures city-wide compliance with the Open Meetings Act
- Advocates for fair and efficient Freedom of Information Act (FOIA) processing

- **ENTITIES REQUIRED TO COMPLY**

- Any government council
- The Council of the District of Columbia

ENTITIES EXCLUDED

- Meetings of the Mayor's Cabinet
- Courts
- Governing bodies of public charter schools
- Advisory Neighborhood Commissioners

- **AUTHORITY**

- To bring suit in the Superior Court of the District of Columbia against any public body, absent the Council of the District of Columbia, which fails to comply with the Open Meetings Act
- Impose injunctive relief and fines of up to \$250 per violation

Who, What, When, Where...The Complaint

January 2016 OOG received a complaint alleging that the Board of Medicine failed to comply with the Open Meetings Act (OMA) by failing to publish meeting notices, agendas and meeting minutes detailing the reasons for closed/executive sessions

OOG conducted an investigation

- Subpoenaed Board of Medicine documents covering a two year period

The Findings

- “because the Board has not strictly adhered to the OMA requirements found at D.C. Official Code § 2-575(c) and D.C. Official Code §§ 2-576 and 2-578, the OOG finds merit in the allegations of the complaint. Hence, it is the opinion of the OOG that the Board has violated the Act.”
- “The Board’s failure to timely publish all draft and final open meeting session minutes and all draft and final meeting agendas violates the “Record of meetings” and “Notice of meetings” provisions of the OMA.”

Findings

- The Board of Medicine and the other 18 health licensing boards supported by the Department of Health violated OMA in the following ways:
 - Starting a meeting in a closed session
 - Failure to publish notice of the meetings
 - Failure to publish notice of meetings in a timely manner
 - Failure to publish minutes of the meetings
 - Failure to publish minutes of meetings in a timely manner
 - Discussing matters in a closed session that did not meet the closed session criteria

Recommendations

- (1) timely publish all notices, draft and final meeting agendas, and draft and final open session meetings minutes
- (2) correct all future Notice of Hearings, agenda and minutes to reflect the Board meetings begin in open session, and include the proper and complete citation to D.C. Code § 2-575(d) for meeting in a closed/executive session
- (3) strictly adhere to the statutory regime in D.C. Official Code § 2-575(c) to properly enter into a closed/executive session
- (4) review the category of exceptions in D.C. Official Code § 575(c) to ensure that all matters for discussion or consideration in closed/executive session matters fall into one of the category of exceptions
- (5) for the Executive Director of the Board of Medicine, its attorney advisor, and all members of the Board to attend an open meeting within ninety (90) days upon the issuance of this binding opinion
- (6) for the Department of Health to immediately assess OMA compliance of all public bodies under its charge

Good News / Bad News

- “The OOG does not find the Board willfully or recklessly disregarded the OMA, and notes the Board fully cooperated with the investigation.”
- “The OOG attributes the Board’s lack of compliance to misunderstandings, and in some instances, misapplications of the OMA.”
- “Equally troubling is that records reviewed by the OOG indicate this problem may be systemic and pervasive to all public bodies under the purview of the Department of Health.”
- “It is apparent to OOG that the Board is not alone in the pattern and practice of meeting first in closed/executive session in violation of D.C. Official Code § 2-575(c).”

Lessons Learned

- Boards are regulated too
- Board members and staff must understand the importance of open meetings
- Not paying attention gets Boards in trouble
- Watchdogs exist
- The public does care
- Good systems for open meetings compliance is essential
- Adhere to the letter of the law
- **New Language Used by Boards**
 - Upon conclusion of the open session meeting pursuant to the DC Official Code 2-575B and for the purposes set forth therein, the Board will move into the closed executive session portion of the meeting to consult with the Board attorney, discuss disciplinary matters and hear reports concerning violations of the law or regulations

Recent DC OOG Action

- Sustained Energy Utility Advisory Board (SEUAB) wanted to discuss a report that was the subject of a negative news report in a closed session
- SEUAB argued that it is justified because: a) there would be no action or decision taken; b) closed sessions allow board members to be frank and open about their thoughts and reactions.
- In response, OOG pointed to the letters of the law and concluded that SEUAB's discussion of the report in question constitutes a **preparation for future action or policy decision** and therefore cannot be held in a closed session.
- OOG warned SEUAB that if it persists in its inclination to discuss the report in a closed session, OOG will seek a **court order** to enjoin SEUAB from doing so.

Next Steps

- Review your open meetings act to ensure compliance from your boards and staff
- Trainings, trainings, and trainings – repeated discussions help to reinforce good decisions
- Foster strong, open relationship among staff, board members, and legal advisors

THANK YOU

QUESTIONS

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA



Website Accessibility – What Boards Need to Know

Saturday, January 27, 2018

10:30 am – 11:15 am

Speakers

Mai Lin P. Noffke, Attorney at Atkinson & Atkinson, LLC

- Primary practice area focuses on representation of associations of regulatory boards in all aspects of their operations. Previous experience as national litigation defense counsel for Fortune 500 companies

Tom Gallego and Tyler Ross, L7 Creative

- As the first advertising agency to define and use the principles of digital brand engagement, L7 Creative is committed to growing brands by integrating creative strategies with online technologies

Agenda

- Why is this important?
- Applicable Laws/Standards
- Recent Litigation
- What do we do now?

Objectives

- Understand what accessibility is with respect to websites
- Understand what federal and state laws and regulations may apply
- Gain an awareness of recent litigation on this issue
- Understand what steps to be taken to assess accessibility
- Understand the process of creating/modifying a website to ensure accessibility

Poll Everywhere

Is your board or organization's website accessible?

- a. Yes
- b. No
- c. Not yet, but it is in process
- d. I have no idea

What is website accessibility?

To be accessible, websites should be usable by persons with various sight, hearing, and mobility disabilities so as to have access to all content and functionalities of the website, including access through the use of screen readers and other assistive technologies.

What is website accessibility?

- Persons with low vision need to be able to resize text
- Persons with hearing impairments need captioning to access audio for videos on the website
- Persons with limited dexterity need to be able to navigate website with a keyboard instead of a mouse (watch for navigation/menu bars)
- Websites need to be navigable and usable by individuals using assistive devices, such as screen readers (watch for use of images of text instead of text, diagrams, illustrations, or use of color or highlighting to communicate).

Why is this Important?

- Transition from physical to digital world
- Societal values of diversity and inclusion
- Organizational efficiency and effectiveness
- Reducing risk of litigation or other enforcement activities

Why is this important?

cont'd

- Websites are important
 - Provide information about services and programs
 - Provide ability to transact business with the agency (license application and renewal, apply for jobs, file compliance forms, file complaints, “Contact Us”)
 - Services offered in a more interactive way, increasing participation and expanding audience
 - Increase convenience and efficiency
 - Reduce costs, reduce paperwork
- Just as your office or physical location needs to be accessible, so does your website.

Applicable Laws and Standards

- Americans With Disabilities Act
 - Title II – public agencies
 - Title III – places of public accommodation (private entities)
- Rehabilitation Act of 1973
 - Sections 504 and 508
- State Disabilities Laws
- Regulations/Industry Standards
 - WCAG 2.0

ADA and Rehabilitation Act

- Title II of ADA applies to state and local governments
- Title III of ADA applies to places of public accommodation (private entities)
 - Is a website a place of public accommodation? Does the website need to be connected to a brick and mortar location?
 - There is a split in the court of appeals as to whether ADA applies to websites as a “public accommodation”
 - 1st, 3rd and 7th circuits say YES; 6th, 9th and 11th circuits say NO
- Sections 504 and 508 of the Rehabilitation Act applies to those state and local agencies receiving federal funding

ADA and Rehabilitation Act

cont'd

- For purposes of today's session, going to presume both public and private entity websites are subject to the ADA.
 - Could conduct an entire session on law regarding private entities, public accommodations and websites
- Private entities (such as associations of boards) should remain vigilant.
 - Even if not (yet) legally required to have an ADA compliant, accessible website, probably good business practice.
 - Some states have passed laws requiring that entities that contract with government agencies for IT or related services must respond to and resolve accessibility complaints.
- Disabilities groups have heightened awareness of the issue and are increasing scrutiny of websites.

ADA and Rehabilitation Act

cont'd

The ADA and the Rehabilitation Act (if government entity receives federal funding), generally require that state and local governments provide qualified individuals with disabilities **equal access** to their programs, services or activities unless doing so would **fundamentally alter** the nature of those programs/services/activities **or** would impose an **undue burden**.

(28 C.F.R. § 35.149 & § 35.164)

ADA and Rehabilitation Act

cont'd

- Government agencies have embraced websites and other mechanisms for online presence (mobile apps?) to increase effectiveness and efficiency.
 - Websites create ability for programs and services to be available 24 hours/day, seven days a week.
- An agency with an inaccessible website **may** also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line.
 - Is a telephone line “equal access” in hours of operation and the type/range of services available via telephone?

Section 508 of the Rehabilitation Act

- Section 508 applies to federal departments, agencies and other state and local agencies that receive federal funding
- When developing, procuring, maintaining or using electronic and information technology...unless an undue burden would be imposed...that the electronic and information technology allows, regardless of the type of medium of the technology, individuals with disabilities...to have access to and use and information and data that is comparable to the access of [those] who are not individuals with disabilities.

(29 U.S.C. § 794 (d))

Dept. of Justice – Website Accessibility Standards

DOJ responsible for ADA enforcement and promulgating ADA Standards

- 2003 – Voluntary Action Plan
- 2007 - Guidelines
- 2010 – Advance Notice of Proposed Rulemaking
- 2016 – Supplemental Advance Notice of Proposed Rulemaking
 - Intended to have regulations promulgated by 2015
 - Then delayed to 2017 for government agencies and 2018 for private entities
 - July 2017 - Trump Administration placed process on “inactive” status for both regulations under both Title II and Title III
- December 26, 2017 – DOJ withdraws ALL PENDING ADA rulemaking, including website accessibility rules

Dept. of Justice Resources

- ADA Best Practices Toolkit for State and Local Governments
- Chapter 5: Website Accessibility Under Title II of the ADA
 - <https://www.ada.gov/pcatoolkit/chap5toolkit.htm>

Industry Standards

- Web Content Accessibility Guidelines (WCAG)
 - Tech community developed consensus via Web Accessibility Initiative of the World Wide Web Consortium and first established WCAG in 2008
 - Updated in 2012: WCAG 2.0
 - WCAG 3.0 currently under development

Federal adoption of WCAG 2.0 AA

- In January 2017, federal government issued a final rule adopting WCAG 2.0 Level AA as the standard for **federal agency** websites (per Section 508 of Rehabilitation Act)
 - Final rule effective March 2017
 - Compliance required by January 18, 2018
- Led industry to believe that WCAG 2.0 Level AA would be standard promulgated for other public and private websites per the DOJ ADA rulemaking. That rulemaking has now been withdrawn.

<https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule> (last accessed 1.17.2018)

State Requirements

- States vary as to whether they have **statutes** or just **policies** regarding website accessibility.
- Some states have adopted “little 508s,” which follow/adopt Section 508 of the federal Rehabilitation Act.
- Some states have their own disabilities laws, which may or may not apply to websites.
- Some states have policies that require websites to be accessible.
 - Query: How enforced? Do such “policies” create a private cause of action?

So what now?

- Uncertainty in regulations/standards likely means courts will likely be arbiter of standards
 - whether ADA applies to private entity websites as places of public accommodation
 - is a physical location (bricks and mortar) required
 - what “accessible” means – *currently no legal technical standard*
 - whether telephone access equivalent
- This will likely result in differentiation across jurisdictions as to what is required
- Result is increase in demand letters, litigation, settlements

Nat'l Fed. for the Blind v. Target Corp.

- National Federation for the Blind sued Target in 2006 (after asking Target to modify website) alleging the retailer's website was inaccessible to visually impaired. **Target disputed whether ADA (Title III) applied to online presence, arguing it applied only to its physical retail locations.**
- Class action suit settled in 2008 for \$6 million including:
 - Payment to National Federation for the Blind for certification and monitoring of the website (\$90,000); payment for training by the NFB for affiliated website developers (\$40,000/year thereafter) and over \$3 million in NFB legal fees.
 - Made a donation of \$20,000 to California Center for the Blind on behalf of Bruce Sexton, Jr., the primary complainant.

Nat'l Fed. for the Blind v. Target Corp.

- One of first cases to define relationship between ADA and internet/websites.
- Damages paid were far in excess of what it would have cost Target to make website accessible.
- So, consider accessibility in design and planning of website early on instead of taking a more reactive approach.
- Target's website now considered a model in terms of accessibility to blind consumers.

Recent Litigation

- Robles v. Domino's Pizza – Plaintiff filed suit seeking Domino's website to comply with WCAG 2.0 accessibility standards regarding screen readers. California district court granted Domino's motion to dismiss and rejected plaintiff's claims that the website needed to meet **specific technical standards**. The Court stated while some form of accommodation was required, it would violate **due process** to require Domino's to comply with **specific technical requirements that had not yet been approved by any federal agency** (because DOJ had not yet issued concrete guidance on accessibility standards). (2017 U.S. Dist. LEXIS 53133, March 2017)

Recent Litigation

- Gil v. Winn-Dixie Stores, Inc.- Florida district court (jury trial) found that grocery store’s website heavily integrated with physical locations as a place of **public accommodation** and that website not accessible to visually impaired. Found that store violated ADA, even though evidence presented that store had plans to make website accessible but just had not yet done so. (2017 U.S. Dist. LEXIS 90204, June 2017)
- Gorecki v. Hobby Lobby Stores, Inc. – California district court denied Hobby Lobby’s motion to dismiss and held Title III of ADA applies to websites as a **place of public accommodation**. Court noted that the Robles v. Domino’s decision was not applicable since that case sought to impose specific accessibility technical requirements where as here, plaintiff sought only “full and equal enjoyment. (2017 U.S. Dist. LEXIS 109123, June 2017)

Recent Litigation

- Marett v. Five Guys - New York district court denied Five Guys motion to dismiss and held Title III applies to websites—**either** as place of **public accommodation** or as a result of its **close relationship as a service** of Five Guys’ restaurants. The Court was unmoved by Five Guys’ efforts to make its website accessible because they had yet to do so and there was no clear assurance that further accessibility issues would be avoided. (2017 U.S. Dist. LEXIS 115212, July 2017)
- Gorecki v. Dave & Buster’s – California district court (same court as Hobby Lobby) denied Dave & Buster’s motion for summary judgment, holding **there was a factual question as to whether telephonic access in lieu of an accessible website was sufficient to satisfy ADA**. Notable because first case to mention option that providing the same goods and services available on the website through telephonic or other means may satisfy a business’s obligations under the ADA. (2017 U.S. Dist. LEXIS 187208, October 2017)

Litigation Landscape Summary

- Plaintiffs generally have been allowed to proceed past motions to dismiss or have won on the merits in most of the recent court decisions.
- The vast majority of cases settle either immediately, or after the plaintiff wins a motion to dismiss.
- Only 1 trial verdict and it was for plaintiff (Winn-Dixie).
- Most plaintiff's lawyers make monetary demands low enough to make litigation option relatively unattractive.
- In 2017, **over 800 FEDERAL court lawsuits** alleging inaccessible websites. Even more lawsuits in state courts under state laws....

What Should a Board Do?

- Take down its website?
- Is your board or agency considering updating or revising the website?
 - Remain cognizant of this issue – be proactive
 - Consider how the type of content (audio, video, pictures, document format) may affect accessibility

What Should a Board Do?

- If demand letter received or sued, make a commitment to making the website accessible in the settlement agreement or consent decree which improves litigation/negotiation position for future cases.
 - Some of the cases mentioned previously proceeded past initial motion to dismiss because no settlement agreement in place.
- Make website accessible as quickly as possible.
- Establish a 24/7 telephone line with live operators who can perform all functions and provide all information on website for users with disabilities.
 - Publicize phone line on website Accessibility page and make sure a screen reader is able to navigate to and read this information.
- Require accessibility (conformance with WCAG 2.0 AA) in new contracts with vendors that provide software, development services, or content for website.

L7 Creative – Tom & Tyler

- Please hold questions until end of session.
- Don't forget to complete evaluation:
<https://www.surveymonkey.com/r/WCDPVYT>

L7 Creative – Tom & Tyler

Goal: To showcase and highlight the differences in an accessible and non-accessible websites. Discuss what these changes look like for your developer in a context that both you and your developer will understand.

<https://www.w3.org/WAI/demos/bad/before/annotated/home.html>

L7 Creative – Tom & Tyler

ADA Compliance Checklist

What is ADA Compliance?

The Americans with Disabilities Act (also known as ADA) is a comprehensive civil rights law that was enacted to protect individuals with disabilities from discrimination.

The law has a wide scope. It applies to:

- State and local government
- Public and private spaces
- Employment
- Building codes
- Transportation
- Telecommunication

Website Accessibility Under Title II of the ADA

1 **Perceivable Guidelines** help content producers ensure their media is usable by all.

- **Guideline 1.1 Text Alternatives**
 - Provide text alternatives (alt, longdesc) for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.
 - Always provide documents in an alternative text-based format, such as HTML or RTF (Rich Text Format), in addition to PDF. Text-based formats are the most compatible with assistive technologies.
- **Guideline 1.2 Time-based Media**
 - Provide alternatives for time-based media.
 - Include audio descriptions and captions for videos. Provide text captions synchronized with the video images to make videos and audio tracks accessible to people who are deaf or hard of hearing.
- **Guideline 1.3 Adaptable**
 - Create content that can be presented in different ways (for example simpler layout) without losing information or structure.
 - Avoid dictating colors and font settings. Websites should be designed so they can be viewed with the color and font sizes set in users' web browsers and operating systems.
- **Guideline 1.4 Distinguishable**
 - Make it easier for users to see and hear content including separating foreground from background.

2 **Operable Guidelines** ensure the functionality of your website does not create problems for users.

- **Guideline 2.1 Keyboard Accessible**
 - Make all functionality available from a keyboard.
- **Guideline 2.2 Enough Time**
 - Provide users enough time to read and use content.
 - When a timed response is required, the user shall be alerted and given sufficient time to indicate more time is required.
- **Guideline 2.3 Seizures**
 - Don't design content in a way that is known to cause seizures. Pages shall be designed to avoid causing the screen to flicker with a frequency greater than 2 Hz and lower than 55 Hz.
- **Guideline 2.4 Navigable**
 - Provide ways to help users navigate, find content, and determine where they are.
 - Provide a "Skip Navigation" link to bypass the row of navigation links by jumping to the start of the web page content.

3 **Understandable Guidelines** ensure that web pages feature logical functionality and language.

- **Guideline 3.1 Readable**
 - Make text content readable and understandable.
 - Electronic forms shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.
 - Markup shall be used to associate data cells and header cells for data tables that have two or more logical levels of row or column headers.
- **Guideline 3.2 Predictable**
 - Make Web pages appear and operate in predictable ways.
- **Guideline 3.3 Input Assistance**
 - Help users avoid and correct mistakes.

4 **Robust Guidelines** ensure that web pages feature logical functionality and language.

- **Guideline 4.1 Compatible**
 - Maximize compatibility with current and future user agents, including assistive technologies.

Always remember to provide a link with contact information that provides a way for users to request accessible services or to make suggestions for the site.

Want to Talk Further?

- L7 Creative Contact Info:
 - Tom Gallego
 - Tom@L7Creative.com
 - 760.931.0777 ext. 11
 - Tyler Ross
 - Tyler@L7Creative.com
 - 760.931.0777 ext. 10
- Table Outside of Meeting Room – please stop by and see us

Questions? Comments?

Don't forget to complete evaluation:
<https://www.surveymonkey.com/r/WCDPVYT>

Top Recent Regulatory Cases

January 27, 2018

11:15am – 12:15pm

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA

Dale Atkinson, FARB Executive Director
& General Counsel



About the Speaker

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Naruto v. Slater

2016 U.S. Dist. LEXIS 11041 (US District Ct ND CA 2016)



United States District Court for the Northern District of California dismissed lawsuit filed by PETA on behalf of a monkey that took selfies with camera of defendant photographer.

9th Circuit Court of Appeals Oral arguments

<https://www.youtube.com/watch?v=WufdT8HT6Uw>

By AIMEE PICCHI MONEYWATCH August 22, 2014, 12:55 PM

U.S. says copyrighting a "monkey selfie" is bananas



Case4:15-cv-04324-RAW Document1 Filed09/21/15

Nexus Between Conduct and Profession

- Teacher convicted of persistent disorderly conduct and attempted violation of a temporary protective order (misdemeanors)
- Teacher had dated victim 40 years ago
- Ohio Department of Education suspended license for 4 months; teacher appealed
- **Court of appeals stated neither the statute or administrative code expressly requires a nexus between conduct and ability to teach**

Sutton v. Ohio Department of Education (Ohio)
2017-Ohio-105; 2017 Ohio App. Lexis 111
(January 2017)

Turf Battle

- State chapter of medical trade association challenged 20 year old rule promulgated by MFT board that allowed MFT's to provide "diagnostic assessment"
- Trade association argued that only physicians licensed to practice could provide diagnostic assessment
- Lower court granted trade association declaratory judgment motion; appellate court affirmed
- **Texas Supreme Court reversed finding that common interpretative analysis of MFT law allows MFT's to perform diagnostic assessment.**

Texas State Board of Examiners of Marriage & Family Therapists v.
Texas Medical Association (Texas)

2017 Tex. LEXIS 211
(February 2017)

Immoral or Scandalous Mark

- Applicant sought to register the mark “FUCT” with Copyright/Trademark office
- Application rejected as mark comprises immoral or scandalous matter
- **U.S. Court of Appeals reversed, holding that that section of the Lanham Act that prohibits registration of immoral or scandalous marks violates the First Amendment and is, thus, unconstitutional**

In re Brunetti (Virginia)
2017 U.S. App. LEXIS 25336
(December 2017)

License Up in Smoke

- Licensed nurse had job offer rescinded due to positive drug screen (twice, marijuana)
- Consequently, Board suspended license for one year (stayed)
- Licensee appealed arguing Board did not act in timely manner. Statute call for order within 45 days of receipt of materials. Board took 166 days
- Licensee also argued ineffective counsel at administrative hearing
- **Court of appeals affirmed finding that 45 day period was essentially complied with as documents were delayed**
- **Further, court held that no constitutional right to counsel in an administrative hearing, thus no merit to claim**

McClanahan v. West Virginia Board of Examiners for Registered Professional Nurses (Virginia)

2017 W. Va LEXIS 262
(April 2017)

Arrest Records: Relevant?

- Penal Code states arrest record unable to be used after successful completion of pretrial diversion program
- Practice act states successful completion of diversion program shall not prohibit Board from administrative action.
- Conflicting statutes
- **Court held that Penal Code prohibiting use of arrests record created a blanket prohibition from use.**

Medical Board of California v. Superior Court of San Francisco

(California)

2018 Cal. App. LEXIS 11,

(January 2018)

11 Years Ago.....Laches

- Teacher Standards and Practices Commission revoked teaching and administrator licenses related to non-reporting of inappropriate activity
- Events occurred over 11 years prior
- **Court held that Commission order lacked substantial evidence and reason, thus reversed revocation**

Lockett v. Teacher Standards & Practices Commission (Oregon)
2017 Ore. App LEXIS 1602
(December 2017)

Induced to Attend School

- Disgruntled graduate of MRI school, with less favorable accreditation rating, sued school alleging fraud in inducement
- Court, under New Jersey law, found case must sound in educational malpractice
- **Court dismissed case finding that the claims were wholly conclusory and failed to identify specificity necessary to withstand motion to dismiss**

Winter v. American Institute of Medical Sciences & Education (New York)

2017 U.S. Dist. LEXIS 39694

(March 2017)

Take the Fifth

- Gaming Board held hearing re drivers of harness racing, alleging race-fixing scheme
- Drivers invoked 5th Amendment rights at administrative hearing; Gaming board suspended licenses based on refusal to cooperate
- Drivers filed lawsuit vs. Commission alleging procedural due process and 5th Amendment violations.
- Issues centered on qualified immunity and 5th Amendment rights
- **Court of appeals affirmed the denial of qualified immunity on procedural due process**
- **Court of appeals reversed the grant of qualified immunity on the 5th Amendment claims**

Moody v. Michigan Gaming Control Board (Michigan)
2017 U.S. App. LEXIS 17483; 2017 FED App. 0211P (6th Cir.)
(September 2017)

Lifetime Ban

- Early Learning daycare facility employee was convicted of 2nd degree robbery.
- Employee did not disclose conviction, Dept. learned through news report
- Department cited statute and issued lifetime ban to employee as required per law
- **Court of appeals upheld lifetime ban, rejected substantive and procedural due process arguments.**

Fields v. Department of Early Learning (Washington)

2017 Wash. App. LEXIS 1985; 2017 WL 3588960

(September 2017)

Zestimate; Private Cause of Action

- Homeowner sued Zillow, argued Zestimate figure low thus property values diminished
- Homeowner argued unlicensed practice of real estate appraisal
- Alleged violations of practice act, sought injunction, costs, attorneys fees
- **Court held that Real Estate Act does not provide for a private cause of action either explicitly or implicitly**

Patel v. Zillow, Inc. (Illinois)

2017 U.S. Dist. LEXIS 134785

(September 2017)

Delegation to Students

- Veterinary board disciplined veterinarian for delegating vaccine administration to veterinary students, such delegation deemed to be unprofessional conduct
- Under the Rabies Rule, vaccines only valid if administered by a veterinarian, vet. tech., or other person approved by the State Veterinarian.
- **Court reversed discipline holding that consequence of student administration of vaccine not unprofessional conduct, but simply invalidates vaccine.**

Genova v. Oregon Veterinary Medical Examining Board (Oregon)

2016 Ore App. LEXIS 1452; 282 Ore. App. 234
(November 2016)

Delegation to Trade Association via Rule

- Original rule promulgated by board delegated authority to establish CE program and fee setting to state chapter of the trade association.
- Plaintiff challenged, alleging separation of powers and improper delegation of authority principles.
- **Legislature changed the law, removed references to trade association and authorized board to annually seek proposals for both pre-licensure and CE programs.**

Kiesling v. Arkansas Professional Association (Arkansas)

2017 Ark. LEXIS 296; 2017 Ark. 346

(December 2017)

Antitrust: Specialty Certification

- Association of Physicians and Surgeons sued American Board of Medical Specialties alleging antitrust violations re maintenance of certification program.
- Plaintiffs alleged ABMS restrained trade through numerous activities, including conspiring with the Federation of State Medical Boards.
- **Court dismissed the case without prejudice as Plaintiffs failed to allege facts sufficient to withstand the motion to dismiss**

Association of American Physicians & Surgeons v. American Board of Medical Specialties

(Illinois)

2017 U.S. Dist. LEXIS 205845

(December 2017)

One Bite at the Apple

- Board sent notice to nurse of complaint and administrative proceeding
- Dispute as to whether nurse waived right to a hearing. Board proceeded through informal process, as if waived. Revoked license.
- **Court reversed and remanded; questioned whether licensee actually waived right to hearing.**
- **Note: Court noted that revocation based upon first inaccurate entry into medical record did not support revocation, but first offense of falsifying medical records was grounds for revocation.**

Campbell v. Department of Health (Florida)
2017 Fla. App. LEXIS 18730
(December 2017)

Due Process: Conflicted Board Attorney

- Board revoked physician license related to prescribing practices
- On appeal, licensee argued that dual role of board counsel as board attorney and prosecutor on behalf of state creates conflict
- But, physician did not appear at hearing. Matter??
- **Court held that failure to appear did not constitute waiver of conflict argument, but physician failed to sufficiently develop his arguments , thus waived.**

McCormick v. Arkansas State Medical Board (Arkansas)
2017 Ark. App. LEXIS 753; 2017 Ark. App. 697
(December 2017)

Don't Run This Red Light

- Board sanctioned Plaintiff for unlicensed practice of engineering re red light camera research
- Plaintiff filed suit under First Amendment
- Board admitted violation of First Amendment as applied to Plaintiff, but denied law facially invalid. Board sought entry of judgment with court, against itself.
- **Court denied entry of judgment and allowed litigation to proceed.**

Järlström v. Aldridge (Oregon)

2017 U.S. Dist. LEXIS 205533
(December 2017)

Write An Essay

- Physician agreed to resolve complaint by stipulation that called for reprimand, courses on boundaries & records, and write an essay on what he learned.
- Failed to comply with stipulation, Board entered indefinite suspension, ordered mental and physical evaluation with report sent to board.
- Physician sought reinstatement of license and eventually filed litigation vs. Board and board members for violation of Minnesota Government Data Practices Act.
- **Court affirmed summary judgment in favor of Board rejecting physician arguments related to access to documents.**

Peterson v. Martinez (Minnesota)
2017 Minn. App. Unpub. LEXIS 1051
(December 2017)

Expunged Charges and Convictions

- Pharmacist filed complaint in federal court in North Carolina seeking to require Michigan Board to refrain from posting disciplinary action on website.
- Pharmacist argued that charges and convictions that formed the basis for administrative action by the Michigan board were expunged.
- Misdemeanor conviction occurred in NC in 2004 and expunged in 2016.
- **Court dismissed the case under the 11th Amendment for lack of subject matter jurisdiction**

Abdulfattah Budayr v. Michigan (North Carolina)
2017 U.S. Dist. LEXIS 201297; 2017 WL 6061972
(December 2017)

Return of Seized Materials

- Guam Dept of Health and Social Services via an administrative inspection order and search warrant seized files, computers, cameras, cash and controlled substances from veterinarian
- Seized materials with exception of drugs returned to veterinarian
- Complaint filed by vet for return of drugs
- Court identified parameters of when seized materials may be maintained by government without criminal proceedings being filed
- **Court remanded matter to determine if seized materials legally in possession of vet and whether they must be returned.**

In re Department of Health & Social Services (Guam)

2017 Guam 15; 2017 Guam LEXIS 15; WL 6027728

(December 2017)

Reciprocal Discipline: Fine Not Fine

- Physician reprimanded by Wisconsin Medical Board; failed to notify the Michigan Board
- Note, physician was licensed in 9 states....
- Michigan Board fined the physician \$500
- Physician challenged the fine under Michigan “Rule 5” that sets forth the criteria to consider when assessing a fine
- **Court affirmed the violation by the physician by not disclosing the reprimand within 30 day, but remanded the fine issue to the Board.**
- **The court was unable to ascertain whether the Board considered the factors under Rule 5.**

Bureau of Professional Licensing v. Butler (Michigan)
2017 Mich. App. LEXIS 2120
(December 2017)

Reciprocal Discipline

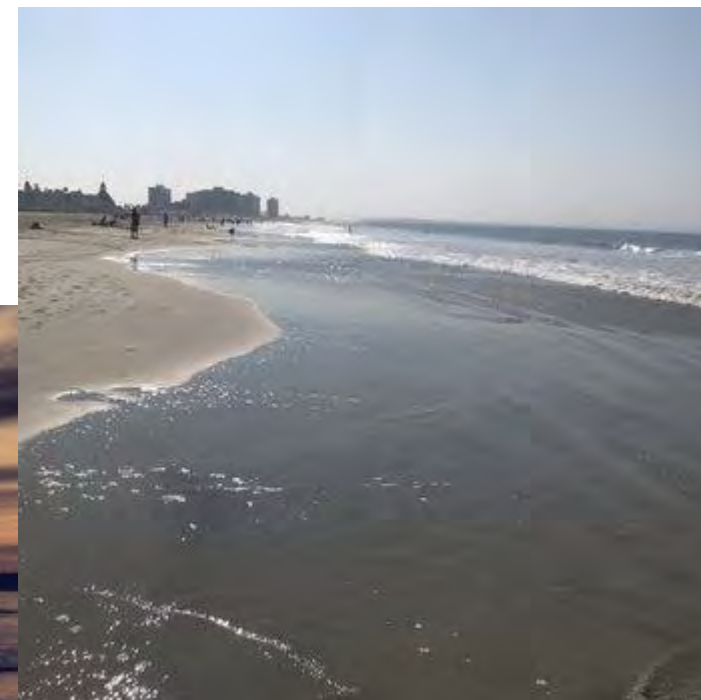
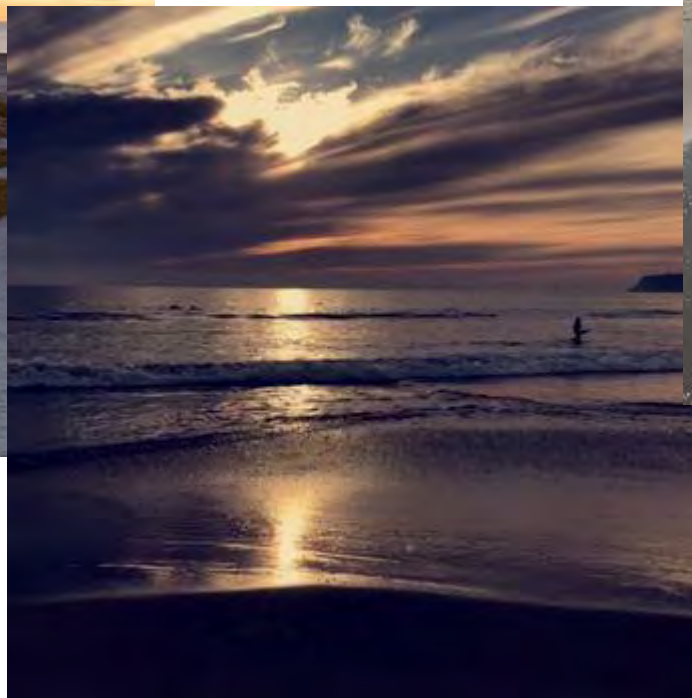
- Chiropractor entered into agreed order in 2012 with Kentucky Board; included a reprimand and \$1K fine
- In 2015, IL Dept. issued reprimand and \$1K fine.
- On appeal, chiropractor argued mitigating circumstances, including 36 year clean record
- **Court reversed and set aside IL Dept. sanction finding no purpose served under the Act.**
- **Also, court took critical notice of “policy” whereby IL Dept “mirrored” sanctions from other states**

Labrot v. Illinois Department of Finance & Professional Regulation (Illinois)

2018 Ill. App. Unpub. LEXIS 39

(2017)

THANK YOU....Enjoy Coronado!!





2018 FARB Forum • Loews Coronado Bay Resort • Coronado, CA

**Coronado State Board of Licensure
Meeting Agenda
January 28, 2018**

- I. **Call to Order** **Hal Taylor, Chair**
- a. Attendees/Quorum
 - i. **Jane A. Barber**
 - ii. **Linda Lyter**
 - iii. **Ned Martello**
 - iv. **Rick Orgain**
 - v. **Staff**
 - vi. **Counsel**
 - b. Approval of Agenda (**ACTION**)
- II. **Act I: Introductory Remarks** **Hal Taylor, Chair**
- a. Executive Director's Report **Virginia Herold**
- III. **Act II: Proactive Risk Management** **Cheryl Lalonde, Esq.**
- a. Immunity
 - b. Conflicts of Interest
 - c. Antitrust in Post-NC Dental Era
 - i. State Oversight
 - d. Insurance/Indemnification
- IV. **Act III: Request for Board Action** (aka Statutory Navigation) **Mark Brengelman, Esq.**
- a. Three action items (**ACTION**)
 - i. Petition for Expungement
 - ii. Initial application for licensure: Accredited Institution
 - iii. Initial application: Criminal record
- V. **Act IV: Legislative Request for Comment on Board Structures** **Hal Taylor, Chair**
- a. Board Discussion of Recommended Structure
 - i. Departmentalized
 - ii. Composite; or
 - iii. Stand-Alone
 - b. Board Recommendation
- VI. **Adjourn**

**42nd Annual
FARB FORUM**
January 25-28, 2018
Coronado, CA



Regulation in the News

Joel Albizo, FASAE, CAE
Chief Executive Officer
Council of Landscape Architectural Registration Boards

President
Federation of Association of Regulatory Boards



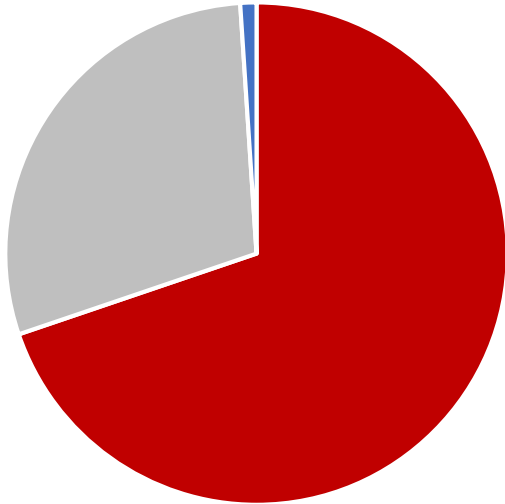
Three Takeaways

- What's happening and why?
- What does it mean to regulatory boards?
- What can we do?

What's happening and why?

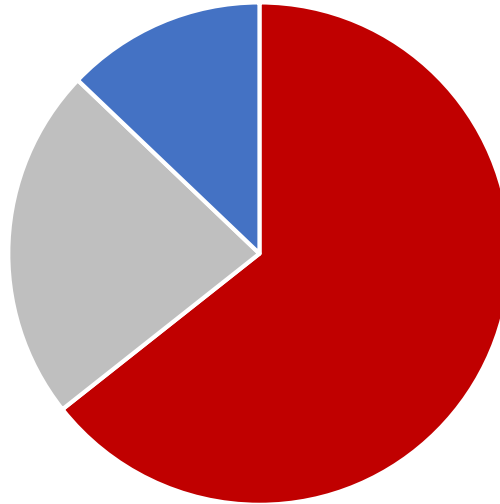
The public is hearing a one-sided story

Google



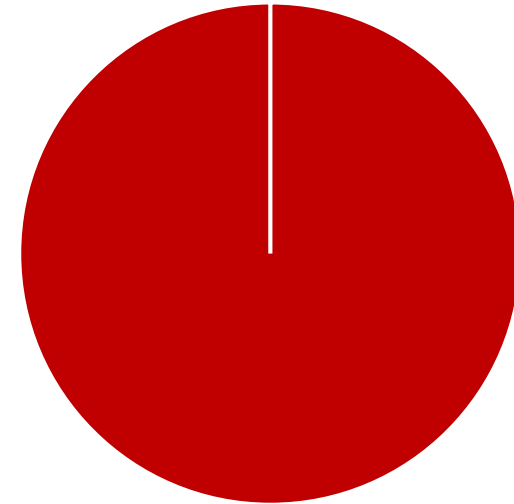
■ Negative ■ Neutral ■ Positive

Twitter



■ Negative ■ Neutral ■ Positive

Facebook



■ Negative

n=50

Legislator rips up bill to end licensing for social workers, barbers, other professionals

Do Occupational Licenses Exacerbate the Prison-to-Poverty Pipeline?

The Disappearing Right to Earn a Living

Occupational Licensing Reform Becomes a Cause Both Republicans and Democrats Can Love

The Onerous, Arbitrary, Unaccountable World of Occupational Licensing

Occupational (License) Hazards: Style Hair at a Church And Go to Jail?

Occupational Licensing Reduces Interstate Mobility

License to Mow Lawns? Occupational Licensure and Liberty

New Study Shows Licensure Laws Kill Jobs in All 50 States

States realizing it's stupid to make it hard to earn a living

Nebraska Requires Barbers To Train Longer Than EMTs. That's Ridiculous

The Positive Side of Licensing Barbers

Imposing requirements on certain kinds of work could actually be a better deal for consumers.

By [Justin Fox](#)

17 June 26, 2017, 10:58 AM EDT



More choices, better haircuts. Photographed: Dannan McColasben/Getty Images for Boston Children's Hospital

Licensure replaces the informal, often hard-to-penetrate networks that previously steered people into work as hairstylists or bakers and replaces them with a straightforward set of training and certification requirements.

"Suddenly the occupation is actually easier to get into than before."

--Dr. Beth Redbird

New examination of occupational licensing contradicts decades of research

Professional licensure does not limit competition nor does it increase wages

Date: October 17, 2017

Source: Northwestern University

Summary: From doctors to engineers to carpet layers to massage therapists, more than one in three Americans is required to hold a license to work in their occupation. Broad consensus among researchers holds that licensure creates wage premiums by establishing economic monopolies, but according to research, licensure does not limit competition nor does it increase wages.

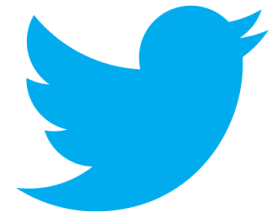
It's reverberating across the media landscape

Forbes

LA
Times



THE DAILY SIGNAL



WSJ

The Des Moines Register

PART OF THE USA TODAY NETWORK

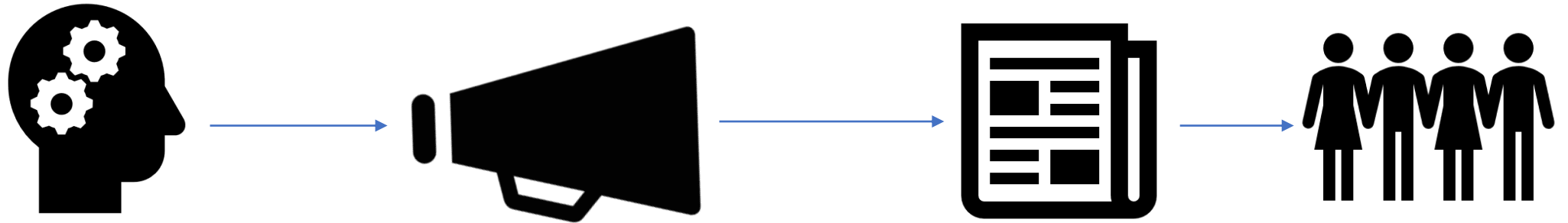
reason
Free Minds and Free Markets



The Atlantic

the
FEDERALIST

The publicity engine is revved up



The narrative is well-established

Keeps markets closed, rewards incumbents

Raises prices to consumers

Disadvantages women and minorities

Disadvantages those of lesser means, education

Makes low income work less rewarding

Discourages entrepreneurship, innovation

Limits mobility

Doesn't align with health and safety risks

When Unpaid Student Loan Bills Mean You Can No Longer Work

Twenty states suspend people's professional or driver's licenses if they fall behind on loan payments, according to records obtained by The New York Times.

By JESSICA SILVER-GREENBERG, STACY COWLEY and NATALIE...



4



ARTICLES REMAINING



Disadvantages Women, Minorities

This Company Is Trying To Disrupt The Braces Industry And Dentists Are Fighting Back



Discourages Entrepreneurism



Jenna Bentley @JennaMBentley · Nov 7



Excessive **occupational licensure** creates higher consumer prices, restricted employment, and dampened innovation



Occupational Licensing Run Wild | Regulatory Transparency Project

This paper provides historical analysis of occupational licensure in the United States, discusses the costs and benefits of our licensing system,

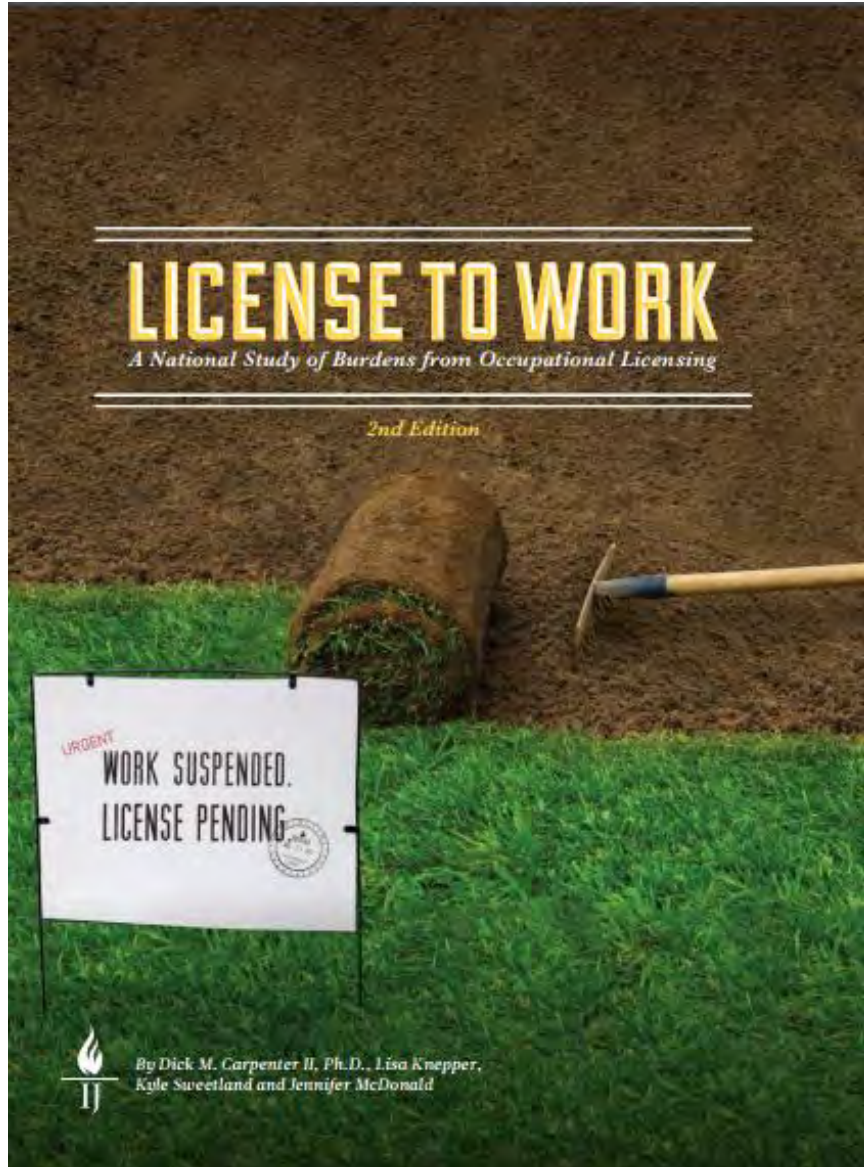
regproject.org



Illegal Math? A state board in Oregon is punishing people for talking about traffic lights and any other “engineering” topics

“Neither revolution nor reformation can ultimately change a society, rather you must tell a more powerful tale, one so persuasive that it sweeps away the old myths and becomes the preferred story...”

--Ivan Illich, “Storytelling or Myth-making”



“The right to earn an honest living has always been a fundamental American right.”



OPINION | REVIEW & OUTLOOK

Licenses to Kill Opportunity


A new study shows how state licensing rules block upward mobility.



PHOTO: ISTOCK/GETTY IMAGES

YOU ARE BORN TO MOVE

By *The Editorial Board*

 323 COMMENTS



Ivanka Trump 

@IvankaTrump

Follow



A new study shows how state occupational licensing rules block upward mobility

[wsj.com/articles/licen ...](https://www.wsj.com/articles/licen...) via [@WSJ](#)



Licenses to Kill Opportunity

A new study shows how state licensing rules block upward mobility.

[wsj.com](https://www.wsj.com)

What's happening and why?

1

The public's hearing
a one-sided story

2

It's compelling,
consistent and easy
to understand

3

It's being amplified
across the media
landscape

What does it mean to boards?

You're being defined by someone else



Your story isn't being told

- Protects public by ensuring competency
- Delivers streamlined, expert-led investigation of complaints
- Provides accountability through governor/legislature appointments
- Promotes fair, defensible, unbiased licensure standards and processes
- Encourages professional competency
- Promotes efficient marketplace by reducing information asymmetry





Joel Albizo

@JoelAlbizo

Common-sense professional regulation protects consumers, saves tax dollars and promotes transparency and trust in the market. #FARB #HSW

4:18 PM - 4 Oct 2017

Conflict
Limitations
Fear



What does it mean to regulatory boards?

1

You've been defined

2

You're story hasn't
been told

3

You're in a difficult
position

What can we do?

FARB

Regulatory Associations

Regulatory Boards

Those who tell the
stories rule society

Plato

Develop a compelling story for common sense occupational regulation





WHAT'S
YOUR
STORY?

jalbizo@clarb.org



E₁ M₃ P₃ O₁ W₄ E₁ R₁

S₁

P₃

E₁

W₄

P₃

R₁

E₁

H₄

A₁

D₂

Z₁₀

Find your voice





Learn from, lean on each other

Experiment.

Learn.

Repeat.

New Year's Resolution



It is not enough that
we do our best.
Sometimes we have
to do what's
required."

Thank You

SAVE THE DATES

2018 FARB Regulatory Law Seminar
September 27 -30, 2018
Portland, Oregon



2019 FARB Forum
January 24-27, 2019
New Orleans, Louisiana

