

# ShortCircuit363

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Occupational licensing, professional licensing, licensing boards, antitrust, public protection, disciplinary actions, regulatory capture, state legislatures, healthcare professions, board meetings, licensing fees, labor unions, regulatory reform, public interest, Institute for Justice.

## SPEAKERS

Rebecca Haw Allensworth, Anthony Sanders

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 00:00

 Anthony Sanders 00:10

Hello, and welcome to Short Circuit your podcast on the federal courts of appeals. I'm your host. Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, February 7, 2025 and we have a few times, instead of talking about the federal courts of appeals or the latest in the law, discussed a recent book that's been published with its author, and I am very pleased to say that is what we are going to do today. Now, anyone who follows the Institute for Justice and what we do at the Center for Judicial Engagement knows the subject of occupational licensing. At IJ, we've published this report 'license to work,' we've done a few additions of it, documenting occupational licensing across the country. We've done other reports. We of course, have challenged many occupational licensing laws in state and federal courts across the country many times, and we've talked about many of those cases and other cases here on Short Circuit. So I think our audience will be excited to hear about this book, especially the title, which is 'The Licensing Racket.' I mean, that's a good start, right? How we decide who is allowed to work and why it goes wrong. Now it's published by Harvard University Press, and it's actually coming out a few days after we're recording the show on February 11, but about three days before we plan to release it, which is on Friday, February 14, 2025. So if you're just listening to this, the day it comes out, and you want to spread a little Valentine's love, go to the show notes and click to the books' page, and you can buy a copy and spread a little bit of that love around. The author, who we have here today is Rebecca Haw Allensworth. She is a professor at Vanderbilt University Law School. She is the Associate Dean for Research the David Daniels Allen Distinguished Chair of Law. She has degrees from places like Yale and Cambridge and Harvard. And she even clerked for Judge Posner, which would be cool to talk about, just for Short Circuit reasons. And she is primarily an antitrust scholar, but she got into this thing occupational licensing, and so I want to welcome her to the show and hear what's her book about.

R

Rebecca Haw Allensworth 02:51

Well, first, I want to thank you for having me on the show, and just to say that the Institute for Justice has provided me so much research and information that's been very influential on this book, so it's a real treat to be here. So the book is about as you call it, occupational licensing. I call it professional licensing because it's a little bit different, actually, from the definition that Institute for Justice uses for occupational licensing. I'm interested in those kind of government permission slips to work that require a big investment in human capital to get. So, we're talking about education that you would measure in months, if not years, and testing. So the ones that would be very familiar here would be medicine law, but also alarm system installers, funeral directors, and hair professionals. This actually excludes some of the occupations that may be in a lot of Institute for Justices', reports, ones where you need to have, like, a weekend CPR course or something to be a coach. You know, this would be an example of an occupational license, but maybe not professional license.

A

Anthony Sanders 03:58

Oh, sorry, in some of them we talk about how its really like a bonding requirement, right? You have to pay a certain fee. And so sometimes that's called registration, not full blown licensing. You're talking about the more meaty licensing part.

R

Rebecca Haw Allensworth 04:13

Yeah and it's a really onerous form of regulation. It excludes a lot of workers, and it raises prices for consumers. And there really hadn't been a comprehensive book length treatment of occupational or professional licensing in America that looked at the whole regulatory thing in about 40 years. And so I wanted to write that book. And as you mentioned, I'm an antitrust professor, and I knew going into this book project that we let the professions regulate themselves, if the regulation is done through licensing boards that are mostly made up of members of the profession. So I thought, well, I've seen cartels work. I bet I know what happens at these licensing board meetings, and I'm going to start showing up for my book research and just see what's really going on there. And this book is really a product of what I saw. So the book is very much about licensing boards, not just the laws that restrict work, but also the boards that regulate them. The working title for the book was 'Board to death,' which got nixed, but I still sort of love it. And I when I showed up with these licensing board meetings, about half of what I saw is more or less what I expected, as far as raising barriers to entry and keeping workers out and raising prices to consumers through lots and lots of regulation that maybe doesn't protect the public. But then there was this other set of things that I was not expecting at all, that I don't think was on the radar of people who were critical of licensing- like Institute for Justice. Which is the disciplinary side of things, and how badly boards do the public protection that they're supposed to be doing when it comes to bad providers.

A

Anthony Sanders 06:06

Yeah, so that's the aspect of this book, and overall your treatment of boards that I think even those of you listening who think "I know all about occupational licensing, I've read work by Morris Kleiner," who is an economist that you mentioned, who's written all kinds of studies on

on occupational licensing- if you read work that IJ has produced, what is really different and new and great about your book is how these boards actually function. Like you think some public choice scholar in the past would have dug into how these boards actually work, because it's the kind of thing that libertarians talk about all the time. When you look at how the Department of Education, even though it's set up with grand purposes, actually works- it actually has all these terrible things that happen and but no one had done that for occupational licensing boards, which really surprised me. But the way that you did it, in going to the board meetings. And these people we're happy to talk to you, it seems and that is really impressive. And there were a lot of moments in reading your book where my jaw dropped and I am like, "wow, they actually did that." You would think I would have been immune to it at this point, working at IJ for 15 years, but its happened over and over again.

R

Rebecca Haw Allensworth 07:37

Yeah, the regulators were unselfconscious about the ways that what they were doing was actually hurting the public. And I- you know, one thing that- so I went in here with a sort of cartel model, right? A mustache-twirling villain was going to be at this. But that's not what I found. The people on the boards were very high integrity. They cared about public protection to the extent that they understood what they did, you know, and the ways in which it was going to affect it. They were willing to talk to me because, you know, I was somebody who wanted to learn more about what they were doing. And so when I say they were unselfconscious, I guess part of what I mean is they just didn't know or understand the effect that their regulation had- both on, you know, the "too much red tape" problem. Because it's easy to think, like, well, we're protecting people. We're making it harder to enter the profession, and the people in here are going to be really good at their job, and that's going to be safer for consumers. It takes a kind of systemic perspective on the whole thing to see that the higher you raise the barriers, the scarcer the provision of services, the more people go without, the more people have to pay for it. And then the other side- I think they were also kind of clueless about what happened when they failed to discipline the really bad providers. I think that they kind of had this idea like, well, they'll never work again. How are they going to work again with, you know, probation or a reprimand in their file? And the answer is, they will go on to work again- just not in the areas of practice that the board members were most familiar with. In fact, they would go on to work again in areas where maybe they would encounter some of the more vulnerable patients and clients. So the board members were, you know, they were doing their best, you know, in most cases. But my jaw also dropped, having the perspective of, like, you know, this should not be about protecting the profession. This should be about protecting the public. My jaw dropped at a lot of the stuff that I saw, too, and that was especially true when it came to the discipline.

A

Anthony Sanders 09:47

So look, I want to get into the discipline, because that's some of the most shocking stuff. Even if you don't think we should have occupational licensing, at least maybe it should work as it's intended to work, which is to punish people who do bad things. But first, on the boards themselves, you discuss how the people on boards, as you would expect, are kind of some of the leading lights of the profession, the most outspoken, the most networked, in whatever state they're in. And so they often wear the hat of the board, but they wear the hat of, say, the

professional association, just like a private bar association for lawyers, that then does things like lobby the legislature about the law. And they don't see a conflict between those two roles, it seems. Could you talk a bit about that and how pernicious that sometimes can be?

R

Rebecca Haw Allensworth 10:53

Yeah, so it's funny you brought up hats. I heard a lot about hats, and mostly it was when I sit on the board, I change hats. I go from being a member of the board of the Association of Physical Therapists to being a member of the Board of Physical Therapy. And my role is different, and I can compartmentalize those two interests. And when I'm sitting on the board wearing my regulator hat, I'm not thinking about the profession at all. But I just did not see them succeed in compartmentalizing in this way. I did not see them actually able to set aside their professional interests in thinking about the public- and sometimes nakedly so. The alcohol and drug abuse counselors example that I mention in the book- the staff wanted to roll back the requirements very slightly, and it wouldn't have reduced the amount of relevant education that the counselors would have had to have, but it would have made it easier to enter the profession. And the board members said things like, "When you open the door, you let the bugs fly in," and "I worry about pay for our providers," and "We need to have a more professional profession." You know, it was very much about what this would do for the profession. And this is a profession, by the way, that has only 400 people in the state of Tennessee, while we have 70,000 people who suffer from opioid use disorder. So this is a profession that really could be much larger, and it has a huge demand. And that- I don't call that public protection. That's not public protection. So that can be pretty pernicious.

A

Anthony Sanders 12:44

One license that I know some states have, that I've always thought is kind of funny, is the alarm installers license. And you describe this alarm installer licensing meeting, where someone had a handyman had installed a ring camera at someone's front door, and apparently you can't do that without a license. And the reaction of the board toward this poor little handyman who's doing this tiny little job, just seemed to me, out of bounds to what the actual health and safety ramifications were for their job. But they didn't seem to get that that was a problem.

R

Rebecca Haw Allensworth 13:27

No. And, in fact they kind of threw the book at this guy. I think this was maybe before ring, he had installed some sort of camera system that he got at Sam's Club for his neighbor, and then he put on his business card that he could do this kind of installation. And I think it was especially putting it on his card that really bothered the board, because it was like, "Oh, this is going to be competition. He's going to find more clients like this." And in fact, the staff of the board was trying to get them to back off a bit and say, "Look, we talked to him. He's not going to do it again. He didn't know that you needed a license for this. He bought it at Sam's Club." And they were like, "oh, no, maximum fine." And the staff said, "Well, he only did it once." And then the board said "that we know of." And it was just this really extreme reaction. And I think that that's a perfect example of not understanding of the chilling effect that this kind of regulation can have. I think people are really scared of these boards. That handyman had to

pay \$1,000 fine, not to mention the terror being hauled in front of a licensing board for installing something from a big box store. I will note that I think that they've gotten rid of that board since I concluded my research. So that's progress, I guess.

A

Anthony Sanders 15:00

Yes one board down, many more to go. The contrast between that, that I think your book is really valuable for, and how boards treat people on the inside, people who already have a license is really powerful. But what I don't quite understand, and maybe this is just a lack of lawyers educating the public or, maybe I just have American Constitutionalism all wrong- but it doesn't seem like people on these boards get that an interest like protecting public health and safety is far more important than keeping people out of the profession. Because it's going to be more "professional" if we don't have people who look like basically, they're the Riff Raff within our profession. And they don't see one as like legitimate and one the other, they see both as legitimate. Do you think that's actually true? Or do you think if they thought about it are a little embarrassed by this anti competitive impetus that they have or is it just kind of lost to them? I mean, why it's lost to them would be a whole different story. But is it just not something that crosses their minds, and maybe their staff attorneys minds?

R

Rebecca Haw Allensworth 16:33

So, I think it is. I think it has crossed their mind. I think that's why I heard about the hats. I think they knew they had to change hats because they understood, on some level, there was going to be a conflict of interest between the interests of the profession and the interests of the public. But one thing they're able to do is play up all the ways in which they don't conflict. So, you know, high licensure barriers are likely to lead to more competent providers. That's probably true on some level, to some degree. And I heard an awful lot of, "You know, we want to throw the book at the really bad providers because they make us look bad." So, you know, they would say that they wouldn't actually do it, but there are these ways in which the interests of the profession and the public line up. And I think the cognitive dissonance they were engaging in was really about mostly thinking about those things, thinking that that's what they were doing- that they were operating in that space where those things line up. Also, I'll say, you said something about the staff. I actually think the staff, the full-time employees, the bureaucrats, if you will, working for the state but operating as lawyers for the board or as executive directors of the board, were not clueless at all. They actually, I think, fully understood the anti-competitive nature. They are the ones who brought up the case that shall not be named, which is what the boards call.

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Anthony Sanders 17:55

Which we will name later

R

Rebecca Haw Allensworth 17:57

Yeah we'll name later. But they're the ones who brought up the possibility of antitrust liability, and of anti competitive possibilities. It was the staff that kind of knew what was going on. And here's where I'll maybe depart ways with Institute for Justice a little bit. I am in favor of more

here's where I might depart ways with Institute for Justice a little bit, I am in favor of more bureaucratic regulation for the professions that we need licensing for, because they were the ones who seemed to understand what was going on. So I don't really want to burn it down, at least not for some professions. Not to unfairly characterize the Institute for Justice's perspective. I liked the bureaucrats perspective on a lot of these problems.

A

Anthony Sanders 18:37

So that's an interesting, maybe segway we can go in into now. You discuss how, in the United States, the model of having a board that licenses and regulates a profession within a state that is primarily composed of practitioners in that profession, which is the big antitrust problem that is super common right across the country, but it's not really common in other countries. Now, your book isn't a comparative international perspective, in a deep way, but you do talk a little bit about this. Could you discuss that? I know that funnily enough, we think America is the land of the free. A lot of other modern democracies are not as occupationally licensed as the United States, like the UK, for example, they have their own problems, but they don't have as much occupational licensing. But when they do it, it seems like they do it the old fashioned way, with bureaucrats who, although they're bureaucrats, they're not tied into the profession in the same way that these boards are.

R

Rebecca Haw Allensworth 19:49

Yeah, okay, so this is really interesting, the way you framed this question, because I think a lot of legislators think that these licensing boards are kind of small government. They think this is actually a light-touch thing because the fiscal report on the creation of a board is zero, you know, that's not going to cost the state anything. It's, you know, essentially the private sphere regulating, which is what maybe you'd want if you believe in small government. And when it comes to discipline and investigations, it's a very light touch, you know. I remember talking to some Republican and even maybe libertarian-minded lawmakers who made this argument, and I was kind of like, "You know, you get what you pay for," and this is big government that, yeah, it looks like small government because these guys are not bureaucrats and aren't drawing a salary from the state, but look at how much they're costing- not only the people in your state who have to pay for services but leading to all kinds of failures that are very expensive for the state, like the opioid crisis. And, you know, the cost of health care licensure actually plays a role in both of those things. So, yeah, this idea that the way America does it is actually small government is an argument I've heard made, and I think it's part of why it proliferated. And I think it's totally wrong. As for other countries, the one I'm familiar with is England, as you said, the UK, and specifically the way they regulate doctors. Of course, they license doctors, but they do it through a regulatory body that's not 100% dominated by physicians. There are a lot of other people involved in that. And then they have this disciplinary system that's a lot more independent and, I think, expert and reliable. You know, it's a little hard to compare the two in terms of their results, just because medicine is so different between the two countries, but I think that we found, I did an empirical study comparing the outcomes between Tennessee and this regulator in the UK, and we found that the results in the UK were a lot more reasonable than in Tennessee.

A

Anthony Sanders 22:02

In terms of discipline, had a story

in terms of discipline, bad actors

R

Rebecca Haw Allensworth 22:05

In terms of discipline, yeah. I mean, we didn't look at the other side of things. I think that would be interesting to look at too as far as the difficulty of entering the profession, and the barriers to entry that they create in England. I wonder about that. Although there, you're really going to encounter apples and oranges because of the NHS and socialized medicine there.

A

Anthony Sanders 22:24

Yeah, they do have a few private doctors, but mostly they're government employees. We keep hinting at how these boards discipline their people on the inside, so that you've gotten enough education, you pass the test, you're on the inside of the profession. At that point, things seem pretty good. Now you talk a lot about medicine, and particularly because you've done a lot of research in Tennessee. A lot of states have gone through this, but Tennessee especially went through the opioid crisis and its impact on medicine. So maybe you can talk a bit about what you found with how Tennessee doctors regulated themselves in that way, but also, more generally, how it impacts other professions to that dynamic.

R

Rebecca Haw Allensworth 23:19

Yeah, so I started with medicine for a reason, and it was because I felt like the libertarian case against licensing that the Institute for Justice has made so persuasively, was not going to it wasn't going to get any traction against medicine. Because the sort of health and safety risks there were so high that you wouldn't really roll your eyes at, oh, we need to be worried about life and death, the way that you would roll your eyes at an argument about hair professionals, that we need to be worried about life and death.

A

Anthony Sanders 23:52

There's a lot of licenses to worry about before that one.

R

Rebecca Haw Allensworth 23:56

Yeah, exactly. And so I thought if this self-regulation is going on, I bet it's just as bad. And we sort of think doctors have it all figured out, but maybe they don't. That's why I started with medicine. I also thought that this is really important- everybody could agree that this is a really important thing to get right. And so I wanted to see if we are getting it right? Also, medicine is a small fraction, like actual physician licensure is a small fraction of the healthcare workforce that's licensed, but it sets the tone. It's kind of like they're the big guys in the room, and so what they do really trickles down to the largest healthcare profession, which is nursing, and then all the other healthcare professions, too. So, although a lot of my examples come from doctors, I think that what I learned there is broadly applicable to a lot of the prescribing professions and healthcare professions. And what I learned is that as much as they were sort of

concerned about patient safety- maybe overly concerned about patient safety when it came to talking about entry requirements and controlling their own competition- they became focused on something totally different when it came to discipline. So, if a doctor came in accused of using his license to deal in drugs or having sex with a patient, the scarcity of medicine became foremost in their mind- the scarcity that they had basically created. Yeah, and it was like, "Oh, well, this doctor has had so many one and a half million dollars worth of training. We can't just abandon it. He's potentially this font of consumer benefit. We just need to rehabilitate him. We need to find a way to get him off drugs. We need to find a way to give him a chaperone so he won't touch patients." That's the way we're going to preserve access to care. And I think I saw some similar things happen at the physician assistant board with overprescribing, same thing at the nursing board. So, it isn't just medicine that's doing this. And the thing that I think is really interesting about this argument is that it actually strengthens what I'll, as a shorthand, call the Institute for Justice position because the Institute for Justice has done such a good job of highlighting as ridiculous arguments for why you would need licensure are even more ridiculous if you see what boards are doing when life and death is on the line. You know, it kind of puts truth to the lie.

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Anthony Sanders 26:44

Of course, I'm going to agree with what you just said about IJ. But what really struck me in your discussion of these boards, is just how many second and third and fourth chances they give to these doctors that are completely out of line. And that it is really only when the criminal process comes in, which, of course, is not run by doctors, that the board will actually do something. Could you give, maybe give a couple examples of that?

R

Rebecca Haw Allensworth 27:16

Yeah so it is kind of the revolving door. I mean, one thing I often heard when I talked to board members about a case that I thought was too light, they would say, "Well, he'll be back. They'll get another chance to get it right." I'm thinking this is not good for patients that they're just sending, sending them out, and he'll come right back. And they did. I saw examples of, like you said, second, third, fifth chances in front of licensing boards. And you said that the criminal system is the thing that'll stop it. What I would say is not even then- I saw a lot of people get second and third chances after criminal justice involvement. But that was a shortcut to findings of fact. Okay, so one thing that we need to know about boards is that they're really underfunded, and they're under resourced, and trials are expensive. Oh, and because the boards only meet for two days every two months, that's the way the medical board meets, but the other boards are similar. So if you're going to have a five day trial, that's going to take you six months.

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Anthony Sanders 28:22

When you told a story about one of those long trials. It was unbelievable that it's actually set up that way. They have two days trial, then they break for a month and they do a little more trial.

R

Rebecca Haw Allensworth 28:32



Yeah, and they actually only have one day of trial because the first day of the meeting is a bunch of other business. So, they do trials one day at a time, every two months. The thing about the criminal system is that, now, if you have a plea or a trial, you have findings of fact, and you can lose your license. The legislature has set it up so that if you have a criminal conviction of a certain kind, that itself can be a reason to lose your license. It becomes sort of administratively easy for the boards to take licenses once there's a conviction. That's part of the answer. But keep in mind, the criminal system can take forever, and so in the meantime, that doctor may be practicing and prescribing unless the criminal judge has figured that out, in which case, the criminal judge has to set the terms of their release to limit prescribing. So, now you have a judge deciding what's safe for this doctor to do, and it's just goofy. The weirdest thing, though, is that even somebody who has a conviction, I often found the board going a lot lighter than I thought they would. And I think the idea there is like he's really been through the ringer- and it's usually a he, but not exclusively. We'll just let him keep his license because otherwise, he'll just be in even worse shape. He's already been punished enough.

A

Anthony Sanders 30:07

It reminded me how little prosecutors are disciplined by lawyer licensing boards, by bars, even when they've done absolutely egregious things. They can't be sued because of prosecutorial immunity. And yet, the one thing that could maybe stop them from doing all these bad things and coming up with fake evidence or whatever is to lose their license. And that hardly ever happens. And so it's terrible. I was going to say it's kind of heartening in an ironic way, but it's terrible to learn that that's true in other professions as well. Well, let's move on to your background when you started all this, which is anti trust. And this case that shall not be named, which we can now name. I can't remember the the exact title, but it's the North Carolina Board of Dental Examiners Antitrust case from 2014.

R

Rebecca Haw Allensworth 31:10

Well, the Supreme Court decided it in 2015 and I believe we are almost at the 10 year anniversary, like to the day.

A

Anthony Sanders 31:18

So, that's the North Carolina Board case about teeth whiteners. Not a lot of people have paid attention to it since then, but I will say we at IJ were interested in it when it happened because we've been interested in teeth whitening and licensing, and we've done a few cases in that area. My colleague, Paul Sherman, did a few cases in that area, and I will say the day the argument happened here in Minnesota, in our little office in Minnesota, we listened to the argument with Morris Kleiner himself and a couple of his colleagues. That was fun. Oh, that's so cool because Morris was interested in what's going to happen. So, that case comes out and basically says, yes, licensing boards could be subject to federal antitrust laws depending on a few factors. There's been some litigation in that area, trying to crack down on abusive licensing boards, but there hasn't been that much. So, maybe you could describe, in a nutshell, the background. I know it's complicated, but how these boards might be causing antitrust violations, and then what has happened since then, and maybe why it hasn't gone as far as some reformers hoped it would.

R

**Rebecca Haw Allensworth 32:40**

Yeah. So this case involved the North Carolina dental board sending cease and desist letters to teeth whiteners in malls, saying, "You guys are practicing dentistry without a license, and if you continue to do this, we're going to open disciplinary cases against you."

A

**Anthony Sanders 32:57**

This is something you can do at home, like super cheaply. These people just help you put get your teeth whitened.

R

**Rebecca Haw Allensworth 33:03**

That's right, yeah, this is not- we won't get too deep into the statute, but it was a real stretch to say that the statute in North Carolina really described what was happening at these mall kiosks. So, let's imagine this was just a private cartel. Okay, so let's imagine that a bunch of dentists got together and said, "We don't like that this cheap teeth whitening is happening. We want to funnel our patients into the most expensive, you know, full-in-office version of teeth whitening. It's an important source of income for us, which it actually is, so let's all agree not to deal with or provide any support to anyone doing teeth whitening without a full exam, and not in the office." That would be an antitrust violation. It would be a horizontal cartel organized around wanting to suppress competition. The difference here is that the dentists who made this plan and executed it sat on a licensing board, and the Supreme Court has said that state regulation is immune from antitrust liability, so you can't sue your state legislature for creating a law that suppresses competition. It's kind of obvious why you have to have that immunity- think about it for two seconds. But the problem is that so much of what states do is not done by the legislature or the governor, the sovereign parts of government, if you will. It's done by these middle entities, like boards or commissions, and sometimes they look an awful lot like a cartel. So, there's a test to distinguish between government regulation that's properly government regulation and regulation that's basically the state saying, "Hey, you can be a cartel, and we'll just go with whatever you want to do." The latter is supposed to be subject to antitrust liability. And the case really turned on whether or not this dental board was more like a state agency or more like a cartel. The case said, "Look, if you want to use a board to regulate in your name, and you want to use a majority of members from the profession or industry on this board, then you need to actively supervise it. You need to have much more involvement in their regulation." So, that's what the case said, and then it was like, because there's not a lot of supervision of boards, people thought, "Oh, there's going to be a ton of antitrust liability for licensing boards." As you said, there was some, but not a lot of actual cases. However, I do think that the effect of the case (that shall not be named, but it's the North Carolina Board of Dental Examiners case) has affected the behavior of boards in a good way. It's made them a little bit more self-conscious about their self-dealing.

A

**Anthony Sanders 36:09**

Okay? And so there may be some cease and desist letters that they don't send out today, that maybe they would have sent out 15 years ago; because at least their general counsel are

saying that could get you in trouble.

R

Rebecca Haw Allensworth 36:25

Yeah. I mean, I literally saw this. I sat in on board meetings where the board wanted to do something, and then the lawyer for the board said, "No, North Carolina dental. No, can't do that. No, anti trust." So how much effect is that having? Some but not as much as we would have hoped for a case like that. But, the other thing is, I saw so much bad regulation, watching the boards work. Very little of it, is what I have described as an antitrust violation, like an actual suit that is going to succeed, like the teeth whitening case. So I think that case is important, but it has a limited effect on reforming what's happening at the boards.

A

Anthony Sanders 37:06

And that's not an area that we do at IJ for many reasons, including we're not antitrust lawyers, but if people are interested, there are a few firms around the country that specialize in that work. One is Bona Law, which is headed by Jared Bona who's an old clerk of IJ, and another colleague of his, Aaron Gott, who is a lawyer who's done work for us in the past, and they do a great job there. So if you have an antitrust problem with a board, reach out to Jared and Aaron, and maybe they can help you. But as you say, a lot of licensing especially when it's in the board model, it's not exactly anti competitive. It's just not exactly put through the cost benefit analysis for how it's going to help the state. And is that maybe part of the problem, that the board is conflicted, or is that really just a problem with democracy and how the legislature sets it up, and there's really only so much blame we can cast at the board members.

R

Rebecca Haw Allensworth 38:15

So I think it's both. I think you can blame the board members only in the sense that they're not able to fully change that hat, and they go about seeking what's good for the profession. And then what will often happen is that the boards themselves will influence what happens at the legislature, and then whatever the legislature does, as I said, is totally immune from antitrust liability. So, for example, going back to alcohol and drug abuse counselors, you used to have 1500 hours of practical experience after you finished the education to become a counselor. That became 3000 that became 6000. Now all that is done. By the way, 6000 is about three years of full time work that would be a medical residency- that is all done by the legislature. So that's completely immune from antitrust laws. There's no argument that you could make.

A

Anthony Sanders 39:11

Although it could be on behalf of lobbying by the board members, right?

R

Rebecca Haw Allensworth 39:15

Exactly. So, boards drive this legislation. In fact, there was a bill to prevent boards from using

licensing fees to pay for lobbying in front of the legislature that they're supposed to be interpreting and it failed. So somehow, I guess the professional interest defeated this bill that would have prohibited boards from using their own fees to lobby the legislature, so that when we look at the legislature going 1500 to 3000 to 6000 we have to understand that the board is behind that.

A

Anthony Sanders 39:52

Well, so all of this mechanics of the board and their interests and everything hits me in a special way, because I am one of the very few libertarian public interest lawyer in the country who used to represent labor unions in my old job.

R

Rebecca Haw Allensworth 40:18

You had some sort of conversion experience.

A

Anthony Sanders 40:20

Well, no, I needed a job, and it was really fun work. I got in court a lot, and I worked with great people. The clients were very fun and interesting, as you might imagine- Chicago labor unions. But, yeah, they were not my people, ideologically, coming in and out. But so many of the discussions you put in the book between the board members remind me of how labor unions talk. Now, labor unions- they're not regulating the economy. I mean, they are, in a grand sense, but of course, they are taking advantage of the legal structure, whether it's a public union or private union, and going about it for their members, as you would expect. For example, one time, we were- this is not, you know, attorney-client privilege, so I'm not revealing anything- there were some members talking, and they worked at a plant. There was some work that they could do, but it was being done by an outside contractor coming in and doing work at the plant. Their argument was, "That's our work. Like, we've always done that in the past, it's our work now." It wasn't really in a collective bargaining agreement that they got to do that work, but it was kind of a common law, you might say, of the facility that they would do that. But they really thought that there was some rule being broken by not getting to do that work. It seems like it's exactly the same thing going on with these boards- that, "Hey, that's our work. That camera on that guy's front stoop? That's actually our work," even if there's not really a law that says it's theirs. So, do you see a lot of parallels- I'm sure you do, in some ways- between labor unions and boards? Is it underexplored in that way, or do you see some differences? Of course, the labor union isn't going to be as pernicious as the board because, you know, they're not making law, so to speak.

R

Rebecca Haw Allensworth 42:31

Yeah, there's this graph that everybody likes to talk about when they talk about licensing. It's in one of Morris's books, Morris Kleiner, the economist you mentioned earlier, where union membership, as a percentage of the workforce, goes from super high in 1950- just all the way down to the present. Then, licensing as a percentage of the workforce goes in the exact opposite direction. It starts low in the '50s and goes up high in the present day. This has

prompted a lot of people to be like, “Oh, you know, one is substituting for the other,” or there’s some kind of causal relationship going on here. I don’t think that has to be the story of why those lines are intersecting, but what they do illustrate is that one way of organizing labor has really taken over for the other, in the sense that it’s just a lot more important of an institution now than it was before. Licensing is more important than unions, and the similarities are important to note. As you said, the self-interest in the organization and the professional betterment is going on for sure. In both, unionization and licensing tend to raise wages, but there are also some really important differences. The biggest one you’ve already hit on, which is that a union is organized. Nobody expects it to be anything other than self-interested. The point of a union is to vindicate the interests of its members. The point of unionizing is that you get a seat at the table across from management, where you hash it out, and there’s a more even distribution of power in deciding on the terms of those contracts. That process is protected through law, and the outcome of that process is not just decided by the union. Obviously, management has a major role, and there’s a lot of law about what can and can’t happen in those agreements. That’s not the way licensing works. It’s like we handed the whole thing over to the union and then just said, “You’re the government now.” Also, unionization’s whole point is to better worker conditions. That’s not what licensing is supposed to be about. It’s this backdoor, sort of under the guise of public protection. If we wanted to use licensing to protect workers, it would look totally different. So, I do think there are interesting parallels, but at the end of the day, some progressives have made this argument that, like, “Oh, we need to preserve licensing because it’s the new union.” I just think that’s really wrong.

A

Anthony Sanders 45:13

So how do we make this better? You talked a little bit about having more bureaucrats, which is less shocking than it sounds. I'm sure there's other ideas you have. We've done a lot of litigation at IJ, but as everyone knows, that can't be the only solution, even if you know the courts were different than they are today. So where do we go from here?

R

Rebecca Haw Allensworth 45:38

Yeah, I think the entity with the most power to fix this is the state legislatures. They need to get rid of a bunch of licenses. The way we did in Tennessee for alarm system installers, we need to do that for half a dozen or a dozen other professions. And that's just the start. I think we also need to overhaul the way we do licensing boards for the remaining professions that need licensure. Basically, we want to reduce the influence of members of the profession. You could do that by vesting decision-making authority in government. For example, the Department of Commerce and Insurance runs the program for burial services- people who operate graveyards and do cremation. That's not run by members of that industry; it's just run by the government. That's one way to do it, so get rid of licensing boards. Another way would be to change the composition of these boards and make them less than 50% members of the profession. I think the first solution is more dramatic and may be harder politically, but I think the second is really possible. I don't think there's any reason why we need to have nine out of 12 doctors on the boards. It would be better if the rest of the people on that board had some expertise and interest in the area too.

A

Anthony Sanders 47:17

Now, in terms of your idea about having just the government do licensing. I can hear my free market friends, whispering in our ears right now that you're still going to have some kind of regulatory capture, as they put it. In that instance, it's not going to be the same, because the members of profession will basically have a cartel in licensing, but they're going to be pressured from the same association. The legislature is going to get the same pressures. And so in the end, is it really going to be all that different? In fact, it could be even worse, because then they're going to have the full hand of the centralized authority of the state, instead of this board. What would be your response to that critique?

R

Rebecca Haw Allensworth 48:06

I don't think it will be worse because they won't have any more governmental authority than the boards already have. Right now, we have the worst of both worlds, where you have all the special interests of a private organization and all the state power we associate with government vested in this licensing board. So I don't think it will be worse than the current system. Will there still be a capture problem? Possibly, and that's why we should only do this for professions that truly need it, where there's a real public interest in having licensing. I can't single-handedly solve capture- that's a problem that will come up. What I can say is that I compared the burial services program, which is run by the government, to funeral services. Funeral services is governed by a board of funeral directors, and the regulation there is much more onerous. So, to the extent that the burial services professional association has tried to capture the commission, the assistant commissioner who runs the program hasn't been as successful as in funeral services. Capture is a problem, but these boards are inherently captured. You don't even have to capture them; they are just industry-driven.

A

Anthony Sanders 49:33

There have been successes. So you, you mentioned this the licensing board at Tennessee for alarm installers that was disbanded, there's other examples. Does anything strike you as to what made that possible, like, what came together, where you actually do get deregulation or re regulation in a good way, of these industries?

R

Rebecca Haw Allensworth 49:57

Well the answer to that question is a little bit depressin because I think that there is not a large, organized, professional organization on the other side of that argument. So I'm not sure that the alarm system installers of Tennessee came together in a way that was effective to fight against that. Oh, also, by the way, we did away with licensing for beauty pageant operators. And no beauty pageant operators showed up to that meeting of the legislature. So that was an easy that was a slam dunk.

A

Anthony Sanders 50:34

There was a beauty pageant operator license?

R Rebecca Haw Allensworth 50:37

Yes, there was.

A Anthony Sanders 50:40

Do any other states have that?

R Rebecca Haw Allensworth 50:42

I don't know. But we don't have it anymore, and it's because no one showed up. I don't even know if anyone had this license, you know? What that suggests is that if we pursue licensing reform in this way, and we don't do it in a bigger picture way taking big, bold steps- then we're just going to trim away at the margins of these smaller professions where the public risk is really small. And, you know, I guess I'm all for that, like, why not? But I don't know that that's really going to cut at the heart of the problem. We have to take on the organized interests of the professions. We have to take on the AMA or the state level version of that if we really want to fix this.

A Anthony Sanders 51:26

Anything else you'd like to tell our listeners? A reason that they should read your book?

R Rebecca Haw Allensworth 51:36

Maybe I'm tooting my own horn, but I think it's more fun to read than you might expect. I don't know if you are allowed to swear on the show, but I think one of the best compliments I got was from somebody who's actually in the book. He said, "this was way more interesting than some of the boring shit I sometimes have to read." So what I will say is that my book is way more interesting than the boring shit you sometimes have to read, all right?

A Anthony Sanders 52:04

Well, we're not going to put that in the tagline for the episode, because you gave sufficient warning to people who may have children in the car. I think that's that's just fine. So the book is 'The Licensing Racket: How We Decide Who Is Allowed to Work, and Why It Goes Wrong.' By the time you're listening to this, it is available for sale right now, so please go and order your copy today. And Rebecca Haw Allensworth, thanks for coming on.

R Rebecca Haw Allensworth 52:32

Thank you!



Anthony Sanders 52:33

And thank you all for listening. Please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.