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Baked-In Corruption: The Need to Reform Boards and Commissions

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“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”

– James Madison in Federalist No. 10

Introduction

Legislatures too often give individuals the power to judge their own cause by giving too little thought to the institutional structures of boards and commissions that provide more in-depth oversight to certain programs and agencies than a legislature can provide. Concentrated impacts to the interests directly affected by boards and commissions push those interests to lobby for outsized representation on those very bodies. In fact, special interests often suggest creation of boards and commissions in the first place, and receive overwhelming representation on them at the hand of accommodating lawmakers. The result is

that the regulated become the regulators. Those who should be mere participants in programs become overlords of us all.

Legislatures must give more careful consideration to the institutional structures for which they are responsible, and stop creating governance structures where conflicts of interest, self-dealing, and groupthink are to be expected. The corruption referenced in the title is not the sort that gets prosecuted. Indeed, self-dealing behavior is given a sheen of legitimacy by the very fact that governmental power has been granted to bodies that have the ability to grant themselves market power.

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Conflict of Interest Explained

Perhaps one of the first things that comes to mind when people hear the word “corruption” is bribery, or the

solicitation of bribery through extortion. It is obvious to just about anyone that when a public official takes money for his or her own use in exchange for voting a certain way or for pursuing a particular policy, this compromises the public official and the public good. The ideal we expect of our public officials is that they act in a way consistent with the interests of the collective that they represent as a whole, without regard to specific individuals or classes of individuals.

In legal terms, our public officials have a *fiduciary duty* (an obligation to act in the best interest of someone else)¹ to their constituents as a whole. This is especially true for every elected official, regardless of who voted for the official, regardless of who financially supported the official's campaign, and regardless of who has any other close relationship with the official. But it is also true of any other public official, whether that individual is in a voluntary, uncompensated, appointed office or if that individual is hired full-time into a bureaucracy.

A fiduciary duty is one of the highest forms of legal obligation. However, when a person acting in an official capacity has a pecuniary interest in the outcome of decisions they make or help to make it is extremely difficult to carry out their fiduciary duty dispassionately. A *pecuniary interest* in a decision occurs any time a person will, expects to, or is likely to be financially impacted as a direct result of that decision.² Having a pecuniary interest in an official decision where there is a fiduciary duty is a very close cousin, at least in appearance, to taking a bribe, and in practice is practically equivalent to taking or giving a bribe if one prioritizes the pecuniary interest over the public interest.

A pecuniary interest by an official in a decision that official is involved in making is practically the very definition of a conflict of interest.³ We expect officials to recuse themselves from participating in making decisions when they have conflicts of interest because of the moral quandary such an individual faces and the inherent difficulty of keeping the general interest front and center in making such decisions.⁴ While someone with a pecuniary interest might have the moral fortitude to act morally and completely consistently with a fiduciary duty, most recognize that this is unlikely and it is even morally questionable to put an individual in such a situation. This is one reason so many governors and presidents have had their assets placed in blind trusts for the duration of their time in office. In this way, they are less likely to know (or at least appear to know) how their personal finances, and those of their colleagues, might be affected by their decisions and the decisions of those to whom they delegate.

Groupthink Explained

Groupthink occurs when a group loses a clear view of reality and of what is moral in its deliberations and decision making due to group pressures. There is a tendency to dehumanize other groups or to think of others as ignorant and whose opinions are automatically without merit. Members of a group with basically the same background and interests become insulated from outside opinions and perspectives.⁵ Groupthink can occur in labor unions, think tanks, political parties, corporations, bureaucracies, and teams within organizations, just to name a few. However, it is particularly unjustifiable to create institutions that encourage groupthink, as has become the habit of legislatures when it comes to boards, commissions, and other institutional bodies.

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Most examples of the deleterious effects of groupthink come from military, engineering, or intelligence operations gone awry. But the groupthink concept can apply to policy in general. Purposely populating boards and commissions with people from the same professions and largely the same backgrounds leads to tunnel vision and narrowed perspectives just as groupthink does in other endeavors.

Legislatures Create Boards with Inherent Conflicts of Interest and Groupthink

We have become strangely inured to the idea that it is normal and ethical to create official governmental entities with baked-in conflicts of interest. For example, every licensing agency is headed by a board comprised mostly of individuals licensed to practice the profession they regulate. Virtually every decision they make impacts their own professional practice directly or indirectly and is almost bound to have financial implications for each of the board members. Various other boards having to do with health care, the judiciary, and education are frequently populated with individuals who have pecuniary interests in the decisions they make.

Automatically, therefore, many state regulatory agencies are "captured" by law in Oklahoma and other states. *Agency*

capture occurs when an agency is largely under the influence of the very interest groups that agency is supposed to regulate. Instead of acting in the public interest, the agency acts in the interest of those it regulates.⁶ In many cases, capture only occurs over time as lobbying and bureaucratic accretion occur. However, many agencies in Oklahoma (and in other states) have the dice effectively loaded in favor of the regulated industry because their oversight commissions and boards are automatically packed with representatives of that regulated industry.

Groupthink is an outgrowth of capture. All the members of a board or commission do not necessarily think they are doing anything wrong or immoral when they reinforce and create or push for new policies that block opportunities for others. Instead, there is a tendency to go along to get along or there develops a mentality among the members that they truly do have superior knowledge and intellect. They fail to recognize other perspectives or to conceive that the public could be perfectly fine without the board/commission's expert intervention. The consequence of groupthink is that the group is highly manipulable by those who have nefarious intentions but talk a good game. Further, the group may, in good faith, do significant harm by blocking innovations that are inconsistent with what the group thinks best. The history of innovation is replete with examples of major innovations that have been contra to what the industry "group" thinks.

If a board or commission with policy-making power must exist, the primary alternative for a legislature would be for active citizens whose interests are not directly implicated to be seated on these bodies. Two issues arise, however. One is that there might not be enough interested citizens. That is actually a hint that a board or commission might not be the right institutional structure. A second problem has to do with expertise since otherwise disinterested citizens are not likely to have a good deal of expertise in the area they are to regulate or oversee. But nothing prevents such a body from employing experts in the field as they see fit or from soliciting advice and expertise when necessary. There is still risk of manipulation, but groupthink and self-dealing are less of an issue.

Licensing Boards

Some of the decisions licensing boards make are purely administrative in appearance, but even seemingly mundane decisions, such as precise rules of what services licensees can offer, or what training curriculum must be followed in order to obtain a license, can have direct financial impacts on licensees, potential licensees, and consumers. As has been repeatedly demonstrated by economists for decades,

licensing restricts the supply of practitioners in an occupation. A restricted supply of practitioners compared to what it otherwise would be means the prices that practitioners can charge are higher than they otherwise would be. Obviously, licensing board members who themselves are licensed have a pecuniary interest in the decisions they make.

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Licensing board members have an inherent conflict of interest *if* their primary duty is to the general public (a fiduciary duty). And licensing laws are always sold as essential to protect the public, so that fiduciary duty would seem a given. Therefore, as far as claimed legislative intent is concerned, legislatures throughout the country have repeatedly created licensing laws that are inherently chock-full of conflict of interest problems. Alternatively, legislatures have repeatedly lied to their constituents, creating licensing boards whose primary duty is actually to other licensees while publicly claiming these boards are instituted for the public interest. These two explanations of why most licensing boards are constituted as they are (no other potential explanations arise) reflect either a supreme lack of wisdom or outright corruptive intent on the part of state legislatures.

The Federal Trade Commission and then the United States Supreme Court recognized the inherently anti-competitive, self-dealing nature of licensing boards in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* in 2015. While historically licensing boards had enjoyed immunity from federal anti-trust law because they are state agencies, the FTC determined that the board in North Carolina was acting in restraint of trade when it limited teeth whitening services only to dentists. That board took the FTC to court and ultimately lost.⁷ It should be noted that the Court did not rely on the reasoning above. Instead, its decision was based on narrow legal precedent. Also, potential remedies do not necessitate reconstituting licensing boards. (See *Why Statewide Official Oversight Is Not Enough* below.)

Although the precise thinking and motivations of FTC

officials and judges involved in the North Carolina dental board case is not known, one can surmise that at least a few of them viewed that board's actions as immoral and, perhaps, corrupt, which indeed they were. Teeth whitening is obviously not a service that requires a medical degree to administer. Yet, relatively prosperous dentists were willing to use the power granted to them by the legislature to block those with more modest skills and incomes from economically bettering themselves. This behavior is seen over and over again, with veterinarians attacking horse-related services (farriers, tooth floaters, and massagers), cosmetologists attacking hair braiders, and electrolysis services in Oklahoma limited to 21-year-olds with science degrees (this latter explicitly by law and the most restrictive requirements in the nation), just to name a few examples.⁸

Health Boards

In Oklahoma, the state's health department is overseen by the Health Department Board. Law specifies that of the board's nine members, at least four must be doctors.⁹ The Health Department's mission is "to protect and promote health, to prevent disease and injury, and to cultivate conditions by which Oklahomans can be healthy."¹⁰ This group has come under extreme criticism for their negligent management of state funds, and for failing to supervise senior health department management who lied about the department's financial condition – even to the extent of laying off employees and cutting off services in order to fake a financial emergency so as to get more money for the agency.¹¹ Moreover, this agency has the ability to limit competition through the state's Certificate of Need law with respect to nursing homes and mental health treatment centers, and its licensing of hospitals and surgical centers.¹²

There is every potential that any of the legislatively mandated physicians on the Health Department Board could find themselves faced with decisions in which they have a direct pecuniary interest. With their legally-mandated sizable plurality, and nothing preventing physicians from being a majority, the makeup of the Health Department Board has all the appearances of a purposely created conflict of interest, an interest that would benefit a very small minority of the state's population.

A similar situation prevails with the Oklahoma Health Care Authority. This is the agency in charge of administering the state's federally-compliant Medicaid system. The Health Care Authority has seven members. Four of these are to be consumers. The other three are explicitly required to have "experience in medical care, health care services, health care delivery, health care finance, health insurance and managed

health care."¹³ Here again, a plurality of the members are required to have a direct pecuniary interest in the outcomes of the Authority's decisions.

Not surprisingly, the Authority takes positions that seem aimed at boosting the profits of the industry. It has consistently lobbied to expand Medicaid eligibility, and at the same time failed to look at what appear to be fraudulent claims by members of the industry.¹⁴ The instant reaction to a criticism of doctors and health system insiders making up large blocs on each of these bodies is likely to be that we need these experts' expertise in these important roles. However, as noted earlier, expertise can be gained without giving that expertise decision-making power that is inherently tainted with conflicts of interest. If the only way to make a particular institutional structure work is to seed it with conflicts of interest and potential self-dealing, then the institutional structure itself should be questioned and alternatives explored. Certainly, in the case of the Health Department, all this "expertise" does not seem to have worked.¹⁵

Lawyer and Judicial Boards

An attorney who litigates, despite being one of two in an adversarial system, is effectively deputized to be part of a governmental process that is supposed to find truth. Thus, judges who are charged with discovering and enforcing blind justice have some significant interest in determining who practices before them. So the highest court understandably has some role in determining and approving the qualifications of litigating attorneys.

This does not change the fact that to all appearances, the legal profession is regulated in a way that allows for self-dealing. The Oklahoma Bar Association (OBA) is a creature of the Oklahoma Supreme Court exercising its plenary powers over the state's courts. The OBA uniformly licenses all attorneys in the state, whether they litigate or not, independently of the legislature. Its 17-member board consists only of lawyers elected exclusively by lawyers. The OBA is a private organization, which receives no public funding, but is granted governmental powers by an unelected governmental body that gets to decide what is legal under the state's constitution.¹⁶

The Oklahoma Constitution was amended by a vote of the people in July of 1967 to create the Judicial Nominating Commission. It provides lists of names from which the governor must select to fill judicial vacancies. Six of its fifteen members, a sizable plurality, are lawyers selected by the OBA. This section of the state constitution is the only place in the constitution that the OBA, a body not even created

by statute, is mentioned. Of course, all potential judicial nominees are, themselves, members of the OBA.¹⁷

The history of why that 1967 constitutional amendment election took place has its own story of corruption. However, replacing the election of judges with an appointment system that heavily defers to the profession that judges regulate replaces one kind of corruption with a different, albeit more subtle, kind of corruption. Quite simply, judges should be appointed by the governor and confirmed by the Senate, a system analogous to the federal level. The Judicial Nominating Commission appears to be a way for the legal profession to maintain its incestuous hold on our legal system.

The Unique Institutional Structure of School Boards

Most of the present discussion has been about explicitly-defined board membership requirements. But institutional structure can more subtly, and perhaps unintentionally, create perverse outcomes. In the case of school boards, the institutional structure is less direct and, therefore, less certain. Therefore, it is also often quite subtle.

School board elections in Oklahoma occur in February, an obscure election date when very few voters are paying any attention or bother to show up at the ballot box.²⁰ One study showed that teachers turn out to vote in school district elections at rates more than double and even triple the rates of general voters – the taxpayers who foot the bill.²¹ One reason for this is obvious. Teachers have a strong financial interest in the decisions the school board makes. It is likely that the voting differential is made all the more dramatic when that financial interest, which boosts teacher turnout, is combined with obscure election dates, which suppress the turnout of taxpayers.

Because of the outsized role that insiders have in the election of school board members, school boards at times appear to be more interested in serving the interest of the insiders rather than the interests of parents and taxpayers. Witness the recent situation in Oklahoma where some school boards cancelled two weeks of school at great inconvenience and cost to parents and educational detriment to students, so that their teachers and administrators could go to the Capitol in an attempt to make a large pay raise even larger (and get paid by the district for doing it).

Educational Boards

In Oklahoma, three school-related institutions are constituted in ways that make conflict of interest an inherent problem. These include local school boards (discussed in a separate box due to their unique nature), the Educational Quality and Accountability Commission, and the Board of Private Vocational Schools.

The Educational Quality and Accountability Commission, created only in 2013, is in charge of accrediting teacher education programs in the state and certifying teachers, in addition to overseeing the state's student testing system. Only two of the seven members of this body are picked from the general population. One of these must be a parent of a currently-enrolled student. The others are teachers, administrators, and the Secretary of Education.¹⁸ Thus, the majority of this commission's members are highly subject to pressures and prevailing current philosophies in the already-existing education establishment.

The Board of Private Vocational Schools licenses most private jobs-training schools in the state. Three members of the nine-member board are heads of state agencies, four have to have been managers in private vocational schools, and two have to have come out of business and industry.¹⁹ Although a plurality of the members are from the vocational school community, it is easy to recognize that there is a good deal of built-in tension on this particular board since the agency members (Superintendent of Public Instruction, Department of Career and Technology Education Director, and Chancellor of the State Regents for Higher Education) are likely to agree more than disagree. The two "general public" members do not represent potential students, and this is true of the entire commission. It is composed of two groups with a natural tendency to disagree bridged only by non-consumers. Thus, any conflicts and their resolutions may negatively impact consumers.

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Institutional Alternatives

It has been demonstrated that Oklahoma's legislature has created institutional arrangements replete with conflicts of interest almost guaranteed to result in self-dealing. The list of examples given could be significantly expanded. Most likely, these arrangements have occurred as a result of

legislative naiveté as busy legislators have been relentlessly pursued and lobbied by interests with less than pure intent. Unfortunately, it is not as if one of the other 49 states stands as a shining example. But this only means there is an opportunity for the leadership of a state to create that shining example for everyone else. The problem is choosing the right policies to replace those that encourage corruption now.

Why Statewide Official Oversight Is Not Enough

In its decision regarding licensing boards and violations of federal antitrust law, mentioned in the section on licensing boards above, the Supreme Court allowed licensing boards to continue as before, but required there be active state supervision. Therefore, in Oklahoma the Attorney General's office was placed in charge of overseeing and reviewing policies of licensing boards. Four basic requirements for active supervision must be shown:

1. Review cannot just be procedural, but must be substantive,
2. The supervisor must have the power to veto or modify decisions,
3. Review must actually occur,
4. A disinterested state official must serve as supervisor.²²

Potentially, this same sort of supervision could be applied to other types of boards and commissions. However, with 50 states and potentially dozens of licensed occupations to oversee, the only way for the general citizenry to enforce the Supreme Court's ruling is through litigation, one case at a time, time after time. There is no assurance that the four conditions just listed will be followed, or if they are not followed, that this fact will be recognized. State supervision is an institutional arrangement that requires a level of diligence that it is not reasonable to believe will regularly occur. Accretion of unjustified rules and anti-competitive practices is still possible. They just have to be more subtle, and more subtle they will undoubtedly become.

What's more, there is the very human failure that some among us are corruptible. Take teeth whitening, for example. Suppose five dentists on a board and a few of their dental colleagues each (a total of 20 dentists) determine that their incomes could increase a mere \$50,000 per year each, were dentists granted a corner on the teeth whitening market under their licensing board's authority. That is a total of \$1 million per year. So together, they decide to bribe their state-level overseer, or alternatively hire a lobbyist. They can afford a considerable bribe, or lobbyist, with \$250,000 for a ruling in their favor being a bargain given the multi-

year future profits these dentists stand to make. Now consider that potential for dozens of licensing boards in a state, multiplied by 50. Luckily, we live in a society where this sort of explicit corruption on both sides of the bribery arrangement is fairly rare, but in most instances, the potential for such corruption is not so fully baked into the institutions within which officials might face temptation. However, hiring someone to lobby for them might achieve the same corrupt purpose in a legal manner.

Straightforward Governance

One solution is a more straightforward method of governance where lines of responsibility are clear and there is as little corporate (group) responsibility as possible so that specific individuals can be held to account. The Oklahoma Health Care Authority (HCA) is a prime example. This is Oklahoma's Medicaid agency. Medicaid is a federal program wherein roughly two-thirds of the expenses are funded by the federal government. The rest of the costs are covered by the state. These expenditures cannot be precisely budgeted because Medicaid covers anyone who is eligible, and the number that will apply and gain eligibility is not knowable. Federal rules vary over time and changes do not always neatly coincide with legislative sessions.

Thus, while there is a need to administer the Medicaid program at a high level, whoever governs the day-to-day operations of the system only needs to make occasional policy decisions and judgments. Most of the HCA's job is purely administrative. It processes payments for health services provided to poor people according to federal rules and state law. Therefore, why have a board at all? Instead, have a single individual head the agency with limited rule-making authority and with legislative oversight. In this way, HCA management can be called to account, if necessary, in a straightforward way. Issues of policy, like Medicaid expansion or adding work requirements for eligibility, would be the sole responsibility of the legislative branch.

Reconstitute Board/Commission Membership

Instead of populating powerful boards and commissions with representatives of the very interests and industries those bodies are supposed to supervise and control, legislatures should populate them with citizens who have no pecuniary interests. Of course, the problem with this, as mentioned above, is that getting citizens without vested interests to participate on such bodies can be problematical. Another problem is that such citizens might not have any expertise in the area that they oversee.

As for the first objection that it might be too difficult to

find citizens interested in overseeing an area in which they have no vested interest, there are two possible solutions. First, it might be necessary to incentivize participation by paying individuals to serve on boards and commissions. Second, the difficulty this objection addresses might best be interpreted as a reason to consider an entirely different institutional structure such as the others offered here.

As for the second objection regarding lack of expertise, the solution is clear. Regulatory bodies can hire expertise either as consultants or to be part of a supporting bureaucracy. There is no reason that smart members of a regulatory body cannot ask for the opinions of people directly involved in the regulated activity.

Competition

Private business is full of arrangements that look awfully suspicious when it comes to self-dealing. A business owner might choose to contract with a family member or put a son in charge of an important company division. Money from a profitable business might be used to prop up one that is not profitable at all. These actions would justifiably appear shady in a government context. However, “the market” (a term used here for business-to-business and business-to-consumer interactions) is highly successful in making everyone in society better off. Voluntary exchanges in a market context benefit both parties. Incentives are aligned so that virtually everyone in a market economy is practically working for everyone else. But all this occurs in a competitive environment.

The cost and quality of services performed by the various licensed occupations would benefit from more competition. Health care would benefit from more competition. Education would benefit from more competition. Competition means more value created for consumers today, and often even more value in the future from the innovations it encourages. This means less, though not necessarily no, regulation. It also means that when there is regulation, it should be carried out by disinterested parties, not industry insiders.

Public education has had a history of rising costs with nothing to show for it, virtually fitting economists’ description of monopoly. Indeed, that’s what public education is when children are assigned to schools based on where they live. Just as economic theory describes how monopolies end up favoring the producers more than consumers, so do those who run public schools behave in the same way. Again, rather than putting insiders in charge of school accountability systems, the solution is greater competition in education. The Oklahoma legislature has

taken some tentative steps in the direction of greater competition with the Lindsey Nicole Henry scholarship program and expanded provision for charter schools, but it can do more by passing education savings accounts.²³ In this way, private providers would compete for students and improve educational services in the state. The problem of the insider-dominated school board disappears when students have the option of going to competing schools.

Consumer-Friendly Innovations for Self-Regulation

The 1889 Institute has produced several publications that mention the *21st Century Consumer Protection and Private Certification Act* model bill.²⁴ (A publication dedicated to explaining this model is forthcoming.) Broadly speaking, it could serve as a model for more than just an alternative to licensing laws. Basically, the model would protect private organizations that certify individuals to practice professions from having those credentials compromised by individuals claiming private credentials that they do not actually have. Such false claims would be prosecuted as fraud, instead of having to be civilly adjudicated at an organization’s expense. However, this fraud protection would only extend to private organizations that meet certain objective criteria that include consumer-friendly transparency requirements.

The model bill contemplates a world where certified practitioners of a given occupation do not only compete with each other, but different certifying organizations play at least a part in that competition as well. There could be, for example, two different groups of separately certified competing optometrists. The benefit of this kind of system would be that the government licensing system, with its monopoly-like characteristics, could be supplanted without danger to consumers and without blocking economic opportunity.

Conclusion

This paper seeks to accomplish two goals. First, it is to call attention to the fact that states have created institutions that automatically disfavor the general public and general good, and almost automatically lead to corrupt, self-dealing behavior. Second, it is to point out that there are alternative ways to protect the general interest other than creating self-dealing boards and commissions skillfully lobbied into existence by industry insiders.

The hope is that legislators will learn to recognize self-serving institutional arrangements and reform them. Then, when legislators are convinced that government action and

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institutions are warranted, understand that what form these institutions take matters a great deal. Past legislatures fell into error when it comes to how they too-often constituted boards and commissions with insiders. Only future legislatures can correct that error.

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