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Rebecca Haw Allensworth  
*Vanderbilt University Law School*

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ARTICLE

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CARTELS BY ANOTHER NAME:  
SHOULD LICENSED OCCUPATIONS FACE  
ANTITRUST SCRUTINY?

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AARON EDLIN<sup>†</sup> & REBECCA HAW<sup>††</sup>

*It has been over a hundred years since George Bernard Shaw wrote that “[a]ll professions are a conspiracy against the laity.” Since then, the number of occupations and the percentage of workers subject to occupational licensing have exploded; nearly one-third of the U.S. workforce is now licensed, up from five percent in the 1950s. Through occupational licensing boards, states endow cosmetologists, veterinary doctors, medical doctors, and florists with the authority to decide who may practice their art. It cannot surprise when licensing boards comprised of competitors regulate in ways designed to raise their profits. The result for consumers is higher prices and less choice, as licensing raises wages by eighteen percent and bars competition from unlicensed workers. For African-style hair braiders, the result is either an illicit business or thousands of hours of irrelevant training imposed by a cosmetology board. For lawyers, the result is less competition from tax accountants, paralegals, and out-of-state lawyers.*

*The Sherman Act’s great accomplishment has been to make cartels per se illegal and relatively scarce—unless the cartel is managed by a professional licensing board. Most jurisdictions consider such boards, as state creations, exempt from antitrust scrutiny by the state action doctrine, leaving would-be competitors and consumers no recourse against their cartel-like activity.*

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<sup>†</sup> Richard Jennings Professor of Law and Professor of Economics, University of California, Berkeley; Research Associate, National Bureau of Economic Research; J.D., Stanford University; Ph.D., Economics, Stanford University.

<sup>††</sup> Professor of Law, Vanderbilt University Law School; J.D., Harvard University. We thank Einer Elhauge, Prasad Krishnamurthy, and Carl Shapiro for helpful comments. We also thank James Blumstein for comments on a previous draft and Sean Ryan for excellent research assistance.

*We contend that the state action doctrine should not prevent antitrust suits against state licensing boards that are comprised of private competitors deputized to regulate and to outright exclude their own competition, often with the threat of criminal sanction. At most, state action should immunize licensing boards from the per se rule and require plaintiffs to prove their cases under the rule of reason. We argue that the Fourth Circuit's recent decision, soon to be reviewed by the Supreme Court, to uphold a Federal Trade Commission (FTC) antitrust suit against a licensing board—denying state action immunity to a licensing board and thereby creating a circuit split—was a step in the right direction but did not go far enough. The Supreme Court should take the split as an opportunity to clarify that when competitors hold the reins to their own competition, they must answer to Senator Sherman.*

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“All professions are conspiracies against the laity.”

George Bernard Shaw

*The Doctor’s Dilemma* (1906)

## INTRODUCTION

The Sherman Act has had one principal success: cartels and their smoke-filled rooms, where competitors agree to waste economic resources for their own industry’s benefit, are unambiguously and uncontroversially illegal in the United States<sup>1</sup>—unless that industry is a profession and that cartel is a state licensing board. Although often overlooked, licensing boards have become a massive exception to the Act’s ban on cartels.

Licensing boards are largely dominated by active members of their respective industries who meet to agree on ways to limit the entry of new

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<sup>1</sup> 15 U.S.C. §§ 1–7 (2012) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”). The loud and lively debate about the Sherman Act’s reach beyond this uncontroversial core tends to obscure this simple yet powerful success of § 1.

competitors.<sup>2</sup> Some boards use their power to limit price competition or restrict the quantity of services available.<sup>3</sup> But professional boards, unlike cartels in commodities or consumer products, are sanctioned by the state—even considered *part* of the state<sup>4</sup>—and so are often assumed to operate outside the reach of the Sherman Act under a line of Supreme Court cases starting with *Parker v. Brown*.<sup>5</sup>

When only about five percent of American workers were subject to licensing requirements during the 1950s,<sup>6</sup> the anticompetitive effect of these state-sanctioned cartels was relatively small. Now, however, nearly a third of American workers need a state license to perform their job legally, and this trend toward licensing is continuing.<sup>7</sup> The service sector—the most likely to be covered by licensing—has grown enormously, with its share of nonfarm employment growing from roughly 40% in 1950 to over 60% in 2007.<sup>8</sup> Some recent additions to the list of professions requiring licenses include locksmiths,<sup>9</sup> beekeepers,<sup>10</sup> auctioneers,<sup>11</sup> interior designers,<sup>12</sup> fortune tellers,<sup>13</sup> tour guides,<sup>14</sup> and shampooers.<sup>15</sup>

Many boards have abused their power to insulate incumbents from competition. Cosmetologists, for example, are required, on average, to have ten

<sup>2</sup> See Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191 (2000) (defining occupational licensing and explaining the composition of state licensing boards); see also *infra* text accompanying notes 49-50 and Appendix.

<sup>3</sup> See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 65-96 (2006) (discussing occupational regulations' ability to restrict supply and the implications of practitioner earnings).

<sup>4</sup> See *Benson v. Ariz. St. Bd. of Dental Exam'rs*, 673 F.2d 272, 275 (9th Cir. 1982) (explaining that the Board of Dental Examiners is "a state agency" due to state statutes that, among other things, "establish the Board").

<sup>5</sup> 317 U.S. 341, 351 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

<sup>6</sup> KLEINER, *supra* note 3, at 1.

<sup>7</sup> See Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S198 (2013) (estimating that, as of 2008, 29% of U.S. workers were licensed and noting that licensing is a growing phenomenon in the U.S. economy).

<sup>8</sup> See Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, POPULATION BULL., June 2008, at 3, 7, available at <http://www.prb.org/pdf08/63.2uslabor.pdf>.

<sup>9</sup> Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, at A1.

<sup>10</sup> Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976).

<sup>11</sup> Dick Carpenter & Lisa Knepper, Op-Ed., *Do Barbers Really Need a License?*, WALL ST. J., May 11, 2012, at A13.

<sup>12</sup> Clark Neily, Op-Ed., *Watch Out for that Pillow*, WALL ST. J., Apr. 1, 2008, at A17.

<sup>13</sup> Emily Sweeney, *Town Rebuffs Fortune-Teller, Citing Residency Law*, BOS. GLOBE, May 9, 2004, at W1.

<sup>14</sup> J. Freedom du Lac, *Regulating the Right to Talk to Customers?*, WASH. POST, Sept. 27, 2010, at B1.

<sup>15</sup> Simon, *supra* note 9.

times as many days of training as Emergency Medical Technicians (EMT) must have.<sup>16</sup> In Alabama, unlicensed practice of interior design was a criminal offense until 2007.<sup>17</sup> In Oklahoma, one must take a year of coursework on funeral service (including embalming and grief counseling) just to sell a casket, while burial without a casket at all is perfectly legal.<sup>18</sup> Even traditionally licensed occupations, the so-called learned professions, use licensing restrictions to repress competition. For example, all states impose some restrictions on lawyer advertising, and some even prevent truthful claims about low prices.<sup>19</sup> In many states, dentists cannot legally employ more than two hygienists each, a restriction that raises demand for dentists.<sup>20</sup> And in some states, nurse practitioners must be supervised by a physician,<sup>21</sup> even though studies show that nurse practitioners and physicians provide equivalent quality of care where their practices overlap.<sup>22</sup>

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<sup>16</sup> See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 29 (2012) [hereinafter LICENSE TO WORK], available at [http://www.ij.org/images/pdf\\_folder/economic\\_liberty/occupational\\_licensing/licensetowork.pdf](http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf) (reporting that states require an average of 33 days of training for EMTs, but 372 days for cosmetologists). Arkansas, for instance, requires 28 days of training for EMTs and 350 days for cosmetologists. *Id.* at 42-43.

<sup>17</sup> Neily, *supra* note 12.

<sup>18</sup> See *Powers v. Harris*, 379 F.3d 1208, 1211-13 (10th Cir. 2004) (outlining the regulatory scheme for the funeral industry in Oklahoma).

<sup>19</sup> See LEXISNEXIS, 50 STATE SURVEYS OF STATUTES & REGULATIONS: ATTORNEY ADVERTISING (Mar. 2013) ("Every state regulates the advertising of its attorneys."); see also OHIO RULES OF PROF'L CONDUCT R. 7.1 cmt. 4 (2012) ("Characterization of rates or fees chargeable by the lawyer or law firm such as 'cut rate,' 'lowest,' 'giveaway,' 'below cost,' 'discount,' or 'special' is misleading.").

<sup>20</sup> See J. NELLIE LIANG & JONATHAN D. OGUR, BUREAU OF ECON. STAFF REP. TO THE F.T.C., RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 6 & n.6 (1987), available at <http://www.ftc.gov/sites/default/files/documents/reports/restrictions-dental-auxiliaries/232032.pdf> (noting that restrictions generally allow dentists to employ between one and three hygienists).

<sup>21</sup> See SHARON CHRISTIAN & CATHERINE DOWER, CAL. HEALTHCARE FOUND., SCOPE OF PRACTICE LAWS IN HEALTH CARE: RETHINKING THE ROLE OF NURSE PRACTITIONERS 3 (2008), available at <http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/S/PDF%20ScopeOfPracticeLawsNursePractitionersIB.pdf> (noting that thirty states require at least some degree of physician supervision or collaboration); Tracy A. Klein, *Scope of Practice and the Nurse Practitioner: Independent, Collaboration, Supervision: How Is Your Scope Regulated?*, MEDSCAPE, [http://www.medscape.org/viewarticle/506277\\_5](http://www.medscape.org/viewarticle/506277_5) (last updated Oct. 19, 2007) ("[Twenty-three] states require no physician involvement for the licensed [Nurse Practitioner] to diagnose and treat, while the remainder of states require some degree of written or formal physician involvement in [Nurse Practitioner] practice.").

<sup>22</sup> CHRISTIAN & DOWER, *supra* note 21, at 6 (listing multiple studies finding no material difference in quality of care); Morris M. Kleiner et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service* (Nat'l Bureau of Econ. Research, Working Paper No. 19906, 2014), available at <http://www.nber.org/papers/w19906>.

Labor economists have shown that the net effect of licensing on quality is equivocal.<sup>23</sup> What is not equivocal, according to their empirical studies, is the effect of licensing on consumer prices. Morris Kleiner, the leading economist studying the effects of licensing on price and quality of service, estimates that licensing costs consumers \$116 to \$139 billion every year.<sup>24</sup> And consumers are not the only potential losers, since more licensing means fewer jobs.<sup>25</sup> All this said, we do not claim that all licensing rules are harmful. Some no doubt improve service quality and public safety enough to justify the costs. Our point is that many do not.

Thanks in part to a spate of stories in mainstream news outlets like *The New York Times*,<sup>26</sup> *The Wall Street Journal*,<sup>27</sup> NPR,<sup>28</sup> and even *The Daily Show*,<sup>29</sup> politicians are taking notice of the growing problem with licensing. In early 2013, Massachusetts Governor Deval Patrick announced a set of “common-sense changes in the Division of Professional Licensure” designed to improve the business climate in the state.<sup>30</sup> Governor Patrick only proposed modest changes,<sup>31</sup> perhaps because an attempt at more dramatic licensing reform by Florida Governor Rick Scott failed in 2011.<sup>32</sup> The White

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<sup>23</sup> See CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FTC, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21-27, 40 (1990), available at [http://www.ramblomuse.com/articles/cox\\_foster.pdf](http://www.ramblomuse.com/articles/cox_foster.pdf) (“The empirical findings indicate that mandatory entry requirements of licensing cannot necessarily be relied upon to raise the quality of service or decrease the overprescription of treatment.”).

<sup>24</sup> KLEINER, *supra* note 3, at 115.

<sup>25</sup> See Kleiner & Krueger, *supra* note 7, at S178 (noting studies that have found that licensing restricts the supply of workers).

<sup>26</sup> See Jacob Goldstein, *So You Think You Can Be a Hair Braider...*, N.Y. TIMES MAG., June 17, 2012, at 20 (discussing the burdens of licensing requirements on certain low- to moderate-income occupations).

<sup>27</sup> See Simon, *supra* note 9 (citing the efforts of cat groomers, tattoo artists, tree trimmers, and other specialists to increase regulations in their fields).

<sup>28</sup> *Why It's Illegal to Braid Hair Without a License*, NPR (June 12, 2012), <http://www.npr.org/blogs/money/2012/06/21/154826233/why-its-illegal-to-braid-without-a-license> (telling the story of one Utah woman who was forced to abandon her business).

<sup>29</sup> *The Braidy Bill*, DAILY SHOW WITH JON STEWART (June 3, 2004), <http://www.thedailyshow.com/watch/thu-june-3-2004/the-braidy-bill> (parodying the potential harm from “illegal braiders”).

<sup>30</sup> Press Release, Massachusetts Office of the Governor, Governor Patrick Builds on Regulatory Reform Successes; Files Legislation to Improve Business Climate for Licensed Professionals (Jan. 7, 2013), <http://www.mass.gov/governor/pressoffice/pressreleases/2013/0107-regulatory-reform.html>.

<sup>31</sup> Governor Patrick proposed merging the electrology and barbering boards and eliminating the Board of Radio and Television Technicians. *Id.*

<sup>32</sup> See Chip Mellor & Dick Carpenter, Op-Ed., *Want Jobs? Cut Local Regulations*, WALL ST. J., July 28, 2011, at A15 (criticizing the Florida legislature for rejecting Governor Scott's proposal to deregulate twenty occupations). Michigan Governor Rick Snyder has made similar proposals. See Carpenter & Knepper, *supra* note 11 (referencing Governor Snyder's April 2012 proposal to abolish eighteen occupational licenses and eliminate nine licensing boards).

House has also taken a stand against excessive licensing. In 2011, President Obama named Alan Krueger, a labor economist whose empirical work highlights some of the anticompetitive effects of licensing, as Chair of the President's Council of Economic Advisers.<sup>33</sup> Krueger has written that licensing has gone too far and become a way to restrict labor supply.<sup>34</sup> First Lady Michelle Obama has successfully lobbied twenty-two states to approve legislation that recognizes out-of-state licenses held by military spouses as a part of her "Joining Forces" initiative.<sup>35</sup> Even Congress has started to pay attention. In 2010, Congress commissioned a report on the effect of healthcare worker licensing on the affordability of care; the report advised streamlining license requirements and allowing for interstate reciprocity.<sup>36</sup>

Despite wide recognition of the potential for economic harm associated with allowing professions to control their licensing rules and define the scope of their art, real reform is elusive. Part of the reason is that, in the professional licensing context, the most powerful legal tool against anticompetitive activity appears unavailable. Most jurisdictions interpret antitrust federalism to shield licensing boards from the Sherman Act despite the fact that the boards often look and act like § 1's principal target. Other avenues for reform, including constitutional suits asserting the rights of would-be professionals, have done little to slow or reverse the trend toward cartelized labor markets.

Last year, in *North Carolina State Board of Dental Examiners v. FTC*,<sup>37</sup> the Fourth Circuit upheld an FTC decision finding a state licensing board liable for Sherman Act abuses, becoming the only appellate court to expose a licensing board to antitrust scrutiny and thereby creating a circuit split. The case is a step in the right direction, but it does not go far enough because the court could be seen as relying on the method of appointment to

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<sup>33</sup> See Press Release, White House, Remarks by the President in Announcing his Nomination of Alan Krueger for Chair of CEA (Aug. 29, 2011), <http://www.whitehouse.gov/the-press-office/2011/08/29/remarks-president-announcing-his-nomination-alan-krueger-chair-cea>.

<sup>34</sup> See, e.g., Alan B. Krueger, *Do You Need a License to Earn a Living? You Might Be Surprised at the Answer*, N.Y. TIMES (Mar. 2, 2006), <http://www.nytimes.com/2006/03/02/business/yourmoney/02scene.html>.

<sup>35</sup> See EXEC. OFFICE OF THE PRESIDENT, MILITARY SKILLS FOR AMERICA'S FUTURE: LEVERAGING MILITARY SERVICE AND EXPERIENCE TO PUT VETERANS AND MILITARY SPOUSES BACK TO WORK 20-21 (2012), available at [http://www.whitehouse.gov/sites/default/files/docs/veterans\\_report\\_5-31-2012.pdf](http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf) (detailing the scope of the problem and the White House's response).

<sup>36</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH LICENSING BOARD REPORT TO CONGRESS 31 (2010), available at <http://www.hrsa.gov/ruralhealth/about/telehealth/licenserpt10.pdf>.

<sup>37</sup> 717 F.3d 359 (4th Cir. 2013).



the board—not just on the identity of its members as competitors.<sup>38</sup> The Supreme Court has now granted certiorari; we urge the Court to take this opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board's members are appointed. In particular, the Court should make clear that, just like the wine producers in *Midcal*, competitor-dominated boards that regulate their own competition and the entry of competitors will be treated as private actors and subject to antitrust review unless their acts are both (1) pursuant to the state's clearly articulated purpose to displace competition and (2) subject to active state supervision.<sup>39</sup> Where a board fails either prong of this test, courts should subject the board's actions to antitrust scrutiny under a modified rule of reason.

Our proposal recognizes the potential benefits of licensing—preventing charlatanism and injury to the public—but rejects the idea that the potential benefits justify total antitrust immunity for licensing. We advocate for an approach that uses the potential benefits to influence *how* restrictions will be reviewed, not *whether* they will be reviewed at all. Although our proposal involves a shift in the dominant interpretation of state action doctrine, it does not require any change in Supreme Court precedent, and the Supreme

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<sup>38</sup> The majority in *North Carolina State Board of Dental Examiners* agreed with the FTC that “state agencies ‘in which a decisive coalition (usually a majority) is made up of participants in the regulated market,’ who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs.” *Id.* at 368. The majority did not explicitly decide whether a board should be treated as private actors if a “decisive coalition . . . is made up of participants in the regulated market” but chosen by the governor, for example, as is true of the vast majority of boards we survey in our Appendix. And, in fact, elsewhere in the opinion, the majority leaves out the method of appointment. *Id.* at 375. (“At the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law . . . .”). Judge Barbara Keenan, in contrast, makes clear in her concurrence that, as she understands the court's decision, the selfish financial interest of the board members as market participants would not alone make them private actors subject to antitrust review; instead, according to the concurrence, the court's holding “turn[ed] on the fact that the members of the Board, who are market participants, are elected by other private participants.” *Id.* at 376 (Keenan, J., concurring).

Our reading, however, is that the majority was careful not to decide a case that was not before them, such as a case in which a financially interested board is appointed by a governor, rather than elected by other financially interested market participants. If the majority had decided that the dental board's method of appointment were critical, the majority could have been explicit about that and thus eliminated the need for a concurrence. The best reading is that the majority simply did not decide this important question because it did not need to in the case before the court. That said, under the Fourth Circuit's opinion in *North Carolina State Board of Dental Examiners*, there is ample room for boards to argue that they are not private actors so long as they are appointed by the state without any election.

<sup>39</sup> *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (explaining the two standards—namely, state articulation and supervision—for antitrust immunity).

Court's unanimous opinion last term in *FTC v. Phoebe Putney Health System, Inc.* demonstrated its appetite for stopping cartel-like abuses of antitrust immunity.<sup>40</sup> The time is right to take action.

This Article proceeds in five parts. Part I details the expansion of licensing in the United States and gives examples of its excesses. Part II explains how the current crisis arose, first summarizing the economics of licensing and then surveying the legal landscape that allowed its relatively unfettered expansion. Part III makes our normative case for imposing Sherman Act liability on state licensing boards, arguing that there is a logical fit between antitrust policy and the economic harm of heavy-handed licensing requirements. We also address antitrust federalism, claiming that deference to state decisionmaking is especially difficult to justify in the context of occupational licensing. Part IV details the mechanics of the alternative system we propose. We suggest that in the licensing context, the rule of reason should be modified to allow defendants to justify their restraint with the argument that less competition (of certain kinds) benefits consumers in the regulated labor market because it will improve public safety and the quality of service provided, an argument that is traditionally out of bounds in § 1 cases. Part

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<sup>40</sup> 133 S. Ct. 1003 (2013). In *Phoebe Putney*, a local government entity (the Hospital Authority of Albany-Dougherty County) purchased a hospital, changing the local market from one with two competing hospitals to one with a single monopolistic provider of acute-care hospital services. The purchase was possible because the state of Georgia had granted the Hospital Authority a variety of powers, including the power to buy hospitals. Because *Town of Hallie v. City of Eau Claire* previously held that sub-state governmental entities do not require supervision to trigger antitrust immunity, 471 U.S. 34, 43 (1985), the question in *Phoebe Putney* was whether the state had clearly articulated a policy of displacing competition through an anticompetitive merger when it granted the Hospital Authority the power to buy hospitals. 133 S. Ct. at 1009. The Court held that the state had not done so, reasoning that although the Authority was entrusted with providing medical care and acquiring the means to provide medical care (which may involve purchasing hospitals), those powers can be exercised without raising competitive issues. *Id.* at 1012. Therefore, the grant of those powers did not implicitly and necessarily contemplate anticompetitive use. *Id.* at 1014. The Court also emphasized that state action exemptions should be disfavored, quoting its prior language from *FTC v. Tior Title Insurance Co.*, to this effect. *Id.* at 1010 (“[S]tate-action immunity is disfavored, much as are repeals by implication.” (quoting *FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 636 (1992))).

To the extent that licensing board cases are about supervision, which is our focus here, *Phoebe Putney*'s relevance to state action immunity for licensing boards is indirect. The case mainly demonstrates an appetite for narrow readings of the state action doctrine and a reiteration of *Tior*'s language that state action immunities are disfavored. We argue, however, that the FTC's success in arguing that the “clear articulation” prong was not met would be much more difficult in the context of professional licensing. Unlike the authority to purchase hospitals, the state-granted ability to restrict professional entry and practice will almost always have an anticompetitive effect. Thus, we do not see *Phoebe Putney* as widening the path for challenges to licensing board immunity. Rather, the battleground in the case of occupational boards remains the supervision prong under *Midcal*. Still, *Phoebe Putney* is in the spirit of narrowing state action immunity and reiterates that state action immunity is disfavored. In that sense, it accords with our thesis.

IV then discusses the parties, damages, and defenses that would be involved in a licensing board suit and speculates about likely state responses to the new system.

### I. OCCUPATIONAL LICENSING BOARDS: THE NEW CARTELS

Once limited to a few learned professions, licensing is now required for over 800 occupations.<sup>41</sup> And once limited to minimum educational requirements and entry exams, licensing board restrictions are now a vast, complex web of anticompetitive rules and regulations. The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.

#### A. *The Scope of Professional Licensing: Big and Getting Bigger*

State-level occupational licensing is on the rise. In fact, it has eclipsed unionization as the dominant organizing force of the U.S. labor market. While unions once claimed 30% of the country's working population, that figure has since shrunk to below 15%.<sup>42</sup> Over the same period of time, the number of workers subject to state-level licensing requirements has doubled; today, 29% of the U.S. workforce is licensed and 6% is certified by the government.<sup>43</sup> The trend has important ramifications. Conservative estimates suggest that licensing raises consumer prices by 15%.<sup>44</sup> There is also evidence that professional licensing increases the wealth gap; it tends to raise the wages of those already in high-income occupations<sup>45</sup> while harming low-income consumers who cannot afford the inflated prices.

The expansion of occupational licensing has at least two causes. First, as the U.S. economy shifted away from manufacturing and toward service industries, the number of workers in licensed professions swelled, accounting for a greater proportion of the workforce. Second, the number of licensed

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<sup>41</sup> KLEINER, *supra* note 3, at 5.

<sup>42</sup> Kleiner, *supra* note 2, at 190.

<sup>43</sup> Kleiner & Krueger, *supra* note 7, at S176, S177 fig.1, S182.

<sup>44</sup> *Id.* at S179 (“[E]stimates of . . . state licensing’s influence on wages with standard labor market controls show a range from 10% to 15% for higher wages associated with occupational licensing.”).

<sup>45</sup> See Kleiner, *supra* note 2, at 194-96 (calculating the extent to which licensing affects wages); see also Timothy R. Muzondo & Bohumir Pazderka, *Occupational Licensing and Professional Incomes in Canada*, 13 CAN. J. ECON. 659, 666 (1980) (performing a regression analysis and finding that licensing restrictions confer benefits to employees in educated professions); Robert J. Thornton & Andrew R. Weintraub, *Licensing in the Barbering Profession*, 32 INDUS. & LAB. REL. REV. 242, 248 (1979) (finding that minimum education requirements may “exclud[e] significant numbers from entering the trade”).

professions has increased. Where licensing was once reserved for lawyers, doctors, and other “learned professionals,” now floral designers,<sup>46</sup> fortune tellers, and taxidermists<sup>47</sup> are among the jobs that, at least in some states, require licensing. Licensing requirements are ubiquitous, although the extent of regulation differs dramatically between states. For example, Massachusetts licenses almost three times as many occupations as Rhode Island does.<sup>48</sup>

Since boards are typically dominated by active members of the very profession that they are tasked with regulating, this dramatic shift toward licensing has put roughly a third of American workers under a regime of self-regulation. Our study of the composition and powers of all occupational licensing boards in Florida and Tennessee revealed that license-holders active in the profession have a majority on 90% of boards in Florida and 93% of boards in Tennessee.<sup>49</sup> Our empirical findings, which we report in the Appendix, corroborate the anecdotal references to “practitioner dominance” in the legal and economic scholarship on occupational boards.<sup>50</sup> Given this composition, it is not surprising that boards often succumb to

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<sup>46</sup> See *Meadows v. Odom*, 360 F. Supp. 2d 811, 823 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006) (noting Louisiana's licensing requirement in the floral profession).

<sup>47</sup> CARPENTER ET AL., *supra* note 16, at 10 tbl.1 (noting that twenty-six states require licensing for taxidermists).

<sup>48</sup> See Kleiner, *supra* note 2, at 199 (suggesting that state-by-state comparisons are one good way to structure economic analysis of licensing); see also Charles J. Wheelan, *An Empirical Examination of the Political Economy of Occupational Licensure* 100 (Mar. 1998) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago) (noting that the total number of professions that a state licenses is an obvious indicator of a state's proclivity to license).

<sup>49</sup> For a table reporting our findings on the composition and rulemaking authority of boards in Florida and Tennessee, see Appendix.

<sup>50</sup> See, e.g., Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 28, 45 (2011) (noting that individuals have strong incentives “to expand the reach of their occupation to the detriment of both consumers and other occupations”); Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. HEALTH POL. POL'Y & L. 587, 596 (2006) (observing that board members are typically chosen from lists of nominees from within the profession itself, with one or two outside members); Kleiner, *supra* note 2, at 191 (“Generally, members of the occupation dominate the licensing boards.”); see also COX & FOSTER, *supra* note 23, at 36-38 (conceding that members of the profession have valuable industry knowledge but acknowledging the accompanying dangers); Jared Ben Bobrow, Note, *Antitrust Immunity for State Agencies: A Proposed Standard*, 85 COLUM. L. REV. 1484, 1496 (1985) (noting that some state statutes require licensing board members to have experience in the industry); J.R.R. II, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1118 (1973) (“[S]eventy-five percent of all occupational licensing boards are made up exclusively of practitioners licensed in the respective occupations.”).

the temptation of self-dealing, creating regulations to insulate incumbents rather than to ensure public welfare.

### B. *The Anticompetitive Potential of Occupational Licensing*

This Section illustrates the anticompetitive potential of licensing regulations as well as the breadth of occupations subject to licensing. A complete picture of state licensing activity is impossible, as there are thousands of professional boards operating in the United States. But a few snapshots suffice to show that the theoretical problems of self-regulation are all too real in practice.

#### 1. The New “Professions”

Jobs once thought to be low-skill and low-stakes are increasingly coming under state regulation. In Louisiana, for example, all flower arranging must be supervised by a licensed florist.<sup>51</sup> So when flower shop owner Monique Chauvin’s only licensed employee passed away, she found her business in violation of state law.<sup>52</sup> Although Chauvin had run her New Orleans shop successfully for over ten years and her arrangements were frequently featured in magazines, she could have been subject to fines and even imprisonment if she continued to operate.<sup>53</sup> One should note that the Louisiana Horticulture Commission uses money collected from the licensing scheme to fund enforcement actions against unlicensed practitioners, rather than using its authority to pursue complaints or alleged violations of its quality and safety requirements.<sup>54</sup> Constitutional challenges against Louisiana’s licensing scheme have proven unsuccessful. A federal court recently upheld the scheme, persuaded by an expert who claimed that licensing

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<sup>51</sup> LA. REV. STAT. ANN. § 3:3808(B)(1) (2010) (“A retail florist’s license authorizes the holder thereof to arrange or supervise the arrangement of floral designs which include living or freshly cut plant materials and to sell at retail floral designs, cut flowers, and ornamental plants in pots normally and customarily sold by florists.”).

<sup>52</sup> See *Freeing Louisiana Florists: Licensing Law is Blooming Nonsense*, INST. JUST., <http://www.ij.org/freing-louisiana-florists-licensing-law-is-blooming-nonsense> (last visited Mar. 22, 2014) (telling Monique Chauvin’s story as an example of licensing gone too far).

<sup>53</sup> *Id.*

<sup>54</sup> The Louisiana Horticulture Commission governs licensure for landscape architects, landscape horticulturists, landscape irrigation contractors, arborists, and florists. The Commission held fourteen meetings between March 2008 and December 2011 and considered sixty-four cases. In sixty-two of those cases, the alleged infraction was practicing without a license. In only two cases did the Commission address violations of substantive rules governing the practice of horticulture. For board meeting minutes, see *Horticulture Commission Meeting Minutes*, ST. LA. BOARDS & COMMISSIONS, <https://wwwprd.doa.louisiana.gov/boardsandcommissions/viewMeetingMinutes.cfm?board=475> (last visited Mar. 22, 2014).

“prevents the public from having any injury” from exposed picks, broken wires, or infected flowers.<sup>55</sup> But the court also noted that the regulation could stand *even without* a public health justification—“industry protectionism” was itself a legitimate state interest.<sup>56</sup>

As another example, Minnesota (along with several other states<sup>57</sup>) now defines the filing of horse teeth as the practice of veterinary medicine, a move that has redefined an old vocation as a regulated profession subject to restricted entry and practice rules. This put Chris Johnson, a “teeth-floater” for hire, out of work. Although his family had practiced this routine, noninvasive, and painless procedure<sup>58</sup> for satisfied customers for generations, the Minnesota Veterinary Board sent Johnson a cease-and-desist letter. Since his business did not employ veterinarians to supervise the teeth floating, continued operation would be considered an unlicensed practice of veterinary medicine, which carries severe penalties in Minnesota. Johnson lost a constitutional challenge against the rule.<sup>59</sup>

Several states even prohibit the sale of caskets by anyone other than licensed funeral directors.<sup>60</sup> This restriction outlawed businesses like a Benedictine monks’ woodshop at Saint Joseph Abbey in Louisiana.<sup>61</sup> For years, the monks had made simple pine coffins to bury their departed. But when they opened their shop to the public to help cover the costs of their healthcare, the State Board of Embalmers and Funeral Directors (a body with only one member from outside the industry<sup>62</sup>) found the competition unwelcome. It served the monks with a cease-and-desist letter, threatening jail time and a fine.<sup>63</sup> The monks never handled bodies or planned funeral

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<sup>55</sup> *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 F. App’x 348 (5th Cir. 2006).

<sup>56</sup> *Id.* at 824-25.

<sup>57</sup> See *State Summary Report: Authority of Veterinary Technicians and Other Non-Veterinarians to Perform Dental Procedures*, AM. MED. ASS’N, <https://www.avma.org/advocacy/stateandlocal/pages/sr-dental-procedures.aspx> (last updated Oct. 2013) (listing each state’s scope of practice for non-veterinarians).

<sup>58</sup> A domesticated horse’s modern diet is not coarse enough to wear down its teeth naturally, which never stop growing. Horse teeth therefore require periodic filing, or “floating.” For more information on Johnson’s story and the industry generally, see *Challenging Barriers to Economic Opportunity: Challenging Minnesota’s Occupational Licensing of Horse Teeth Floaters*, INST. JUST., <http://www.ij.org/minnesota-horse-teeth-floating-background> (last visited Mar 22, 2014).

<sup>59</sup> *Johnson v. Minn. Bd. of Veterinary Med.*, No. 27-CV-06-16914 (Minn. Dist. Ct. 4th Judicial Dist. June 25, 2008).

<sup>60</sup> See, e.g., LA. REV. STAT. ANN. § 37:831(35)-(36) (2007) (defining “funeral director” under Louisiana law as one with a valid license to perform all aspects of “funeral directing,” which includes the sale of caskets and other funeral merchandise).

<sup>61</sup> See *St. Joseph Abbey v. Castille*, 700 F.3d 154 (5th Cir. 2012).

<sup>62</sup> *Id.* at 159.

<sup>63</sup> See LA. REV. STAT. ANN. § 37:850 (2007).

services.<sup>64</sup> They simply drop-shipped the empty caskets to mortuaries, offering an inexpensive and simple alternative to the extravagant caskets typically sold at funeral homes. And although Louisiana restricts the *sale* of caskets, it does not regulate the design of caskets or even require that bodies be buried in a casket at all.<sup>65</sup>

For a final example, we turn to the beauty industry. State cosmetology boards have responded to competition from two increasingly popular practices—African-style hair braiding and eyebrow threading—by demanding that braiders and threaders obtain cosmetology licenses before they can lawfully practice their craft.<sup>66</sup> Neither practice requires sharp instruments or chemicals, and neither involves a significant risk of infection. Now many state cosmetology boards want braiders and threaders to attend two years of school (with a price tag of \$16,000) to learn cosmetology procedures and techniques irrelevant to their practice, pass an exam, and pay yearly dues to maintain a license in cosmetology—a profession they have no interest in practicing.<sup>67</sup>

For Texas entrepreneur Ashish Patel, this meant shuttering his successful brow threading business and firing his employees after the state upheld the licensing requirements against his constitutional challenge.<sup>68</sup> For hair braider Amber Starks, it means crossing the border daily from her native Oregon, where hair braiders are explicitly required to have a cosmetology license, to Washington, where they are not.<sup>69</sup> The majority of her clientele come from Oregon as well, but they make the trip over the border to get their preferred hairstyle at a price they can afford.<sup>70</sup> The millions of customers that live far away from the eleven states that exempt hair braiders from the cosmetology license requirements<sup>71</sup> must either find a practitioner willing to flout the board or pay cartel prices.

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<sup>64</sup> *St. Joseph Abbey*, 700 F.3d at 157.

<sup>65</sup> *Id.* After several years of litigation, the monks finally won a constitutional challenge against the restriction. *Id.*

<sup>66</sup> See Goldstein, *supra* note 26, at 20 (describing the challenges that an African-style hair braider faced when seeking an exemption from Utah's licensing requirements).

<sup>67</sup> *Id.*

<sup>68</sup> See Monica Luhar, *Threading Licensing in Texas Tied Up in Debate, Lawsuit*, INDIA WEST, Mar. 30, 2012, at B1, available at <http://indiawest.com/news/3739-Threading-Licensing-in-Texas-Tied-Up-in-Debate—Lawsuit.html> (discussing a lawsuit filed by eight plaintiffs against the Texas Department of Licensing and Regulation).

<sup>69</sup> See Anna Griffin, *Braiding African American Hair at Center of Overregulation Battle in Oregon*, THE OREGONIAN (Aug. 11, 2012), [http://www.oregonlive.com/politics/index.ssf/2012/08/braiding\\_african\\_american\\_hair.html](http://www.oregonlive.com/politics/index.ssf/2012/08/braiding_african_american_hair.html) (describing Starks's challenge to an Oregon law).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

## 2. Old Professions, New Restrictions

For some professions, licensing provides such an obvious public benefit that barriers to entry and regulation of practice are accepted as necessary evils. But while some professions may require restrictions to ensure quality and public safety, a close examination of restrictions in those professions suggests that those boards, too, have abused their ability to self-regulate.

For example, in many states, dental licensing boards restrict the number of hygienists a dentist can hire to two.<sup>72</sup> The anticompetitive effects of this restriction are well known; in 1987, the FTC published a policy paper showing that dentist-to-hygienist ratios tend to raise prices but not quality.<sup>73</sup> According to some dentists, the ratio restrictions are necessary to prevent “hygiene mills”—practices that offer low-cost dental cleanings without advanced dental services like exams, diagnosis, and surgery.<sup>74</sup> The American Dental Association (ADA) calls such practices unsafe, but since dental hygienists must themselves possess a license requiring extensive education on safe cleaning techniques,<sup>75</sup> it seems clear that the main threat these “mills” pose is to dentists themselves, in the form of reduced demand for their services. At least one state has taken the hygienist restrictions further. In 2001, the South Carolina Board of Dentistry required that exams performed by a licensed dentist accompany all cleanings.<sup>76</sup> The rule frustrated the state legislature’s attempt to extend in-school dental cleanings to rural and other underserved children.

Similarly, the advent of nurse practitioners and physician assistants has ignited a turf war between these “physician extenders” and doctors.<sup>77</sup> Nurse practitioners and physician assistants are trained in some of the same skills

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<sup>72</sup> LIANG & OGUR, *supra* note 20, at 6 (describing the increase in the number of states with such restrictions since 1970).

<sup>73</sup> *See id.* at 44-47 (estimating that, in 1982, the deadweight loss from the restrictions was \$680-710 million in the sixteen states that imposed such restrictions); *see also* Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547, 549 (2000) (showing empirically that, at least for uninsured individuals, stricter licensing restrictions for dentists has only very little impact on quality).

<sup>74</sup> *See* VA. DEP’T OF PLANNING & BUDGET, REGULATIONS GOVERNING THE PRACTICE OF DENTISTRY AND DENTAL HYGIENE DEPARTMENT OF HEALTH PROFESSIONS, 18 VAC 60-20, at 10-11 (Jan. 22, 2002), *available at* [http://townhall.virginia.gov/L/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5C21%5C1112%5C1954%5Cdhp1954%20dentistry%20\(dental%20hygienists\)-b.pdf](http://townhall.virginia.gov/L/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5C21%5C1112%5C1954%5Cdhp1954%20dentistry%20(dental%20hygienists)-b.pdf).

<sup>75</sup> LIANG & OGUR, *supra* note 20, at 4-5.

<sup>76</sup> S.C. Bd. of Dentistry, 138 F.T.C. 229, 230 (2004) (stating that the legislature amended its law to require dental hygienists to work “under general supervision”).

<sup>77</sup> Carl B. Meyer, *Science and Law: The Quest for the Neutral Expert Witness. A View from the Trenches*, 12 J. NAT. RESOURCES & ENVTL. L. 35, 49 (1996-1997) (“[I]ntense turf battles have been fought between . . . doctors and nurse practitioners over the scope of responsibilities of the parties.”).



as family practice physicians but need not learn the more advanced skills essential to obtaining a medical degree. Thus, nurse practitioners' education costs less than that of medical doctors, and nurse practitioners' fees reflect those cost savings.<sup>78</sup> For many procedures, outcome studies reveal that the extenders' services are as safe and effective as that of physicians.<sup>79</sup> Extenders have been essential to low-cost convenience clinics like CVS's MinuteClinics and public health initiatives aimed at serving low-income individuals with restricted access to medical care.<sup>80</sup>

Undoubtedly influenced by powerful lobbying from the American Medical Association (AMA), twelve states (including more populous states such as California, Texas, and Florida) require physician supervision over all nurse practitioner activity.<sup>81</sup> Several states prohibit nurse practitioners from prescribing medication.<sup>82</sup> For the most part, state medical boards, made up primarily of physicians, hold the reins of competition—and decide the level of supervision required.

Lawyers, too, use licensing to limit competition. Restrictions on bar entry and rules defining the ethical conduct of lawyers reveal that attorney-licensing bodies have yielded to the temptation of self-dealing. Advertising restrictions insulate lawyers from competition from other lawyers who can claim better average outcomes for clients. For example, Alabama requires all attorney advertising to include the following disclaimer: "No representation is made that the quality of the legal services to be performed is greater than

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<sup>78</sup> See Veritas Prep, *Should You Go to Medical School or Nursing School?*, U.S. NEWS & WORLD REP. (Aug. 29, 2011), <http://usnews.com/education/blogs/medical-school-admissions-doctor/2011/08/29/should-you-go-to-medical-school-or-nursing-school> (describing the educational differences for nurse practitioners and doctors in terms of time, requirements, costs, and roles).

<sup>79</sup> See, e.g., Daniel Trampf & Jeff Oliphant, *Licensed Athletic Trainers: A Traditional, Unique, and Proactive Approach in Wisconsin Sports Medicine*, 103 WIS. MED. J. 33, 34 (2004) ("Outcome studies at the national level prove that patients utilizing athletic trainers demonstrate a significant reduction in re-injury rates, restricted workdays, and lost work time, and they have a 98% or greater patient satisfaction rating.")

<sup>80</sup> See Elcha Shain Buckman, *The Healthcare Climate and Communication* ("The mission of [corporate-owned retail health] clinics is to . . . relieve the excessive time and costs of unnecessarily using emergency rooms and provide quality care and savings . . . for our millions of Medicaid, Medicare, underinsured, and uninsured citizens . . ."), in PATIENT-PROVIDER COMMUNICATIONS: CARING TO LISTEN 64 (Valerie A. Hart ed., 2010).

<sup>81</sup> See *State Practice Environment*, AM. ASS'N NURSE PRAC., <http://www.aanp.org/legislation-regulation/state-practice-environment/66-legislation-regulation/state-practice-environment/1380-state-practice-by-type> (last visited Mar. 22, 2014) (categorizing states by licensing and regulatory requirements).

<sup>82</sup> *Id.* (explaining that sixteen states and the District of Columbia allow nurse practitioners to prescribe medication, while the remainder of states place restrictions or prohibitions on nurse practitioners' ability to do so).

the quality of legal services performed by other lawyers.”<sup>83</sup> In addition, many states define title certification and abstraction as the “practice of law,” which effectively inflates demand for legal services by requiring attorney representation at all real estate transactions.<sup>84</sup> And the state ethical rules prohibiting “champerty”—selling an interest in the outcome of a lawsuit—help contingency fee lawyers prop up the price of representation at thirty percent of the award.<sup>85</sup>

Moreover, each state has its own bar exam and licensing procedure, which reduces lawyer mobility across state lines. Segmentation of the market means that lawyers in each state are insulated from out-of-state competition, allowing attorneys to charge higher legal fees than they could in a nationwide market. The justification for this is colorable—a different exam is necessary for each jurisdiction because of differing state laws—but it fails to account for practices such as California’s requirement that lawyers qualified in other states retake the multistate portion of the exam when sitting for the California bar.<sup>86</sup>

Licensing bodies have also devised ways to restrict competition among law schools and among law professors. In 1995, the Department of Justice (DOJ) challenged the American Bar Association’s (ABA) law school accreditation standards that required schools to pay faculty “compensation . . . comparable with that of other ABA-approved schools,” limited teaching obligations to eight hours per week, and required schools to provide professors with paid leaves of absence.<sup>87</sup> Although the ABA entered a consent

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<sup>83</sup> ALA. CODE OF PROF’L CONDUCT R. 7.2(e) (West 2013).

<sup>84</sup> The FTC has written letters to state bar associations that are considering whether to implement restrictions on who may participate in loan closings. The FTC has urged bar associations to avoid “the anticompetitive consequences of rules that prevent nonlawyers from conducting closings.” FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 68 (2003) [hereinafter STATE ACTION TASK FORCE].

<sup>85</sup> Max Schanzbach & David Dana, How Would Third Party Financing Change the Face of American Tort Litigation? The Role of Agency Costs in the Attorney-Client Relationship 6 (Sept. 14, 2009) (unpublished manuscript) (on file with authors). Professors Dana and Schanzbach explore the efficiencies of allowing third-party assignment and highlight the anticompetitive effect of a rule allowing assignment only to attorneys. They point out that “the emergence of a full assignment market would undermine the ability of contingency fee firm lawyers to charge as much as they do”—champerty would create a competitive market for legal claims and likely reduce fees to below the traditional (and suspiciously stable) thirty percent that contingency lawyers currently charge. Dana and Schanzbach argue that this pay cut partially explains why legislation allowing champerty lacks attorney support. *Id.* at 5.

<sup>86</sup> Thirteen other states also require retaking the MBE (Multistate Bar Examination). *Bar Exam / MBE Transfer*, BARRECIPROCITY.COM, <http://barreciprocity.com/bar-exam-mbe-transfer> (last visited Mar. 22, 2014).

<sup>87</sup> Competitive Impact Statement at 5, *United States v. Am. Bar Ass’n*, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211), available at <http://www.justice.gov/atr/cases/f1000/1034.htm>.

decree that eliminated some of the most anticompetitive rules,<sup>88</sup> they replaced them with standards that have the same anticompetitive effects.<sup>89</sup> In the same vein, the ABA allegedly refused to accredit the Massachusetts School of Law at Andover (MSLA) for pretextual reasons. MSLA sued, accusing the ABA of enforcing a group boycott and conspiring to monopolize legal education in violation of the Sherman Act.<sup>90</sup> The school lost on state action grounds.<sup>91</sup>

Another device that many professions now use to restrict competition is the apprenticeship. Many state licensing boards require apprenticeships for would-be professionals, essentially guaranteeing incumbents low-cost labor and raising barriers to entry.<sup>92</sup> For example, most states' funeral and mortuary licensing boards require an applicant to complete a one-year apprenticeship under a licensed funeral director in addition to education and testing requirements.<sup>93</sup> Similarly, some states require lengthy apprenticeships for aspiring psychotherapists. California requires a total of 3000 hours of therapy under the supervision of a licensed therapist at that therapist's place of work.<sup>94</sup> Interns cannot receive compensation directly from patients, but rather they can only be paid, if at all, by their supervising therapist.<sup>95</sup> And the statute actually *limits* supervision to five hours per week, restraining competition among therapists for interns.<sup>96</sup>

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<sup>88</sup> *Id.* at 9-12 (discussing the conditions outlined in the proposed final judgment).

<sup>89</sup> For example, where the 1995 standards limited teaching loads to eight hours per week, the modern standards emphasize that professors should have enough time, in addition to teaching, for research; scholarship; "keep[ing] abreast of developments in their specialties"; and fulfilling obligations to the law school, university community, profession, and the public. ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 404, 34 (2011-2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2011\\_2012\\_standards\\_and\\_rules\\_complete\\_book.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2011_2012_standards_and_rules_complete_book.authcheckdam.pdf). Thus, the ABA can make a compelling argument that any school requiring more than eight hours per week of teaching violates this provision. For a list of contemporary restrictions on law schools, see generally *id.*

<sup>90</sup> *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1031 (3d Cir. 1997).

<sup>91</sup> *Id.* at 1038 (granting the ABA *Noerr* immunity).

<sup>92</sup> Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 410 (1993-1994) (identifying medicine and architecture as examples).

<sup>93</sup> For a state-by-state breakdown of license, education, and apprenticeship requirements, see *Licensing Boards and Requirements*, NAT'L FUNERAL DIRECTORS ASS'N (Apr. 5, 2011), <http://www.nfda.org/licensing-boards-and-requirements.html>.

<sup>94</sup> See CAL. BUS. & PROF. CODE § 4980.43 (2014) (detailing requirements that interns or trainees must complete before applying for licensing examinations).

<sup>95</sup> *Id.* § 4980.43(h).

<sup>96</sup> *Id.* § 4980.43(c)(2).

## II. THE ROAD TO PROFESSIONAL CARTELIZATION

State professional boards arose from a belief that, for some professions, inexpert practice would be socially inefficient or even dangerous. Licensing created a mechanism by which the government could prevent incompetent practitioners from participating in the market. Regulation was justified by the idea that the public benefits outweighed the costs of higher prices and reduced economic liberty.<sup>97</sup> But unlike other regulatory bodies, licensing boards became dominantly comprised of practitioners themselves.<sup>98</sup> The theory was that only members of a profession had the expertise necessary to define efficient rules for entry and practice, but self-dealing is inevitable when the regulated act as regulators.<sup>99</sup> Thus, the board-as-cartel was born.

This Part tells the economic and legal stories of anticompetitive licensing in the United States. Section A reviews the economic theory behind licensing, identifying its potential costs and benefits. It explains that licensing schemes that raise consumer prices and yield little benefit to anyone other than incumbent practitioners are socially wasteful. But, as Section B details, state licensing boards have virtually free rein to enact this socially wasteful regulation.

### A. *The Economics of Licensing*

Licensing has long been an obsession of economists, including Milton Friedman, who dedicated an entire chapter to the topic in his 1962 book, *Capitalism and Freedom*.<sup>100</sup> But the past twenty years have witnessed an explosion of empirical work on the effects of licensing restrictions on service quality and price, led most prominently by Morris Kleiner at the University of Minnesota. The work of Kleiner and his contemporaries reveals a consensus in the academy: a licensing restriction can only be

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<sup>97</sup> See KLEINER, *supra* note 3, at 44-48 (discussing various theories of why occupations are regulated); see also Lee Benham, *The Demand for Occupational Licensure* (“Licensed occupations place great emphasis on convincing the larger society of the benefits associated with their licensure . . . .”), in OCCUPATIONAL LICENSURE AND REGULATION 13, 17 (Simon Rottenberg ed., 1980); Wheelan, *supra* note 48, at 6 (discussing the three traditional public-interest justifications for licensing).

<sup>98</sup> See *supra* text accompanying notes 49-50 and Appendix A; see also Kleiner, *supra* note 2, at 191 (“Generally, members of the occupation dominate the licensing boards.”).

<sup>99</sup> See COX & FOSTER, *supra* note 23, at 36-38 (discussing the impact of self-regulation on the public).

<sup>100</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM, ch. IX (1962); see also 1 ADAM SMITH, THE WEALTH OF NATIONS, bk. I, ch. 10, pt. II (George Bell & Sons 1908) (1776) (observing that guilds raise earnings by limiting the availability of apprenticeships and lengthening their duration), cited in KLEINER, *supra* note 3, at 3.

justified where it leads to better quality professional services—and for many restrictions, proof of that enhanced quality is lacking.<sup>101</sup>

### 1. The Costs of Licensing: Higher Prices, Lower Quantity

Licensing restrictions can affect price along four dimensions. First, professional licensing can act as a barrier to entry into the profession.<sup>102</sup> Second, licensing can establish rules of practice, like advertising bans, that restrict competition.<sup>103</sup> Third, state boards can suppress interstate competition by recognizing licenses only from their own state.<sup>104</sup> Finally, a profession can prevent competition by broadening the definition of its practice, bringing more potential competitors under its licensing scheme.<sup>105</sup> These “scope-of-practice” limitations tend to oust low-cost competitors that operate at the fringes of an established profession.<sup>106</sup>

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<sup>101</sup> See KLEINER, *supra* note 3, at 8 (“The major public policy justification for occupational licensing lies in its role in improving quality of service rendered . . . . [T]he effect of regulation on the level of service quality is uncertain.”); REBECCA LEBUHN & DAVID A. SWANKIN, CITIZEN ADVOCACY CTR., REFORMING SCOPES OF PRACTICE 3 (2010) (“The stated purpose [of state licensing laws] is to ensure consumers that healthcare workers conduct their practices in areas for which they are properly trained.”); Sidney L. Carroll & Robert J. Gaston, *Occupational Licensing and the Quality of Service*, 7 LAW & HUM. BEHAV. 139, 145 (1983) (“[L]icensing has gone far enough to ensure adequate quality in most places and has gone too far in others.”); Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 1, 3, 8 (2010) [hereinafter Kleiner, *Enhancing Quality*] (“The general rationale for licensing is the health and safety of consumers. Beyond that, the quality of service delivery . . . [is] sometimes invoked.”); Morris M. Kleiner & Charles Wheelan, *Occupational Licensing Matters: Wages, Quality and Social Costs*, CESIFO DICE REP., Mar. 2010, at 29, 29 (“Of course, these labor market distortions must be weighed against any potential gains to consumers from the quality improvements in the licensed profession. Yet even the putative benefits of licensure have come under academic assault.”); Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 4 (W.E. Upjohn Inst., Policy Paper No. 2011-009, 2011) [hereinafter Kleiner, *Protecting the Public Interest or Protectionism?*], available at [http://research.upjohn.org/up\\_policypapers/9](http://research.upjohn.org/up_policypapers/9) (“[S]everal studies have found a number of cases where licensing reduces employment, increases prices, but does not result in better services.”).

<sup>102</sup> See Kleiner, *supra* note 2, at 192 (describing methods by which licensing curtails labor supply); see also Simon Rottenberg, *Introduction to OCCUPATIONAL LICENSURE AND REGULATION*, *supra* note 97, at 1, 2.

<sup>103</sup> See John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211, 216 (1984) (concluding from data in the optometry profession that advertising increases competition but nonadvertising increases quality).

<sup>104</sup> See Kleiner, *supra* note 2, at 192-93 (providing examples of limitations such as tougher examination pass rates and longer residency requirements).

<sup>105</sup> See Kleiner & Krueger, *supra* note 7, at S178 (“For example, the work of ‘hair braiders,’ which is an unlicensed profession, could be brought under the control of the cosmetology board and limited to only licensed cosmetologists or barbers.”).

<sup>106</sup> *Id.*

It is worth starting this cost analysis with what makes a professional licensing cartel different from a typical cartel. A typical price-fixing cartel will only be effective if an industry has a small number of firms; otherwise, the temptation to cut price and expand output will be too great. Licensing boards, however, can effectively raise price despite thousands of market participants. Sometimes they work by muting price competition among members through direct restrictions on professional practice, but that is not the only way. Limiting the number of licensed professionals by making entry difficult—and unauthorized entry illegal—raises prices because it limits supply, and it does so even if licensed participants compete vigorously.<sup>107</sup> Unlike firms, which may be able to expand without bound, a licensed professional can only provide so much service herself. Boards can further limit supply by controlling what unlicensed workers can produce and how they must be supervised; the rule requiring that dentists supervise a maximum of two hygienists is an example. As a result, licensing boards can limit output and raise price even with thousands of competing professionals, much as cartelized oligopolies can in other industries.

Economists have studied extensively the effects of these professional licensing requirements on price and, less extensively, quantity of services. Studies that have the statistical power to identify an effect tend to show an increase in price and a reduction in quantity.<sup>108</sup> Mandatory entry requirements—such as examinations or educational prerequisites—tend to raise consumer prices, but estimating the effect with any certainty has proven difficult.<sup>109</sup> One 2006 study estimated that licensing requirements raise wages by 10% to 12%.<sup>110</sup> Newer data suggest that licensing raises hourly wages by 18%.<sup>111</sup> A 2000 study showed that tougher licensing, in the form of

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<sup>107</sup> See Kleiner & Wheelan, *supra* note 101, at 32 (illustrating this point using a hypothetical restriction on prospective teachers).

<sup>108</sup> See KLEINER, *supra* note 3, at 8-11. Since professional licensing is mostly the prerogative of individual states, economists have used the United States as a kind of natural experiment to observe price differences under different licensing regimes. Studies of the effects of licensing on price typically adopt one or more of three basic methodologies. First, studies can compare prices in professions before and after states' imposition of licensing requirements. Second, studies can compare prices of professional services in a state that requires a license with prices in a state that does not (interstate study). Finally, economists can compare wages (as a proxy for price) between licensed professions and unlicensed professions that require similar education levels, similar day-to-day responsibilities, and lifestyle. See generally Kleiner & Kudrle, *supra* note 73, at 548-49.

<sup>109</sup> See Kleiner, *supra* note 2, at 197 (“[R]elatively little empirical work has looked at issues involving the quality of output or the demand-side response to these quality effects.”).

<sup>110</sup> Morris M. Kleiner, *Regulating Occupations: Quality or Monopoly?*, EMP’T RES. (W.E. Upjohn Inst., Kalamazoo, Mich.), Jan. 2006, at 2 tbl.1, available at [http://research.upjohn.org/empl\\_research/vol13/iss1/1](http://research.upjohn.org/empl_research/vol13/iss1/1).

<sup>111</sup> Kleiner & Krueger, *supra* note 7, at S185.

lower pass rates on the qualifying exam, increased prices for dental services by 11%.<sup>112</sup>

Similarly, most studies examining practice restrictions show that when a licensing board is more heavy-handed in dictating hours, advertising, or levels of supervision within a profession, the consumer prices are higher. For example, one team of researchers estimated that restricting the number of hygienists a dentist may employ increased the cost of a dental visit by 7%,<sup>113</sup> resulting in an estimated \$700 million cost to consumers in 1982.<sup>114</sup> Restrictions on advertising by lawyers is associated with an increase in price,<sup>115</sup> and in optometry, restrictions on advertising have been shown to inflate prices by at least 20%.<sup>116</sup> Geographic restrictions—like nonreciprocity between states—also tend to increase consumer prices.<sup>117</sup>

Because the nature of licensed practice is not to produce physical goods that can be counted, measuring output as a function of licensing restrictions has been a less attractive method for economists to measure licensure's effect on competition. Several studies, however, have analyzed its effect on a related issue: employment growth. Here, the results have been more mixed than in the price context. One 1981 study examining electricians, dentists, plumbers, sanitarians, and veterinarians found that licensing reduces the number of practitioners in a given field.<sup>118</sup> Yet other studies have failed to measure any appreciable effect of licensing on the supply of barbers<sup>119</sup> and nurses.<sup>120</sup>

If licensing increases consumer prices, then some consumers must go without professional services—these are the services they could afford in a

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<sup>112</sup> Kleiner & Kudrle, *supra* note 73, at 572-73.

<sup>113</sup> LIANG & OGUR, *supra* note 20, at 40, 43.

<sup>114</sup> *Id.* at 47.

<sup>115</sup> See WILLIAM W. JACOBS ET AL., FTC, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 106 tbl.D (1984) (finding many instances of a statistically significant higher price for legal work in areas with restrictions on advertising).

<sup>116</sup> Kwoka, *supra* note 103, at 216.

<sup>117</sup> One study estimated that universal reciprocity among states for dentists would result in a geographical reallocation of dentists generating \$52 million (in 1978 prices) in consumer surplus. Bryan L. Boulter, *An Empirical Examination of the Influence of Licensure and Licensure Reform on the Geographical Distribution of Dentists*, in OCCUPATIONAL LICENSURE AND REGULATION, *supra* note 97, at 73, 94-95.

<sup>118</sup> Carroll & Gaston, *supra* note 101, at 143, 145.

<sup>119</sup> See Thornton & Weintraub, *supra* note 45, at 249 (finding that licensing requirements had a minimal impact on the number of barbers entering the profession).

<sup>120</sup> See William D. White, *Mandatory Licensure of Registered Nurses: Introduction and Impact*, in OCCUPATIONAL LICENSURE AND REGULATION, *supra* note 97, at 47, 68.

world without licensing.<sup>121</sup> Some would-be practitioners lose out as well; these are the individuals who do not have licenses but would like to compete with the licensed professionals by offering low-cost services.<sup>122</sup> A state's ability to cite and even prosecute unlicensed practitioners deters these low-cost transactions; in economic terms, these deterred low-cost transactions are the deadweight loss from licensing.<sup>123</sup>

The story, however, might not be so simple. To get a complete picture of the world but-for licensing, one needs a theory of how efficiently an unrestricted market would function.<sup>124</sup> Advocates of licensing argue that the free market does a poor job of efficiently allocating professional services to consumers because service quality would be too low without licensing.<sup>125</sup> The notion that a free market would result in too-low quality service rests on two possible sources of failure in the market for professional services. First, absent licensing, the asymmetry of information between professional providers and consumers about the quality of service<sup>126</sup> would create what economists call the "lemons problem." Second, free markets for professional services would result in sub-optimal quality because the market participants (providers and consumers) do not internalize all the costs of bad service.<sup>127</sup> In other words, a free market for professional services creates negative externalities.

The lemons problem, first articulated by George Akerlof in 1970, occurs in a market where products vary in quality but consumers cannot reliably distinguish good products from bad ones.<sup>128</sup> If consumers cannot distinguish between good and bad professional service, the high-quality, high-price

<sup>121</sup> See KLEINER, *supra* note 3, at 43 (quoting an article about a farm worker who performed two root canals on himself because he could not afford dental services).

<sup>122</sup> See Kleiner, *supra* note 2, at 192-93 (describing the deterrent effect of licensing, which may lead to greater entry into unlicensed professions).

<sup>123</sup> See Kleiner, *Enhancing Quality*, *supra* note 101, at 4 (noting that using licensing requirements as a gatekeeping mechanism can lead to negative consequences); see also Kleiner & Wheelan, *supra* note 101, at 31 ("When members of the legal profession told Milton Friedman that every lawyer should be a Cadillac, he famously replied that many people would be better off with a Chevy . . .").

<sup>124</sup> See Kleiner & Wheelan, *supra* note 101, at 30 (comparing and contrasting certification regimes with licensure regimes).

<sup>125</sup> See Kleiner, *supra* note 2, at 191; see also Benham, *supra* note 97 ("Almost all licensed occupations have claimed they will successfully cope with undesirable market failures.").

<sup>126</sup> Alex R. Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors*, in OCCUPATIONAL LICENSURE AND REGULATION, *supra* note 97, at 26.

<sup>127</sup> See COX & FOSTER, *supra* note 23, at 10-11 (discussing how reputation and litigation will likely be efficient to control the problem of externalities only in some circumstances).

<sup>128</sup> See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) (explaining that buyers possess imperfect information when purchasing a car because they do not know whether the car "will be good or a lemon").



providers will not be able to attract even those customers who both want and can pay for better quality service.<sup>129</sup> Unable to obtain a premium for their service, high-quality providers will either exit the market or reduce the quality of the service to match their low-quality, low-cost competitors.<sup>130</sup> This leads to deadweight loss in the form of deterred transactions between high-quality providers and high-quality demanding consumers.<sup>131</sup> Licensure addresses the information asymmetry at the root of the lemons problem by assuring consumers that all providers meet a minimum quality standard.

The second market failure possibly addressed by licensure occurs when low-price, low-quality transactions impose costs on third parties. An individual may be willing to receive poor service for a low price rather than no service at all, but only because she does not have to bear the full costs of bad service (e.g., treatment in a public hospital for infection from a careless barber or a nuisance settlement of a frivolous suit filed by an unscrupulous lawyer). Licensure can improve public safety by imposing quality standards on professionals through education or examination and by setting rules of professional practice.

It may not be fair to say that professional licensure results in deadweight loss by harming competition if it also avoids the deadweight loss (associated with the lemons problem and negative externalities) that would obtain in a free market. But the cure must not be worse than the disease: a procompetitive licensing scheme should avoid more deadweight loss than it creates. Quantifying the social harm from licensure on the one hand, and from free-but-inefficient markets for professional services on the other, is difficult. But if licensing has *any* effect on the market failures it is designed to address, then it should improve service quality. Put simply, if licensure works, quality of service should improve.<sup>132</sup>

## 2. The Benefits of Licensing: Improved Quality?

The economic research on quality of service as a function of licensing paints a murky picture. Some studies show modest increases in quality,<sup>133</sup> at

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<sup>129</sup> See COX & FOSTER, *supra* note 23, at 5-6.

<sup>130</sup> *Id.* at 6.

<sup>131</sup> *Id.*

<sup>132</sup> Kleiner, *supra* note 2, at 191-92.

<sup>133</sup> See KLEINER, *supra* note 3, at 53 tbl.3.2 (showing varying levels of quality improvements in a number of licensed professions); Carroll & Gaston, *supra* note 101, at 145 (concluding that licensing results in better delivered quality but not better quality received by society as a whole); Kleiner & Kudrle, *supra* note 73, at 575 (suggesting that licensing increased the quality of dental visits but not overall dental health); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 850-51 (1986) (finding an overall increase in service quality

least for some kinds of consumers, but other studies do not find that same effect.<sup>134</sup> A few studies even claim to show that licensing *reduces* quality.<sup>135</sup> Part of the explanation for the mixed results may be the difficulty of assessing the quality of professional services;<sup>136</sup> this is the very source of the lemons problem that licensing is designed to address. Researchers have used a variety of ingenious methods to evaluate the quality of professional services in the last few decades, but none is without its flaws.

Alex Maurizi, for example, used the number of consumer complaints lodged with the California Contractors' State License Board as a proxy for the quality of service provided by professional contractors.<sup>137</sup> He hypothesized that if barriers to entry (a licensing examination in this case) were effective in eliminating low-quality providers, then lower pass rates should be associated with higher quality service.<sup>138</sup> In fact, he found the opposite.<sup>139</sup> Similarly, economists have used malpractice litigation rates to measure the quality of professional outcomes.<sup>140</sup> Using consumer dissatisfaction to gauge quality has obvious limits because consumers may not take the initiative to formalize their unhappy experience in a complaint or lawsuit.<sup>141</sup>

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due to licensing, but finding that consumers who put little value on quality are worse off because of higher prices).

<sup>134</sup> See Joshua D. Angrist & Jonathan Guryan, *Teacher Testing, Teacher Education, and Teacher Characteristics*, 94 AM. ECON. REV. 241, 246 (2004) (“[T]here is . . . no evidence that testing hurdles have raised the quality of new and inexperienced teachers . . . .”); Thomas J. Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615, 629 (2008) (“We find little difference in the average academic achievement impacts of certified, uncertified and alternatively certified teachers.”); Morris M. Kleiner & Daniel L. Petree, *Unionism and Licensing of Public School Teachers: Impact on Wages and Educational Output* (concluding that teacher licensing has “ambiguous effects” on student performance), in WHEN PUBLIC SECTOR WORKERS UNIONIZE 305, 317 (Richard B. Freeman & Casey Ichniowski eds., 1988); Robert Gordon et al., *Identifying Effective Teachers Using Performance on the Job* 30 (The Hamilton Project, Discussion Paper No. 2006-01, 2006) (“[R]aising the hurdles for entry into the teaching profession a little higher is not likely to generate a watershed improvement in teacher quality.”).

<sup>135</sup> See Carroll & Gaston, *supra* note 101, at 145 (suggesting that “excessive restriction” reduces the quality of services available to the “lower middle income classes”); Maurizi, *supra* note 126, at 34 (“[C]onsumers may be receiving a quality of service quite similar to what would prevail in the absence of licensing, and they may be paying higher prices for that quality.”).

<sup>136</sup> Kleiner, *supra* note 2, at 198.

<sup>137</sup> Maurizi, *supra* note 126, at 27-29.

<sup>138</sup> *Id.* at 31-34.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., KLEINER, *supra* note 3, at 57-58.

<sup>141</sup> Maurizi, *supra* note 126, at 27-28 (challenging the assumption that increases in low-quality work will “produce an equivalent increase in the number of voiced complaints”). *But see* KLEINER, *supra* note 3, at 56 (“[L]icensing makes an occupation more visible and sets up rules and regulations that make lawsuits easier to file.”).

Sometimes quality can be measured directly by looking at actual outcomes from professional services. For example, Kleiner used test scores to measure the effect of licensing requirements for public school teachers on student performance.<sup>142</sup> His study ultimately did not show an effect from licensing.<sup>143</sup> Using a similar outcome-based technique, Kleiner and Kudrle analyzed dental exam results from new enlistees in the U.S. Air Force. They found that, for uninsured individuals, the strictness of licensing requirements for dentists in their home states did not impact enlistees' dental health at the time of enlistment.<sup>144</sup>

### B. *The Legal Landscape of Professional Licensing*

Where researchers have been able to show that licensing improves quality, existing regulation might be addressing the market failures caused by information asymmetry and negative externalities. If so, and if the benefits of licensing outweigh its harm to competition, then it is socially desirable. But under the dominant interpretation of antitrust immunity, state licensing boards never have to balance the procompetitive benefits of a restriction against its anticompetitive effects. While all other combinations of competitors operate in Sherman's shadow, licensing boards have mostly escaped antitrust suits—allowing them to create rules that maximize welfare for incumbent professionals at the expense of everyone else. That leaves only constitutional avenues of redress, which have proven to be weak against self-dealing boards.

#### 1. Twin Immunities Shield State Licensing Boards from Antitrust Liability

Licensing requirements are essentially agreements, usually among competitors, to create barriers to entry into their profession. These incumbent professionals reap the rewards of weaker competition in the form of higher prices and higher profits. This conduct sounds, on its face, like a perfect

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<sup>142</sup> See Kleiner, *Enhancing Quality*, *supra* note 101, at 6-8; see also KLEINER, *supra* note 3, at 54 (calling test scores "a generally recognized measure of 'quality' in education").

<sup>143</sup> Kleiner, *Enhancing Quality*, *supra* note 101, at 11-13; see also Kane et al., *supra* note 134, at 629.

<sup>144</sup> Kleiner & Kudrle, *supra* note 73. For those with insurance coverage (which was also associated with higher income), however, tougher state regulations on dentistry improved average dental health. *Id.* at 575-76. The results of the Air Force study exemplify an interesting finding of some quality studies: positive quality effects, where found, tend to be limited to higher-end consumers. See, e.g., Carroll & Gaston, *supra* note 101, at 145 (showing that licensing improved practitioner quality but decreased overall service quality for consumers by creating a practitioner shortage).

target for Sherman Act liability. But with *Parker v. Brown*<sup>145</sup> and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>146</sup> the Supreme Court has created twin immunities that make antitrust suits over state licensure regulation very difficult.

*Parker* created antitrust immunity for “state action,” which shields state governments and bodies delegated a state’s authority from federal antitrust liability.<sup>147</sup> In the line of cases following *Parker*, the Court defined the contours of the immunity to include all bodies “clearly authorized” by the state to restrict competition.<sup>148</sup> In most cases, where these bodies are deemed private actors, these bodies must also be subject to active supervision by the state itself.<sup>149</sup> State action immunity bars suits by aggrieved competitors and public enforcers alike. In *Noerr*, the Court held that private individuals and organizations cannot be sued under the Sherman Act for attempting to influence government action—by either filing a law suit or lobbying a legislature—even if their intent and effect is anticompetitive.<sup>150</sup> Together, these doctrines “are complementary expressions of the principle that the antitrust laws regulate business, not politics.”<sup>151</sup>

#### a. *Parker and State Action Immunity*

In *Parker*, the Supreme Court rejected antitrust claims against what was essentially a price-fixing scheme among competitors because the scheme had been blessed by the state of California.<sup>152</sup> In holding that the Sherman Act does not apply to state government action, the Court found the identity of the actor—the state or private citizens—essential but provided no guidance on how to draw the line.<sup>153</sup> This created serious problems for lower courts trying to apply *Parker* because states rarely regulate economic activity directly through a legislative act. Rather, states delegate rulemaking and

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<sup>145</sup> 317 U.S. 341 (1943).

<sup>146</sup> 365 U.S. 127 (1961).

<sup>147</sup> *Parker*, 317 U.S. at 350-51 (“We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”).

<sup>148</sup> See, e.g., *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980) (“First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy . . . .” (internal quotation marks omitted)).

<sup>149</sup> See, e.g., *id.* (“[S]econd, the policy must be actively supervised by the State itself.” (internal quotation marks omitted)).

<sup>150</sup> *Noerr*, 365 U.S. at 136.

<sup>151</sup> *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991).

<sup>152</sup> *Parker*, 317 U.S. at 351.

<sup>153</sup> *Id.* at 352.

rate-setting to agencies, councils, or boards dominated by private citizens.<sup>154</sup> Are these bodies arms of the state or collections of private actors?

The Court responded in 1982 with *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*,<sup>155</sup> which provided a test to distinguish private action from state action. To enjoy state action immunity, the Court held, the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy to restrict competition,” and the policy must be “actively supervised by the State itself.”<sup>156</sup> For many potential defendants, the *Midcal* rule thus shifted the battleground from the public-private boundary to the precise meanings of “clear articulation” and “active supervision.” In no fewer than ten decisions refining *Midcal*'s two-step test,<sup>157</sup> the Court has made clear that virtually any colorable claim to state authority can be all the articulation necessary.<sup>158</sup> The supervision requirement, in contrast, can have real bite.

Since *Midcal*, however, the Court has created a category of entities not subject to the supervision requirement at all.<sup>159</sup> These entities, which include municipalities,<sup>160</sup> enjoy immunity if they can meet the clear articulation prong alone. The question in the recent Fourth Circuit case, currently under review by the Supreme Court, is whether licensing boards are like municipalities in this respect; in particular, whether a licensing board dominated by competitors—who regulate the way they compete and exclude

<sup>154</sup> For evidence of delegation in two states, see Appendix.

<sup>155</sup> 445 U.S. 97 (1980).

<sup>156</sup> *Id.* at 105 (citation and internal quotation marks omitted).

<sup>157</sup> For the evolution of the *Midcal* two-step test, see *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010-11 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633-37 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370-74 (1991); *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988); 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 341-45 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 267-70 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-40 (1985); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 55-62 (1985); *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984); *Cnty. Comm'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 48-51 (1982).

<sup>158</sup> Clear articulation need not be an affirmative statement about abrogating a competitive policy. See STATE ACTION TASK FORCE, *supra* note 84, at 8 (“To satisfy the ‘clear articulation’ standard, the case law provides that the state need not compel the anticompetitive conduct at issue . . . .”). And if a state creates a policy that has foreseeable anticompetitive effects, that policy is sufficient under *Midcal*'s first prong. See *Hallie*, 471 U.S. at 45. Indeed, since *Midcal*, the Supreme Court has rejected a clear articulation claim only twice. See *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003; *Cnty. Comm'ns Co., Inc.*, 455 U.S. 40.

<sup>159</sup> STATE ACTION TASK FORCE, *supra* note 84, at 18 (noting an exception for boards that “perform a public function and are directly accountable to the state”).

<sup>160</sup> See *Hallie*, 471 U.S. at 45 (“None of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown.”).

would-be competitors—enjoy state action antitrust immunity without being supervised by the state.

b. *Noerr and Petitioning Immunity*

Whereas *Parker* immunity insulates public or quasi-public bodies from antitrust scrutiny, *Noerr* immunity shields private actors' efforts in petitioning governments for anticompetitive restraints.<sup>161</sup> *Noerr* and *Parker* immunities are, as Justice Scalia has observed, “two faces of the same coin”<sup>162</sup>—by disallowing suits against the private parties that influence state action, *Noerr* essentially closes a loophole left open by *Parker*. *Noerr* itself was a suit against a confederacy of railroad companies accused of persuading a state legislature to pass laws unfavorable to truckers.<sup>163</sup> Even though the railroads had used deception in their campaign to influence the state legislature,<sup>164</sup> the Court found their actions to be immune to antitrust liability on federalism grounds.<sup>165</sup> Later cases extended *Noerr* immunity to government petitioning through all avenues, including lawsuits<sup>166</sup> and executive branch lobbying.<sup>167</sup>

c. *Immunity for Professional Licensing Boards Under Parker and Noerr*

Although many potential plaintiffs and scholars—and probably licensing board members—assume that state occupational boards operate outside of the Sherman Act's reach,<sup>168</sup> the question is more complex than it appears.

<sup>161</sup> See *Omni*, 499 U.S. at 379-80 (“The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (“Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability . . .”).

<sup>162</sup> *Omni*, 499 U.S. at 383.

<sup>163</sup> *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129-30 (1961).

<sup>164</sup> The defendants deceived the legislature by attributing their own antitrucking statements and studies to “bogus independent civic groups.” Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 972 (2003).

<sup>165</sup> *Noerr*, 365 U.S. at 137 (holding that allowing such liability would “substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade”).

<sup>166</sup> See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (“If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . . .”).

<sup>167</sup> See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”).

<sup>168</sup> See, e.g., Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISC. L.J. 565, 569 (2010) (“Most licensing boards were created or are managed by the

Notably, the Fourth Circuit recently held a state licensing board accountable for its anticompetitive restrictions on dental practice in *North Carolina State Board of Dental Examiners v. FTC*.<sup>169</sup> The law here is complicated and in flux; thus, a comprehensive treatment of its details is necessary.

Certainly, licensing restrictions passed directly by a state's legislature or supreme court enjoy state action immunity.<sup>170</sup> Most licensing regulations, however, become law when promulgated by an administrative board, and the Supreme Court has not determined the status of practitioner-dominated boards since *Midcal*. Most board decisions likely meet *Midcal*'s first prong requiring clear articulation from the state, but these decisions are not typically subject to the kind of state review that courts have required to find active supervision. Thus, immunity turns on whether state licensing boards are among the entities that do not have to show supervision.

Any state mandate calling for the regulation of entry and good standing in a profession is likely to meet the Court's low bar for clear articulation, since all licensing restricts competition by reducing the number of competing professionals in the field.<sup>171</sup> The Ninth Circuit's opinion in *Benson v. Arizona State Board of Dental Examiners*<sup>172</sup> is typical. In considering Sherman Act claims challenging a state dental board's refusal to recognize out-of-state licenses, the court easily found the necessary clear articulation in the state's statute giving the Board discretion to adopt reciprocity rules.<sup>173</sup> Contrary outcomes involve boards acting in *violation* of state policy. In *Goldfarb v.*

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state, and therefore are beyond the reach of the Sherman Act."); cf. Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 693 (1991) (noting the Supreme Court's suggestion that "the active supervision requirement is probably inapplicable to state agencies, a suggestion with which the lower courts have virtually all agreed" (footnote omitted)).

<sup>169</sup> 717 F.3d 539 (4th Cir. 2013).

<sup>170</sup> See *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) ("[W]hen a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." (citations omitted)); see also *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1036 (3d Cir. 1997) (applying state action immunity because the states made the ultimate decision whether to adhere to ABA standards); STATE ACTION TASK FORCE, *supra* note 84, at 6 (noting that "actions of a state legislature and of a state supreme court acting in a legislative fashion are those of the state acting as sovereign" (footnote omitted)); *Bobrow*, *supra* note 50, at 1487 (noting that discretion over a law restricting attorney advertising was properly left to the state in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

<sup>171</sup> See, e.g., *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1044 (5th Cir. 1998) (noting that, in establishing a permissive policy with respect to the State Board of Certified Public Accountants Board of Louisiana, "the state rejected pure competition . . . in favor of establishing a regulatory regime that inevitably has anticompetitive effects"); see also *Havighurst*, *supra* note 50, at 599 ("Few things are more foreseeable than that a trade or profession empowered to regulate itself will produce anticompetitive regulations.").

<sup>172</sup> 673 F.2d 272 (9th Cir. 1982).

<sup>173</sup> *Id.* at 275.

*Virginia State Bar*, the Supreme Court held that although a state bar association was a state agency for the purpose of “investigating and reporting the violation” of ethical rules promulgated by the Supreme Court of Virginia,<sup>174</sup> it could not enjoy immunity for its price-fixing because it acted contrary to the state’s clearly articulated competition policy.<sup>175</sup>

As clear as it is that typical licensing board actions pass *Midcal*’s first prong, it is equally clear that many would fail the second prong—the active-supervision requirement—if subjected to it. The Supreme Court has recognized that the active-supervision requirement is met only when states actually “exercise ultimate control over the challenged anticompetitive conduct;”<sup>176</sup> the Court has overturned schemes where states possessed, but never exercised, their authority to review the scheme.<sup>177</sup> Even schemes where the state provides the final authorization of a restriction can lack supervision if the state uses a “negative option” that allows a state’s silence to signify approval.<sup>178</sup> For most licensing boards, their restrictions become operational upon, at most, a rubber stamp from the state. The typical case falls short of *Ticor*’s requirement of an affirmative pronouncement by the state signaling that it has “played a substantial role in determining the specifics of the economic policy.”<sup>179</sup>

Thus, a board’s status under *Parker* turns on whether it is subject to the requirement of supervision at all. In *Town of Hallie v. City of Eau Claire*, the Court found a municipality immune under *Parker* because it acted pursuant

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<sup>174</sup> 421 U.S. 773, 776 n.2 (1975) (quoting VA. CODE ANN. § 54-49 (1972)).

<sup>175</sup> See *id.* at 790-91 (“[A]nticompetitive activities must be compelled by direction of the State acting as a sovereign.”); see also *FTC v. Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 614 (1988) (refusing to find clear articulation for an optometry board’s onerous advertising restrictions in light of contrary statutory language).

<sup>176</sup> *Patrick v. Burget*, 486 U.S. 94, 101 (1988); see also *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97, 106 (1980) (finding inadequate supervision because the “State does not . . . engage in any ‘pointed reexamination’ of the program”). Although decided decades before *Midcal*’s two-step formulation, *Parker* itself emphasized the fact that the challenged restriction did not take effect until approved by the state. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

<sup>177</sup> See, e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (“The mere potential for state supervision is not an adequate substitute for a decision by the State.”).

<sup>178</sup> *Id.* at 639-40. Likewise, the FTC has held that “silence on the part of the state does not equate to supervision.” *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 632 (2011).

<sup>179</sup> *Ticor*, 504 U.S. at 635. Boards are typically subject to several mechanisms that improve their accountability to the state, such as member disclosure requirements, adherence to state administrative procedure acts, and public access to meetings and minutes. See, e.g., *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. at 630-32 (noting the board’s required compliance with “North Carolina’s Public Records Act, Administrative Procedure Act, and open meetings law”). But at least one lower court has held that these devices are inadequate to establish supervision under *Midcal*’s second prong. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359 (4th Cir. 2013).



to the state's clearly articulated policy to displace competition, despite being unsupervised.<sup>180</sup> The Court reasoned that, for municipalities, supervision is unnecessary because there is no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State."<sup>181</sup> Although *Hallie* did not provide a test for determining which entities, in addition to municipalities, are entitled to this fast track to immunity, a footnote provided a hint: "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."<sup>182</sup>

Many lower courts have applied *Hallie*'s footnote, though dicta, as law.<sup>183</sup> But by and large these courts have not interpreted the footnote to mean that all entities with a colorable claim to being a "state agency"—which probably includes occupational licensing boards—are automatically exempt from the supervision requirement.<sup>184</sup> Rather, most lower courts analyze the function, composition, and accountability of the entity claiming immunity when considering its status under the *Hallie* footnote.<sup>185</sup> The circuits, too, are split on this question of how state occupational licensing boards fare under this analysis.<sup>186</sup>

Some courts have concluded that occupational boards are among the "state agencies" to which the *Hallie* Court was referring, and thus exempted them from *Midcal*'s supervision prong. For example, in *Earles v. State Board of Certified Public Accountants of Louisiana*, the Fifth Circuit declined to apply *Midcal*'s supervision prong to a state board and thus rejected Sherman Act claims against it.<sup>187</sup> The opinion reasoned that Louisiana's Board of Certified Public Accountants "is functionally similar to a municipality" because "the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition."<sup>188</sup> Similarly, in *Hass v. Oregon State Bar*, the Ninth Circuit held that the state bar, as an agent of the Oregon Supreme Court, "is a public body, akin to a municipality for the

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<sup>180</sup> 471 U.S. 34, 47 (1985).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 46 n.10.

<sup>183</sup> Elhauge, *supra* note 168, at 693.

<sup>184</sup> See 1A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 225c, at 160 (3d ed. 2006) (describing state court cases after *Hallie*); C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1063-64 (2000).

<sup>185</sup> See sources cited *supra* note 184.

<sup>186</sup> *Id.*

<sup>187</sup> 139 F.3d 1033, 1041 (5th Cir. 1998).

<sup>188</sup> *Id.*

purposes of the state action exemption.”<sup>189</sup> The court cited the board’s three (of fifteen) nonlawyer members, public meetings, and open records as evidence of the board’s public nature.<sup>190</sup> Finding no danger that the bar (acting as a state licensing board) was “pursuing interests other than those of the state,” the court did not apply the supervision prong.<sup>191</sup>

Not all courts have been as comfortable eliding *Midcal*’s second prong when considering action by a state agency, especially when that agency is an occupational licensing board. But until last year, the only circuit cases that suggested state agencies must pass both prongs did so in dicta, providing relatively weak support for potential antitrust plaintiffs. Even now, the only circuit decision squarely holding that a state agency must satisfy both prongs has some language suggesting that it could have narrow application.

Before last year’s Fourth Circuit decision, precedent supporting the supervision requirement for licensing boards was weak because the cases at most implied that supervision would apply. For example, in *FTC v. Monahan*, Judge Breyer (then writing for the First Circuit) rejected a licensing board’s claim that state action immunity automatically allowed it to circumvent a federal subpoena in an antitrust case.<sup>192</sup> The court explained that whether the state supervision condition applies “depends upon how the Board functions in practice,” which in turn depends on the information requested in the subpoena.<sup>193</sup> The opinion thus ordered the board to comply with the subpoena, but made no holding on the merits of the board’s claim that its public nature meant it need not show state supervision to enjoy *Parker* immunity.<sup>194</sup> Similarly, the Ninth Circuit, in an opinion that does not cite its somewhat contrary opinion in *Hass*, has observed that a board “may not qualify as a state agency” because its “private members have their own agenda which may or may not be responsive to state labor policy.”<sup>195</sup> As in *Monahan*, the court did not issue a merits opinion after the remand.

Without an opinion squarely holding a licensing board to antitrust scrutiny, case law such as *Hass* and *Earles* has caused scholars to assume away the possibility of an antitrust suit against a licensing board and to deter litigants

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<sup>189</sup> 883 F.2d 1453, 1460 (9th Cir. 1989).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1459.

<sup>192</sup> 832 F.2d 688 (1st Cir. 1987).

<sup>193</sup> *Id.* at 690.

<sup>194</sup> *Id.* (“[W]e cannot now say, without knowing more facts, whether or not this additional ‘state supervision’ condition will apply.”).

<sup>195</sup> *Wash. State Elec. Contractors Ass’n, Inc. v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (emphasis added).

from pursuing such suits.<sup>196</sup> Even if courts acknowledged that the doctrinal question of *Parker* immunity for occupational boards was technically open,<sup>197</sup> scholars and litigants seem to assume that, as a practical matter, the courtroom door was closed.

Last year, however, the Fourth Circuit took these holdings out of the hypothetical realm and squarely applied *Midcal*'s second prong to a licensing board in *North Carolina State Board of Dental Examiners v. FTC*.<sup>198</sup> The decision thus created a circuit split with the Ninth and Fifth Circuits—a split that the Supreme Court recently decided to review.<sup>199</sup> As we noted earlier, the breadth of the Fourth Circuit holding is unclear.<sup>200</sup> According to the concurrence in the Fourth Circuit, the holding is very narrow; it leaves many boards—as presently comprised—immune from suit. Specifically, the Fourth Circuit upheld an FTC decision that struck down North Carolina's dentistry board's claim for immunity based on the board's failure to show adequate supervision.<sup>201</sup> In a lengthy opinion, the Commission explained that whether an entity must satisfy *Midcal*'s supervision prong depends not on its formal label as a "state agency," but rather on the "tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated."<sup>202</sup> The Fourth Circuit agreed, holding that "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership . . . both parts of *Midcal* must be satisfied."<sup>203</sup>

The potential narrowness of the Fourth Circuit holding arises because the panel concluded that a board dominated by practitioners elected by other industry members fits that description.<sup>204</sup> The concurrence contended

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<sup>196</sup> See, e.g., Havighurst, *supra* note 50, at 597 (observing that, despite the FTC's success in a case against the Texas State Board of Accountancy, "[t]here were few follow-up cases of this kind").

<sup>197</sup> Some scholars have recognized this doctrinal uncertainty. See, e.g., Bobrow, *supra* note 50, at 1489; Bona, *supra* note 50, at 42.

<sup>198</sup> 717 F.3d 359 (4th Cir. 2013).

<sup>199</sup> *N.C. Bd. of Dental Exam'rs v. FTC*, No. 13-534, 82 U.S.L.W. 3260 (2013), *granting cert. to N.C. State Bd. of Dental Examiners*, 717 F.3d 359.

<sup>200</sup> See *supra* note 38.

<sup>201</sup> *Id.* at 375 ("[T]he Board's status as a group of professionals does not condone its anticompetitive practices.").

<sup>202</sup> *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 619 (2011). In this respect, the opinion echoes the FTC's State Action Task Force Report, which advocated supervision for organizations where members essentially make rules for their own industries. STATE ACTION TASK FORCE, *supra* note 84, at 55. The idea follows from Areeda and Hovenkamp's argument that "bodies engaged in self-regulation of their members' commercial activities need active supervision by a more public body to satisfy the *Midcal* requirements." AREEDA & HOVENKAMP, *supra* note 184, ¶ 227, at 208.

<sup>203</sup> *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369 (italics added).

<sup>204</sup> *Id.* at 370.

that practitioner-dominance is not alone sufficient to show that a board is a “private actor” in need of state supervision under the rule of the case. The case’s holding, according to the concurrence, “turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market.”<sup>205</sup> Under the concurrence’s reading, boards comprised of private competitors appointed by a governor (ubiquitous among licensing boards<sup>206</sup>) would not be subject to *Midcal*’s supervision prong and therefore would almost always enjoy *Parker* immunity.

We argue that the concurrence’s interpretation—which results in a broad state action immunity—has a weak foundation under Supreme Court precedent or sound public policy, even if several circuit courts might agree. A presumption of such a broad state action immunity has, in many circuits, relegated plaintiffs to ill-suited constitutional challenges to boards’ anti-competitive actions.

## 2. The Common Route to Challenging State Licensing Restraints: Due Process and Equal Protection

With powerful antitrust immunities in place, the only viable avenue for consumers or would-be professionals seeking to challenge the actions of state licensing boards is to make a constitutional claim.<sup>207</sup> Like all state regulation, professional licensing restrictions must not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Due process prevents a state from denying someone his liberty interest in professional work if doing so has no rational relation to a legitimate state interest.<sup>208</sup> Similarly, equal protection requires that states distinguish licensed professionals from those excluded from practice on some rational basis related to a legitimate state goal.<sup>209</sup> The two analyses typically conflate into one question: Did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest?<sup>210</sup>

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<sup>205</sup> *Id.* at 376 (Keenan, J., concurring).

<sup>206</sup> Almost all the licensing boards we surveyed are appointed by the governor. *See* Appendix.

<sup>207</sup> *See* Katsuyama, *supra* note 168, at 567-69 (“The two principle [sic] means through which licensing regulations have been challenged are the Fourteenth Amendment’s Due Process Clause and the Sherman Antitrust Act.”).

<sup>208</sup> *See generally* Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigiles v. Giles*, 88 MINN. L. REV. 668, 671-74 (2004) (explaining economic regulation and modern rational basis jurisprudence).

<sup>209</sup> *See id.* at 674-78 (noting the parallels between economic substantive due process and equal protection jurisprudence).

<sup>210</sup> Katsuyama, *supra* note 168, at 567-69.

That burden is easy to meet, as illustrated by the leading Supreme Court case on the constitutionality of professional licensing schemes. In *Williamson v. Lee Optical*, the Supreme Court upheld a state statute preventing opticians from fitting patients' existing lenses in new frames without a prescription from an ophthalmologist or optometrist.<sup>211</sup> The *Williamson* plaintiffs sued on the theory that the scheme was designed to artificially increase demand for optometry services and therefore violated the Due Process and Equal Protection Clauses.<sup>212</sup> The Court implicitly recognized a liberty right under the Due Process Clause to pursue one's chosen occupation.<sup>213</sup> But since that right is not sufficiently "fundamental" to give rise to strict scrutiny<sup>214</sup> and because opticians are not a protected class under the Equal Protection Clause, both claims were subject only to rationality review.<sup>215</sup> The Court rejected the plaintiffs' challenge, making clear that any possible justification for the restriction, however thin, was enough.<sup>216</sup> Other cases have further held that the proffered justification need not have actually motivated the legislature to survive rationality review; it may be post-hoc and prepared only for litigation.<sup>217</sup>

The Supreme Court has only once found an occupational licensing restriction to fail rationality review, in *Schwartz v. Board of Bar Examiners of New Mexico*,<sup>218</sup> and then only because an otherwise valid licensing requirement was unlawfully applied to an individual. Like most states, New

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<sup>211</sup> 348 U.S. 483, 486 (1955). Although the case considered state legislative activity, subsequent cases have clarified that the case's analysis is applicable to administrative rules promulgated by state licensing boards. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (suggesting that "merely a citation to *Williamson* would have sufficed to dispose of" a case involving a statute).

<sup>212</sup> *Williamson*, 348 U.S. at 484.

<sup>213</sup> Although the *Williamson* Court did not make this explicit, subsequent cases have articulated this finding. See, e.g., *Meadows v. Odom*, 360 F. Supp. 2d 811, 813 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006) ("The right to pursue the 'common occupations of life' is a protected liberty interest, subject to reasonable limitations." (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 941 (5th Cir. 1995))).

<sup>214</sup> See *Craigsmiles v. Giles*, 312 F.3d 220, 223-24 (6th Cir. 2002) ("Although the licensing requirement has disrupted the plaintiffs' businesses, the regulations do not affect any right now considered fundamental and thus requiring more significant justification.").

<sup>215</sup> *Williamson*, 348 U.S. at 487-88.

<sup>216</sup> *Id.* It found enough rationality in the fact that "in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition." *Id.* at 487. Thus the Court upheld the statute even though it conceded that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases." *Id.*

<sup>217</sup> See, e.g., Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 905-07 (2005) (explaining that actual reasons are irrelevant because legislatures need not articulate reasons for statutes).

<sup>218</sup> 353 U.S. 232 (1957).

Mexico requires attorneys to exhibit good moral character in order to sit for the bar exam. In *Schware*, the Court found a rational basis for such a requirement on its face, but it held that the New Mexico Supreme Court did not have a rational justification for denying a former communist permission to sit for the exam.<sup>219</sup> Because of its politically charged subject matter, *Schware* has largely been limited to its facts. In any case, it expressly approved of a state's ability to require its bar applicants to possess a quality as subjective as "good moral character."<sup>220</sup>

In applying *Schware* to the activity of state licensing boards, lower courts have found even extremely thin justifications for anticompetitive licensing restrictions to suffice for rationality review. In *Meadows v. Odom*, a Louisiana district court accepted the state board's contention that licensing florists helped promote health and safety by decreasing the risk of pricks by wires in haphazardly arranged bouquets.<sup>221</sup> Similarly, a California district court upheld the California Structural Pest Control Board's requirement that exterminators of rats, mice, and pigeons—but not those of skunks and squirrels—obtain a state license.<sup>222</sup>

One circuit has even held that insulating professionals from competition is *itself* a legitimate state interest, making matters even more difficult for plaintiffs alleging harm to competition. The Tenth Circuit in *Powers v. Harris* distinguished *intrastate* protectionism, which it considered constitutionally permissible, from *interstate* protectionism, which it acknowledged was illegitimate under the Dormant Commerce Clause.<sup>223</sup>

Contrary holdings are rare. The Sixth Circuit gave the campaign to invalidate anticompetitive state licensing on constitutional grounds<sup>224</sup> its

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<sup>219</sup> *Id.* at 238.

<sup>220</sup> *Id.* at 239.

<sup>221</sup> 360 F. Supp. 2d 811, 823-24 (M.D. La. 2005), *vacated*, 198 F. App'x 348 (5th Cir. 2006). The court quoted the testimony of a retail florist, testifying as an expert, to support the assertion that licensing florists reflected the state's "concern for the safety and protection of the general public." *Id.* at 824. The florist testified, "I believe that the retail florist does protect people from injury . . . . We're very diligent about not having an exposed pick, not having a broken wire, . . . and I think that because of this training, that prevents the public from having any injury." *Id.*

<sup>222</sup> *Merrifield v. Lockyer*, 388 F. Supp. 2d 1051, 1058-61 (N.D. Cal. 2005), *aff'd in part, rev'd in part*, 547 F.3d 978 (9th Cir. 2008). It was enough to pass rationality review that the covered pests were more commonly found inside structures than the noncovered pests, suggesting that they were a more natural target for regulation. *Id.* at 1058. Although the holding was reversed on appeal, the case illustrates that some courts find even very weak justifications colorable.

<sup>223</sup> 379 F.3d 1208, 1219 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005).

<sup>224</sup> Institute for Justice, a public interest law firm, is at the forefront of this movement, and many of the cases cited in this section were argued by their attorneys. See *IJ Cases*, INST. FOR JUSTICE, <http://www.ij.org/cases> (last visited Mar. 22, 2014).

most significant victory in *Craigmiles v. Giles*.<sup>225</sup> Using reasoning that was explicitly rejected in *Powers*, the *Craigmiles* court invalidated Tennessee's restriction on unlicensed casket sales.<sup>226</sup> The court was unusually skeptical about the justifications advanced by the state board, which argued that shoddy caskets presented a public health risk.<sup>227</sup> The court found that only one justification did not reek with "the force of a five-week-old, unrefrigerated fish"<sup>228</sup>: the scheme would allow funeral directors to collect monopolistic profits in selling coffins.<sup>229</sup> Unlike the *Powers* court, the Sixth Circuit deemed such economic protectionism "illegitimate" and invalidated the restrictions because they failed even "the slight review required by rational basis review."<sup>230</sup>

*Powers'* condemnation of *interstate* protectionism suggests that the Dormant Commerce Clause may be an alternative means of attacking the constitutionality of occupational licensing restrictions.<sup>231</sup> Yet cases brought on this theory have failed. Most states do not recognize occupational licenses from other states, and plaintiffs have argued that such "nonreciprocity" violates the dormant commerce clause by discriminating against out-of-state commerce in favor of in-state interests. But courts have rejected this claim, explaining that states have a legitimate interest in applying their own particular requirements to professionals.<sup>232</sup> "Nonreciprocity" licensing schemes pass rationality review as long as they apply the same licensing requirements to in-state and out-of-state applicants.

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<sup>225</sup> 312 F.3d 220 (6th Cir. 2002).

<sup>226</sup> *Id.* at 229.

<sup>227</sup> *Id.* at 225-26.

<sup>228</sup> *Id.* at 225 (citation omitted).

<sup>229</sup> *Id.* at 228. The court noted that the restriction allowed funeral homes to "mark up the price of caskets 250 to 600 percent." *Id.* at 224.

<sup>230</sup> *Id.* at 228-29.

<sup>231</sup> See Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 646 (2006) ("[O]ne can imagine egregious situations in which the impact of state regulation falls almost entirely on out-of-state interests, but then it seems the dormant Commerce Clause would be sufficient to handle the problem.").

<sup>232</sup> See, e.g., *Locke v. Shore*, 634 F.3d 1185, 1197 (11th Cir. 2011) (finding Florida's interior design license requirement constitutional); *Kirkpatrick v. Shaw*, 70 F.3d 100, 104 (11th Cir. 1995) (finding Florida Bar rules constitutional); *Scariano v. Justices of the Supreme Court of the State of Ind.*, 38 F.3d 920, 928 (7th Cir. 1994) (finding Indiana's waiver of bar exam requirements for select out-of-state applicants constitutional).

### III. THE NORMATIVE CASE: WHY SHERMAN ACT LIABILITY FOR STATE LICENSING BOARDS IS A GOOD IDEA

State action immunity for occupational licensing boards is an anachronism with an ever-increasing price tag as more professionals and more services come under board authority. Constitutional suits have done little to solve the problem. This Part makes the normative case for lifting antitrust immunity for state licensing boards. It begins by illustrating the close fit between the harms that the Sherman Act sought to combat and the economic harm from heavy-handed licensing regulation. We argue that it is antitrust law, not constitutional law, that provides the most logical and effective mechanism to evaluate the costs and benefits of occupational licensure.

We then contend that the principal argument against broadening Sherman Act liability—that it disrupts the balance of power between the states and the federal government—is especially unpersuasive in the licensing context. As the scholarly debate flowing from *Midcal* reveals, concerns for federalism are at their peak when federal laws displace state regulations enacted by a locally accountable government with constituent participation. This does not describe restrictions created by practitioner-dominated licensing boards.

#### A. *Antitrust Liability for Professional Licensing: An Economic Standard for Economic Harm*

The Sherman Act—famously called “the Magna Carta of free enterprise”<sup>233</sup>—protects competition as a way to maximize consumer welfare. According to courts and economists alike, competition is harmed when competitors restrict entry or adhere to agreements that suppress incentives to compete. When these kinds of restrictions are naked and horizontal, liability attaches per se, but even when they are not, competitors must prove that they provide a net benefit to consumers in order to pass muster under the rule of reason.<sup>234</sup> At bottom, both the per se rule and the rule of reason ask a single question: Is competition (and therefore are consumers) harmed or helped by this activity? Because this test, unlike rationality review under the Constitution, best safeguards consumer welfare, it should be used to evaluate occupational licensing restrictions.

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<sup>233</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>234</sup> *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”).



1. Sherman Act Policy and the Competitive Harm of Licensing:  
A Close Fit

Without the veneer of “professional licensing,” some board restrictions epitomize the evil at which modern antitrust policy is aimed. Like all agreements between competitors, licensing schemes can be used for competitive good or competitive evil. The normative question in both traditional cartel cases and licensing contexts should be the same: Does the combination, on net, improve consumer welfare?<sup>235</sup> To ensure that this important question is asked and answered in the licensing context, antitrust law and its tools for balancing pro- and anticompetitive effects should be brought to bear on licensing schemes.

This close fit between the Sherman Act’s intended target and the economic harm of excessive licensing can be seen in the functional equivalence of the restrictions promulgated by occupational boards and the business practices held unlawful under § 1. To cut hair legally in Tennessee, a candidate must pass a test—designed by her would-be competitors—proving she can file and polish nails.<sup>236</sup> But when a gas burner manufacturer was denied approval by a private standard-setting association that used a test influenced by his competitors and “not based on objective standards,” the Supreme Court found Sherman Act liability appropriate.<sup>237</sup> Similarly, the Ohio Rules of Professional Conduct prohibit attorneys from advertising their prices using words such as “cut rate,” “discount,” or “lowest.”<sup>238</sup> But when similar restrictions on price advertising are imposed by private associations of competitors, rather than as a licensing requirement, they are per se illegal.<sup>239</sup> Additionally, all lawyers must prove their “good moral standing” to join a state bar.<sup>240</sup> But when a multiple listing service (a private

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<sup>235</sup> Cf. Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday’s Rationality Review Isn’t Enough*, 24 N. ILL. U. L. REV. 457, 484-85 (2003-2004) (“If the government must protect consumers from the ill effects of monopolies, then monopolistic practices by government licensing agencies should also be prohibited. The potential victims are the same (consumers); the potential injury is the same (unreasonable prices); and the potential wrongdoers are the same (monopolistic producers).”).

<sup>236</sup> See TENN. CODE ANN. §§ 62-4-102; 62-4-110; 62-4-111 (West 2009) (requiring applicants for a cosmetologist’s license to prove that they have passed a course of instruction in practice and theory at a school of cosmetology).

<sup>237</sup> *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658, 660 (1961).

<sup>238</sup> OHIO RULES OF PROF’L CONDUCT R. 7.1 cmt. 4.

<sup>239</sup> See AREEDA & HOVENKAMP, *supra* note 184, ¶225c, at 160 (discussing such cases).

<sup>240</sup> For more information on bar qualifications, see NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* (2014), available at [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf).

entity not created by the state) comprised of competing real estate agents tried to impose a “favorable business reputation” requirement on its members, a court found the requirement to violate the rule of reason because the standard was vague and subjective.<sup>241</sup> The requirement failed Sherman Act scrutiny because it gave the listing service the power to exclude competitors in arbitrary and anticompetitive ways.<sup>242</sup>

Sometimes the match between a licensing restriction and an unlawful private restriction on trade is more analogical than literal, but the anticompetitive risk is the same. For example, nonrecognition of out-of-state licenses subdivides the national market for services and insulates professionals in one state from competitors in another. Market allocation, which has a comparable economic effect, is per se illegal under § 1 of the Sherman Act when agreed to by private competitors. Similarly, when a licensing board dominated by practitioners tightly controls the standards of professional practice, it acts as a standard-setting association passing judgment on its competitor’s products. In both contexts, there is potential for consumer benefit and opportunistic self-dealing, but only private standard-setting associations are subjected to antitrust scrutiny.<sup>243</sup>

Thus, licensing schemes can be similar to cartel agreements in substance, which alone may justify antitrust liability. But making matters even worse for consumers, licensing schemes come in a particularly durable form. Licensing boards, by their very nature, face few of the cartel problems that naturally erode price and output agreements between competitors. By centralizing decisionmaking in a board and endowing it with rulemaking authority through majority voting, professional competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—on professionals who break the rules.<sup>244</sup> Finally, most cartels must fend off new market entrants from outside the cartel that hope to steal a portion of its monopoly rents. For licensed professionals, licensing deters entry and ensures that all professionals (at least those practicing legally) are held to its restrictions.

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<sup>241</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1376 (5th Cir. 1980).

<sup>242</sup> *Id.* at 1385-86.

<sup>243</sup> 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2230, at 430 (3d ed. 2012); *cf.* *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493-94 (9th Cir. 1952) (finding that the jury could reasonably infer that the defendant corporations were maintaining noncompetitive prices in order to sell to both dealers and the public), *cert. denied*, 344 U.S. 892 (1952).

<sup>244</sup> Ninety-five percent of Florida licensing boards and seventy-six percent of Tennessee boards are backed up by criminal sanctions. *See* Appendix.

We highlight the similarities between cartel activity and licensing restrictions to suggest that licensing is a natural target for regulation under the Sherman Act. But just because both kinds of restrictions can be held to antitrust scrutiny does not mean that the outcome of that analysis will (or should) be the same. As we explain in detail in Part IV, *per se* condemnation of most board activity is inappropriate. And, under our proposed modification to the rule of reason, some restrictions—restrictions that would be condemned if used by a private cartel—will be approved. The point here is that if excessive licensing threatens competition, then it should be held to a standard designed to address competitive harm. Modern antitrust law provides just that standard.

## 2. Constitutional Suits and Their Limited Ability to Protect Consumers

Constitutional suits alone cannot curtail the anticompetitive effects of professional licensing for two reasons. First, and perhaps most important, they are almost impossible to win.<sup>245</sup> Second, successful challenges vindicate an individual's right to work, not a consumer's right to low prices driven down by robust competition.<sup>246</sup> It is a happy coincidence that these interests are often tethered. But because the constitutional question is framed as a struggle between the individual and the state, the standard—rational basis—requires no direct inquiry into competitive effects. Therefore, it is antitrust law, not constitutional law, that can directly address the economic evils of licensing by requiring restrictions to be economically reasonable. And it is the rule of reason, not rationality review, that can balance pro- and anti-competitive effects of a restriction and ensure that only the efficient survive.

Suits challenging state licensing restrictions on constitutional grounds are rarely successful because plaintiffs must overcome powerful presumptions in favor of the state. In the professional licensing context, “the demands of rational basis review are not impossible to overcome, but they are extraordinarily high.”<sup>247</sup> A law for which “there is any conceivable state of facts that could provide a rational basis” will survive constitutional challenge;<sup>248</sup> even the flimsiest justification will do. The legitimizing

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<sup>245</sup> See *supra* subsection II.B.2.

<sup>246</sup> See, e.g., McCormack, *supra* note 92, at 457 (asserting that the Supreme Court has created a right to livelihood and suggesting that it should be used as the basis for due process challenges to regulation).

<sup>247</sup> Sanders, *supra* note 208, at 692.

<sup>248</sup> FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

rationale may be post hoc, unsupported by facts or evidence,<sup>249</sup> or even supplied by the judge himself<sup>250</sup> if the state fails to articulate a sufficient rational basis in its brief. As one judge puts it, rational basis scrutiny “invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute.”<sup>251</sup> With so many ways to validate a statute, plaintiffs are forced “to prove a negative—a nearly impossible task.”<sup>252</sup>

When constitutional suits are successful, the right vindicated is that of the individual against the government, not the right of the consumer against a self-dealing industry. Sometimes these interests are aligned; robust protection for an individual’s right to work means more competitors in the profession, which in turn could mean lower prices for consumers. But scholars have framed the campaign to invoke constitutional rights against heavy-handed professional regulation as a revival of the right to livelihood,<sup>253</sup> not as a consumer-welfare movement. Thus, courts hearing constitutional challenges to licensing schemes are confronted with arguments about what kinds of economic activity a state may regulate in the first place, not arguments about whether the benefits of licensing outweigh its costs. When the dispute is framed as a question about when states can legitimately use their police power for economic regulation, courts can invoke the specter of *Lochner*<sup>254</sup> to justify a hands-off approach.

Nowhere is it more apparent that constitutional law and antitrust law serve different purposes than in *Powers v. Harris*. In that case, the Tenth Circuit upheld a licensing restriction as rationally related to Oklahoma’s “legitimate state interest” in insulating incumbent professionals from competition.<sup>255</sup> The court noted that “while baseball may be the national

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<sup>249</sup> Neily, *supra* note 217, at 905-07 (providing examples of regulations upheld merely because a legislature does not have to articulate any reason or factual basis for adopting it).

<sup>250</sup> Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry’s Protectionist Occupational Licensing Scheme, The Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 153 (2011) (noting that plaintiffs must anticipate not only rationales “stated in the regulation, or . . . stated in the legislative records, but also whatever the judge may think of while on the bench”).

<sup>251</sup> *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

<sup>252</sup> Sandefur, *supra* note 235, at 500 & n.234 (illustrating the difficult challenge that plaintiffs face).

<sup>253</sup> See, e.g., McCormack, *supra* note 92, at 404 (pointing out that the right of livelihood does not fit within the normal construction of constitutional principles because it does not involve “the political relation of the individual to government”).

<sup>254</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (holding that New York could not legitimately exercise its state police power to limit the number of hours that a baker could work each day and week).

<sup>255</sup> *Powers v. Harris*, 379 F.3d 1208, 1222-23 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005).

pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”<sup>256</sup> Although other circuits have held otherwise,<sup>257</sup> the Supreme Court refused to grant certiorari to resolve the circuit split, leaving the Tenth Circuit’s holding as one possible interpretation of “legitimate state interest.” This interpretation eviscerates constitutional law’s ability to safeguard robust competition and its benefits to consumer welfare.

B. *Antitrust Federalism: Its Modern Justifications and Applicability to Sherman Act Liability for Licensing Boards*

The most serious argument against Sherman Act liability for state licensing boards is that it would upset the balance between state and federal power struck in *Parker* and its progeny. As discussed above, the doctrinal question is technically unsettled, even if most courts and commentators take for granted that boards are immune under *Parker*.<sup>258</sup> That doctrinal uncertainty raises a normative question: *Should* boards enjoy state action immunity? In this Section, we argue that they should not.

We reveal the normative foundation of antitrust federalism by surveying the *Midcal* case law and the voluminous scholarship interpreting it. Although the various accounts differ in other ways, they all agree that self-dealing, unaccountable decisionmakers should face antitrust liability. We argue that state licensing boards fall squarely in this category when a majority of members are competitors subject to or benefitting from the boards’ rules. Therefore, all practitioner-dominated boards should be subject to *Midcal*’s supervision requirement, regardless of who selects their members.

1. The *Parker* Debate: Accountability Is Key

Over a dozen Supreme Court cases since *Parker* have wrestled with defining exactly who, and what kind of conduct, enjoys antitrust immunity.<sup>259</sup> Likewise, much ink has been spilled in law reviews over the normative commitments behind the Court’s handwringing. Do we require state supervision because without it, federalism, the underlying justification for

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<sup>256</sup> *Id.* at 1221.

<sup>257</sup> See, e.g., *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (holding that “protecting a discrete interest group from economic competition is not a legitimate government purpose”).

<sup>258</sup> See *supra* subsection II.B.1.c.

<sup>259</sup> For a listing of the cases decided after *Midcal*, see *supra* note 157. The cases decided between *Parker* and *Midcal* include *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); and *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

immunity, is not implicated? Or do we require supervision because we trust governments (but not private entities) to restrict competition only as necessary to serve the public interest? Since *Parker*, both commentators and courts have rejected pure comity justifications for antitrust federalism.

Instead, the law reserves state action immunity for bodies whose structures and processes ensure they act in the public interest. In other words, political accountability is the price a state must pay for antitrust immunity.<sup>260</sup> So held the Court in *FTC v. Ticor Title Insurance Co.*, explaining that “[s]tates must accept political responsibility for actions they intend to undertake” by active supervision.<sup>261</sup> The Court further emphasized state accountability: “Federalism serves to assign political responsibility, not to obscure it.”<sup>262</sup>

The scholarship interpreting *Midcal* echoes this sentiment. Three of the most cited commentators from the debate are William Page, John Shepard Wiley, Jr., and Einer Elhauge. Each wrote within a decade after *Midcal*, and all called for reforms to the state action doctrine that would more effectively sort captured regulation from politically legitimate regulation. Each proposed a different theory and disagreed with the others in significant ways, but all three would deny immunity for licensing boards—at least as they operate presently.

In the year following *Midcal*, Page applauded the clear articulation requirement as protection against industry self-dealing through state agency capture.<sup>263</sup> If a state wanted to enjoy federal antitrust immunity, it had to make a clear statement—through an elected and politically accountable body—expressing a policy in conflict with the Sherman Act.<sup>264</sup> To Page, these legislative statements assured “valid popular consent” for anticompetitive regulations, even if an unelected agency or committee subsequently hashed out the details.<sup>265</sup>

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<sup>260</sup> See Havighurst, *supra* note 50, at 591 (“The active-supervision requirement . . . may also embody a federal expectation that any state that denies consumers the benefits of competition must provide some alternative protection for their interests.”).

<sup>261</sup> 504 U.S. 621, 636 (1992).

<sup>262</sup> *Id.*

<sup>263</sup> See William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1125 (1981) (noting that the clear articulation requirement enables courts and regulated firms to “predict accurately whether their activities are exempt”).

<sup>264</sup> *Id.* at 1122.

<sup>265</sup> *Id.* at 1117.

Five years later, Wiley took an opposing view in criticizing *Midcal*,<sup>266</sup> but like Page, assumed that an essential ingredient of antitrust federalism is public participation.<sup>267</sup> Wiley's proposal allows Sherman Act scrutiny when state restrictions result from producer capture, implying that federal antitrust law should bow to state regulation only when that regulation is at least minimally responsive to the public.<sup>268</sup>

Elhauge disagreed with the framing of the *Midcal* debate, both by the Supreme Court (in post-*Midcal* cases such as *324 Liquor Corporation v. Duffy*<sup>269</sup> and *Fisher v. City of Berkeley*<sup>270</sup>) and by commentators like Page and Wiley, precisely because it obscured the role that politically unaccountable self-dealing played in antitrust federalism.<sup>271</sup> He argued against what he called the "conflict paradigm"—in which state action immunity is perceived as a battle between federal interest in free markets and state interest in protectionism—in favor of his "more straightforward approach" of simply asking whether "under the [state's] statutory scheme, the person controlling the terms of the restraint . . . was financially interested."<sup>272</sup> Thus, Elhauge's vision of antitrust federalism overlaps with Page's and Wiley's where it sees local political legitimacy—to Elhauge, financial disinterest—as a prerequisite to immunity.<sup>273</sup>

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<sup>266</sup> John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715, 729 (1986).

<sup>267</sup> *Id.* at 731-32.

<sup>268</sup> *Id.* at 788-89.

<sup>269</sup> 479 U.S. 335 (1987).

<sup>270</sup> 475 U.S. 260 (1986).

<sup>271</sup> Elhauge, *supra* note 168, at 674-78.

<sup>272</sup> *Id.* at 685.

<sup>273</sup> Many other scholars have argued that separating politically accountable decisionmaking from self-dealing should be the main goal of the state action test. *See, e.g.*, Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291, 1294 (1987) (stating that the underlying rationale of the state action exemption is "respect for the decisions for elected local governments"); Hovenkamp, *supra* note 231, at 633 (arguing that "antitrust need not countenance restraints in which the effective decision makers are the market participants themselves"); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1253 (1997) (concluding that regulations are immune from antitrust scrutiny "provided those regulations were decided by an open, participatory political process"); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 249-50 (1987) (highlighting the importance of opportunities for public participation); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 332 (1994) ("Arguments about state action and petitioning immunity ultimately converge on substantive ideas of democracy and democratic values."); Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 561 (2005) ("State-action immunity, implied from the Sherman Act, affords immunity for purposes of promoting federalism—valued because of the democratic legitimacy it

When the FTC published its State Action Task Force Report in 2003, it adopted what had become the consensus view: antitrust federalism is defensible only when a state could be held accountable for an anticompetitive restriction.<sup>274</sup> According to the report, state action immunity exists to exempt laws and regulations that are attractive to voters because they restrict competition that harms some market participants but simultaneously benefits the public.<sup>275</sup> Immunity is necessary because nearly all government action changes the competitive environment and creates some market losers. However, the FTC report recognized that meaningful voter support is necessary to justify immunity.<sup>276</sup> Unless the decisions of private actors are properly supervised by political actors subject to election, the support justifying immunity is lacking.

## 2. State Licensing Boards: Self-Interested and Unaccountable Consortiums of Competitors

The scholarly perspectives on *Parker* and *Midcal* suggest that state action immunity is not appropriate where the temptation of self-dealing is especially high and the potential for holding officials accountable especially low. For state licensing boards, both conditions hold, resulting in absurd licensing restrictions. First, those most hurt by excessive professional restrictions—consumers—are particularly ill-represented in the political process of licensure. Second, and most important, occupational licensing is currently left up to members of the profession themselves. When *Parker* is used to protect the efforts of incumbent professionals to restrict entry into their markets, it creates the very situation *Midcal* warned against—it casts a “gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”<sup>277</sup>

Public participation in state board activity is very low because the typical state board is comprised of appointed professionals, not consumers or

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affords, not because state decisions in and of themselves are sacrosanct.”); Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1312 (1988) (criticizing Wiley’s state action test as unjustified because it does not “proffer[] an appealing theory of democratic legitimacy”).

<sup>274</sup> STATE ACTION TASK FORCE, *supra* note 84, at 14 (discussing scholarship and recent Supreme Court case law addressing the active-supervision requirement).

<sup>275</sup> *Id.* at 1.

<sup>276</sup> *Id.* at 54 (“Through the active supervision requirement, the Court . . . ensur[es] that . . . the state’s legislators will not be ‘insulated from the electoral ramifications of their decisions.’”) (quoting *New York v. United States*, 505 U.S. 144, 168-69 (1992)).

<sup>277</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).



other public members.<sup>278</sup> While most states' sunshine laws require publication of minutes and require that board meetings be open to the public, only members typically attend.<sup>279</sup> Individual consumers lack the incentive to participate in the process of licensing regulation; rarely would it be rational for a consumer to take the time and effort to try to change a licensing rule in the hopes of getting a cheaper haircut. Lobbying groups could theoretically fill this void by aggregating consumer interests, but public choice theory illustrates that meaningful consumer participation in the political process is difficult even with this mechanism.<sup>280</sup> The most motivated public participants are the practitioners at the margins of the regulated professions hoping for entry.<sup>281</sup> As discussed above, the incentives of would-be professionals are sometimes aligned with those of consumers—but not always.<sup>282</sup>

Second, as our study of boards in Florida and Tennessee suggests, most state licensing boards are dominated by practitioners in the field.<sup>283</sup> On one hand, practitioner dominance is inevitable. Tailoring restrictions to benefit the public (namely, encouraging competent practice) usually requires experience in the profession. Laypersons are generally unable to make judgments about the quality and risks of professional service; indeed, that is how licensing boards justify their actions. But the need for expertise creates a problem: those who have the most to gain from reduced consumer welfare in the form of higher prices are tasked with protecting consumer welfare in the form of health and safety—the fox guards the henhouse.

The most influential accounts of antitrust immunity would exclude practitioner-dominated boards from *Parker* protection. In his straightforward process-based account of state action, Elhauge recognized the anticompetitive inevitability of self-regulation.<sup>284</sup> His normative vision of antitrust federalism, modest compared to Wiley's and Page's in its call to expose state regulation to antitrust liability, would deny immunity to entities whose

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<sup>278</sup> Nominees are often selected from lists provided by regulated professional groups themselves. Havighurst, *supra* note 50, at 596. Some boards are comprised of members elected directly by members of the profession. *See, e.g.*, N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 626 (2011) (“[T]he six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in North Carolina.”).

<sup>279</sup> *See, e.g.*, FLA. STAT. ANN. § 286.011 (West 2012) (requiring open meetings and publication of minutes); TENN. CODE ANN. §§ 8-44-102, 8-44-104 (West 2012) (same).

<sup>280</sup> *See* Ginevra Bruzzone, *Deregulation of Structurally Competitive Services: Economic Analysis and Competition Advocacy*, in *THE ANTICOMPETITIVE IMPACT OF REGULATION* 5, 21 (Giuliano Amato & Laraine L. Laudati eds., 2001).

<sup>281</sup> *Cf.* Kleiner, *supra* note 2, at 197 (discussing barriers to entry).

<sup>282</sup> *See supra* Section II.A.

<sup>283</sup> *See supra* notes 49-50 and accompanying text and Appendix.

<sup>284</sup> Elhauge, *supra* note 168, at 668 (“[T]he effect and intent of state and local regulation is generally to restrain competition.”).

members stand to profit financially from anticompetitive regulation.<sup>285</sup> This would certainly describe the typical practitioner-dominated licensing board. As Elhauge observes, “[A]ntitrust stands for the . . . limited proposition that those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.”<sup>286</sup>

If state licensing fails Elhauge’s test for immunity, then it must also fail under Wiley’s and Page’s broader definitions of illegitimate capture. Capture is often subtle and debatable. Some would argue that the Federal Reserve Board is captured by Wall Street because so many of its members come from or go to Wall Street banks, or because banks have so much access to the Federal Reserve that Federal Reserve board members begin to think like bankers. Whether the Federal Reserve is captured in these senses depends on where one draws the line between enough and too much regulatory access. In the case of occupational licensing, however, this line-drawing is not a problem. By dint of their membership, boards are literally and explicitly captured: practitioners enjoy a majority—often a supermajority—among the decisionmakers.<sup>287</sup> Licensing boards are born captured.<sup>288</sup>

Cases that exempt state licensing boards from *Midcal*’s supervision prong (such as *Hass* and *Earles*) are wrong because they fail to recognize this basic feature of board decisionmaking. These cases analogize licensing boards to municipalities because boards are “public,” citing open meetings, public-minded mandates, and an affiliation with the state.<sup>289</sup> The cases, however, fail to recognize that these features cannot meaningfully check self-dealing in the way that elections and public visibility check municipal officers from self-dealing at the expense of their constituents. These cases are also inconsistent with *Bates*, where the state bar of Arizona was treated as a private actor requiring state supervision to claim state action immunity for its actions.

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<sup>285</sup> *Id.* at 671.

<sup>286</sup> *Id.* at 672.

<sup>287</sup> Here we have, to use Wiley’s terminology, direct evidence of capture. He suggests that judges should “demand . . . plaintiffs . . . identify producers who profit from the regulation’s competitive restraint and who played a *decisive* political role in its adoption.” Wiley, *supra* note 266, at 769.

<sup>288</sup> In Tennessee and Florida, for example, the legislation creating the boards makes the vast majority of boards majority-dominated by participants in the regulated industry. See Appendix.

<sup>289</sup> See, e.g., *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1041 (5th Cir. 1998) (“[T]he public nature of the Board’s actions means that there is little danger of a cozy arrangement to restrict competition.”).

A more searching, case-by-case approach—such as the one the FTC advocated in *North Carolina Board of Dental Examiners*<sup>290</sup>—would look to the actual accountability of the board to determine when there is “an appreciable risk that the challenged conduct may be the product of parties pursuing their own interests rather than state policy.”<sup>291</sup> The FTC, echoing Elhauge’s argument, would find that such risk is present whenever the entity “consist[s] in whole or in part of market participants,”<sup>292</sup> and certainly where the entity is dominated by market participants. We agree.

Such an entity differs significantly from the municipality in *Hallie*. The *Hallie* Court found that when a municipality regulates, “there is little or no danger that it is involved in a *private* price-fixing arrangement.”<sup>293</sup> Although the Court does not provide reasoning for this conclusion, it is easily supplied. A municipality makes decisions through elected officials and civil servants. These decisionmakers are charged with maximizing the public good<sup>294</sup> and—although only a very antiquated view of government would hold that the officials’ self-interest is irrelevant—their subjugation to the electorate achieves the level of accountability and democratic legitimacy that we require to grant immunity.

The flaw of *Hallie*’s footnote ten is its failure to articulate why state agencies and municipalities are so similar that “there is little or no danger”<sup>295</sup> of self-dealing in both.<sup>296</sup> There is a diversity of state agencies, and it may be reasonable to presume that those not dominated by competitors or captured by the regulated industry do in fact pursue the state’s governmental interest.<sup>297</sup> But, the mere fact that a legislature declares a body to be a state agency as the legislature in *North Carolina Board of Dental Examiners* did, cannot itself eliminate the “real danger that [the board] is acting to further [members’] own interests, rather than the governmental interests of

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<sup>290</sup> 151 F.T.C. 607, 618 (2011).

<sup>291</sup> STATE ACTION TASK FORCE, *supra* note 84, at 15.

<sup>292</sup> *Id.* at 55.

<sup>293</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

<sup>294</sup> See Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL’Y 203, 282 (2000) (explaining that the state action doctrine “posit[s] a social structure in which government actors are supposed to act in the public interest”).

<sup>295</sup> *Hallie*, 471 U.S. at 47.

<sup>296</sup> Bobrow, *supra* note 50, at 1500 (listing key differences between state agencies and municipalities).

<sup>297</sup> As the FTC has noted, “Whatever the case may be with respect to state agencies generally . . . the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants.” N.C. Bd. of Dental Exam’rs, 151 F.T.C. 607, 619 (2011). Clark Havighurst has also advocated for a case-by-case analysis of state agencies. See Havighurst, *supra* note 50, at 598 (“[C]ourts applying the state action doctrine should shape their inquiries to give proper weight to federal antitrust concerns as well as federalism.”).

the State,” which the *Hallie* Court viewed as the reason private actors must be state supervised to escape antitrust review.<sup>298</sup> Who could seriously argue that an unsupervised group of competitors appointed to regulate their own profession can be counted on to neglect their selfish interests in favor of the state’s?<sup>299</sup> That would require blindness to Adam Smith’s observation that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>300</sup>

The Fourth Circuit’s analysis in *North Carolina State Board of Dental Examiners* dilutes the importance of a competitor-dominated board of dentists’s self-interest by conflating that self-interest with the self-interest of the dentists who elect the board.<sup>301</sup> Self-interest does not compound like other interest; the self-interest of the board is enough to require supervision. The notion that governor appointment can meaningfully solve the problem of self-dealing is also unrealistic. Indeed, all influential accounts of antitrust federalism, from Wiley’s focus on capture<sup>302</sup> to Elhauge’s focus on financial self-interest,<sup>303</sup> focus on the identity of the decisionmakers, not their means of appointment. A narrow reading of *North Carolina Board of Dental Examiners*’s holding would allow governors—however well-intentioned they may be in the appointment process—to hand the controls of regulation over to the regulated themselves and walk away without any oversight responsibility.

Sound public policy requires that any consortium of competitors be supervised by disinterested state agents, be subject to antitrust laws, or both. That the consortium of competitors is called a state board and given power by the state to regulate its profession does not make it more trustworthy. The grant simply makes the board more powerful and therefore more dangerous. Supervision by disinterested state agents should be a minimum requirement for a state board to receive antitrust immunity under *Hallie* and *Midcal*, *Hallie*’s footnote notwithstanding. If true independence is impossible, which is arguably the case in the licensing context given that industry expertise is essential to decisionmaking, there is even greater need for active supervision to justify immunity. Common sense tells us that

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<sup>298</sup> *Hallie*, 471 U.S. at 47.

<sup>299</sup> See Havighurst, *supra* note 50, at 596-99 (noting that the composition of state licensing boards qualifies them as “more professional than governmental in character”).

<sup>300</sup> SMITH, *supra* note 100, at 134.

<sup>301</sup> 717 F.3d 359, 366-70 (4th Cir. 2013) (“[W]hen a state agency is operated by market participants who are elected by other market participants, it is a ‘private’ actor.”).

<sup>302</sup> Wiley, *supra* note 266.

<sup>303</sup> Elhauge, *supra* note 168.

competition law cannot abdicate control when a powerful consortium of competitors regulates its own industry, even if the state has granted them power to do so. Thus, the Supreme Court should use the circuit split as an opportunity to embrace the Fourth Circuit's holding in *North Carolina State Board of Dental Examiners*—but then go further by clarifying that all practitioner-dominated boards are subject to both *Midcal* prongs, regardless of the appointment process.

In one sense, such a holding would be modest because it would not call into question vast amounts of state law; many areas of state regulation are not delegated to majority-industry boards, or at least are actively supervised by the state itself. The California Department of Insurance, for example, has an elected politician as its current head—one who never worked in the insurance industry.<sup>304</sup> Likewise, many state agencies are largely comprised of civil servants and have only nominal participation from industry members. But in another sense the change would be significant. Most licensing boards would fail the supervision prong if subjected to it; requiring state supervision for licensing boards that claim state action immunity creates the potential for sweeping changes to regulations affecting over a third of the nation's workforce.

#### IV. THE MECHANICS OF ANTITRUST LIABILITY FOR STATE LICENSING BOARDS

Since our proposal would put thousands of boards under the Sherman Act's microscope, we dedicate the last Part of this Article to describing the logistics of such a regime. Section A outlines how Sherman Act suits against professional boards might proceed. Since boards resemble private professional associations in their composition and incentives and the parties involved parallel those in a traditional § 1 suit, we borrow the mechanics of suits under that provision. This Section also recommends modifying the rule of reason in the licensing context to a standard that allows as procompetitive arguments gains to public safety and quality of service, even when these gains flow directly from limitations on competition. We then address questions related to standing and the single-entity doctrine. Section B predicts how states might react and evaluates the competitive consequences of those reactions.

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<sup>304</sup> *About Us: About the Commissioner*, CAL. DEP'T INS. (Oct. 2, 2013), <http://www.insurance.ca.gov/0500-about-us/0200-commissioner>.

### A. *Imagining a New Regime*

Some rules, such as the traditional rule of reason, should be altered to accommodate arguments unique to licensing. But other doctrines, such as standing, treble damages, and the single-entity defense, translate well into the licensing context.

#### 1. The Standard: Rule of Reason as Applied to Licensing

The basic rule of § 1 is the rule of reason. Under this rule, and since *Standard Oil Co. of New Jersey v. United States*, only unreasonable restraints of trade are illegal.<sup>305</sup> Restraints without acceptable justification (or whose justifications are too implausible) are either held per se illegal or illegal under a quick-look rule of reason.<sup>306</sup> The full-blown rule of reason ferrets out the good and the bad to determine if a restraint is justified.

The full-blown rule of reason is used for “agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>307</sup> The central question under a § 1 rule-of-reason analysis is whether a restraint will tend to substantially limit competition. Justice Brandeis formulated the test as “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”<sup>308</sup> Modern courts frame the question as one of balancing pro- and anticompetitive effects of the restraint.<sup>309</sup>

However, not all benefits are considered “procompetitive” under the rule of reason. In perhaps the strongest condemnation of social-welfare justifications, the Supreme Court in *National Society of Professional Engineers v. United States* rejected a professional society’s rule hindering comparison price-shopping for engineering services.<sup>310</sup> The engineers argued that “awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare.”<sup>311</sup> The Court called the engineers’ attempt to so justify the restraint “nothing less than a

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<sup>305</sup> 221 U.S. 1, 66 (1911) (discussing the rule of reason).

<sup>306</sup> See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (describing the “two complementary categories of antitrust analysis”).

<sup>307</sup> *Id.* at 692.

<sup>308</sup> *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

<sup>309</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (“The plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”).

<sup>310</sup> 435 U.S. 679.

<sup>311</sup> *Id.* at 685.

frontal assault on the basic policy of the Sherman Act.”<sup>312</sup> In particular, public safety benefits that flow directly from a reduction of competition do not escape scrutiny because “the statutory policy precludes inquiry into the question whether competition is good or bad.”<sup>313</sup> Under a conventional rule-of-reason analysis, a permissible agreement must directly enhance competition in some way, such as when a group of copyright holders creates a new and valuable product together.<sup>314</sup> Of course, the most plausible benefits of many (and perhaps most) licensing restraints flow directly from their limitations on competition. Curing the lemons problem or eliminating externalities, therefore, might not be seen as procompetitive under the *Professional Engineers* holding.

The basic policy justifications for licensing boards flow from the belief that free and unfettered competition will lower the quality of service provided to the public.<sup>315</sup> Under *Professional Engineers*, such justifications might not be viewed as procompetitive and therefore might be held illegal. This, we think, would be a step too far.

The argument that boards protect the public from charlatans is not inherently implausible and deserves respect. We therefore advocate a modified rule of reason that would allow licensing boards to cite public safety and quality enhancement justifications even when those alleged benefits flow directly from eliminating or limiting competition. When courts balance the competitive effects of a licensing restriction, they should place service quality and public safety benefits on the procompetitive side of the scale.

Modifying the rule of reason to incorporate public health and safety arguments may not actually be as large of a shift in doctrine as it may appear at first glance. Although courts often purport to find public interest justifications irrelevant to a § 1 analysis, this rejection is neither universal nor complete. Courts have been willing to consider appeals to health and safety, especially in the context of reviewing restrictions imposed by professional associations.

For example, even in *Professional Engineers*, the Court acknowledged that *Goldfarb*, which it had decided just three years earlier, “noted that certain practices by members of a learned profession might survive scrutiny under

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<sup>312</sup> *Id.* at 695.

<sup>313</sup> *Id.*

<sup>314</sup> See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24-25 (1979) (holding that the issuance of blanket licenses to copyrighted musical compositions at negotiated fees does not constitute price fixing).

<sup>315</sup> For a discussion of why licensing boards would likely pass rational basis review, see *supra* subsection II.B.2.

the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context.”<sup>316</sup>

Lower courts have used this mixed message from the Supreme Court to find a place for social welfare justifications in rule-of-reason analysis. For example, in *United States v. Brown University*, the Third Circuit remanded a suit challenging an agreement among elite universities about financial aid packages.<sup>317</sup> The court required the district court to undertake a full-blown rule-of-reason analysis and place “social welfare justifications”—which the lower court had previously rejected—on the procompetitive side of the scale.<sup>318</sup> The court said that proper rule-of-reason analysis would consider the benefits of making higher education available to the “needy” and of having a more diverse student body at the elite schools.<sup>319</sup> The court explained that the financial aid agreement in place among the schools “may in fact merely regulate competition in order to enhance it, while also deriving certain social benefits,” and noted that such an agreement would survive Sherman Act scrutiny.<sup>320</sup>

*Brown University* may occupy the outer boundary of a court’s willingness to entertain social welfare justifications for agreements restricting competition, but even the Supreme Court has softened its hard line against these arguments. In a decision that paralleled that in *Brown University, California Dental Association v. FTC* remanded a challenge against a dental association’s advertising ban that failed the lower court’s quick-look rule of reason analysis.<sup>321</sup> By calling for a less-abbreviated analysis of the restraint, the Court implied that the association’s defenses of the ban—that it promoted quality of care and information by restricting one dimension of competition—were legitimate under the Sherman Act.<sup>322</sup>

*California Dental* and *Brown University* set a foundation for the proper standard for Sherman Act analysis of licensing board restrictions. As discussed in Part II, unregulated markets for professional services can harm social welfare in two ways. Offering consumers a choice between low-quality, low-price services and high-quality, high-cost services is inefficient because consumers choosing the low-quality option will not fully internalize

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<sup>316</sup> *Professional Engineers*, 435 U.S. at 686.

<sup>317</sup> 5 F.3d 658 (3d Cir. 1993).

<sup>318</sup> *Id.* at 678.

<sup>319</sup> *Id.* at 677-78.

<sup>320</sup> *Id.* at 677.

<sup>321</sup> 526 U.S. 756 (1999).

<sup>322</sup> *Id.* at 779-81 (suggesting that there is “generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment”).



its costs (the externalities problem). Furthermore, even if a full range of quality were socially desirable, information asymmetries would cause the market for high-quality services to unravel (the lemons problem). If licensing works to remedy these market failures, then the average or minimum quality of service will be higher than under an unlicensed regime.

To solve these problems, courts should apply a modified rule-of-reason analysis in licensing cases as follows. First, courts should accept arguments that a restriction improves consumer access to information or raises quality of service as procompetitive justifications. Measuring quality of service is difficult, especially when it is impossible to observe a market unfettered by licensing. But the difficulty of quantifying competitive benefits is nothing new in rule-of-reason cases. Professional boards should be induced to bring their best evidence of procompetitive effects to the suit. Second, claims of quality improvement should be specific and tied to a theory of market failure that justifies government interference.<sup>323</sup> In other words, for a licensing restriction to pass muster under the rule of reason, it should closely fit the problem it is designed to solve. Finally, courts should consider whether other regulations could restore information symmetry or raise quality of service with less cost to competition. Put another way, courts should consider whether there are less restrictive alternatives to the challenged licensing scheme.

This three-prong system for analyzing a licensing restriction—identifying a legitimate reason for the licensing restriction, analyzing the fit between the restriction and the problem, and inquiring into less restrictive alternatives—resembles the constitutional standard applied to equal protection or due process claims. But it can also be understood as a framework for the balancing that the traditional rule of reason demands. Under the first two prongs, a court places the benefits of restriction on the procompetitive side of the scale. Under the last prong, the court places the restriction's competitive burden on the anticompetitive side of the scale, asking whether there is an alternative less destructive to competition that achieves the same benefits.

Revisiting the specific examples discussed above will illustrate the kinds of arguments that will be persuasive to a court analyzing a state board's restriction under our modified rule of reason. Louisiana's rule forbidding casket sales by anyone other than a licensed funeral director would fail the

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<sup>323</sup> This recommendation is similar to one of Wiley's requirements for lifting state action immunity where the regulation does not "respond[] directly to a substantial market efficiency." Wiley, *supra* note 266, at 743.

first prong of the test. There is no empirical evidence that caskets are of poor quality or that consumers cannot determine the value of a casket in states without such a restriction. Further, the state would have difficulty raising even a theoretical argument that inferior-quality caskets present a public health and safety issue because it does not even require burial by casket at all. Nor could it easily argue that the free market for caskets would suffer from information asymmetries given that one can comparison shop for caskets on websites like Amazon.com, which offers consumer reviews, detailed specifications, and photographs.<sup>324</sup> Therefore, the restriction fails the first prong because it fails to address any significant market failure—in practice or theory.

Restrictions on nurse practitioners would also fail the first prong, but not because there are no theoretical failures in an unregulated market for medicine. In theory, low-quality healthcare creates externalities when the cost of fixing (or living with) bad outcomes falls on other individuals or the government. This is almost certainly the case in our system, in which the effects of poor care are felt everywhere, from emergency rooms and inner-city clinics to schools and the workplace. But despite the strong theoretical argument that any given regulation on a nurse's right to practice improves quality and therefore addresses a market failure, there is no empirical evidence that supervised nurses have better outcomes than unsupervised ones.<sup>325</sup> Thus, licensing restrictions that require nurse practitioners to be supervised would fail the first prong for lack of data suggesting that such restrictions improve the quality of care.

State cosmetology boards' attempts to bring African hair braiding under their jurisdiction, on the other hand, would fail the second prong of our modified rule-of-reason analysis. Whatever health and safety issues arise from the unlicensed practice of braiding, they are not addressed by requiring practitioners to attend up to 1800 hours of schooling on the use of chemicals, dyes, and other beauty techniques that do not relate to African hair braiding. There is simply a poor fit between the restriction and the problem that it purportedly addresses. Similarly, a state restriction requiring a cosmetology license for brow threaders would fail the second prong, as would requiring a degree in veterinary medicine for horse teeth floaters when veterinary schools teach nothing about the practice.<sup>326</sup>

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<sup>324</sup> Amazon.com lawfully sells caskets online to customers living in states without regulations similar to Louisiana's.

<sup>325</sup> See CHRISTIAN & DOWER, *supra* note 21, at 6.

<sup>326</sup> See *Challenging Barriers to Economic Opportunity*, *supra* note 58.

If a restriction survives the first two prongs, the court should balance the benefit of the restriction against its cost to competition. For example, some regulation of horse teeth floating may be justifiable since horse owners may not be able to evaluate the quality of a floater's service. In that case, the third prong would be the crucial factor: making teeth floaters attend veterinary school is an outsized requirement. Rather, a state might be able to justify a less restrictive licensing requirement that is specific to horse teeth floaters and mandates a short educational unit followed by a test narrowly tailored to assessing competency in teeth floating.

In balancing the anticompetitive effects of the restriction, courts should also consider other governmental regulations that are less restrictive than licensing. For example, labor economists hail certification as a superior option to licensing where a free market may suffer from information asymmetry.<sup>327</sup> Certification is similar to licensing in that the state sets educational or testing criteria for professionals; passing these hurdles signals to consumers the individual's minimum quality and competency. But unlike under licensing schemes, uncertified practitioners may still practice as long as they do not claim a "certified" title. Certification thus solves the information asymmetry problem because consumers seeking higher-quality services can pay more for certified practitioners. But it does so at a lower cost to competition, since certification is not an absolute barrier to entry for low-cost practitioners. Accordingly, Louisiana's restriction on unlicensed flower arranging would likely fail the third prong of the test. Since market failure in the flower industry is at most information asymmetry, not externalities, offering state certification programs to florists could easily address the problem.

## 2. The Parties: Standing to Sue and Available Damages

Changing the state action regime for licensing boards raises several logistical questions. Who would sue? What would be the remedy? And would board members pay damages? As a descriptive matter, the answers are relatively easy: lifting state action immunity for state boards means that the parties who sue and are sued would be the same as in a run-of-the-mill § 1 case.<sup>328</sup> Government enforcement agencies such as the DOJ and the FTC,

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<sup>327</sup> KLEINER, *supra* note 3, at 152-57 (identifying certification and registration as policy alternatives); Michael Pertschuk, *Needs and Licenses* (noting that certification is one alternative that provides information without creating a barrier to entry), in OCCUPATIONAL LICENSURE AND REGULATION, *supra* note 97, at 347.

<sup>328</sup> Of course, under the Eleventh Amendment, federal courts could not entertain suits against the boards as "arms" of the state. But under the holding of *Ex parte Young*, 209 U.S. 123

as well as private individuals capable of proving antitrust injury, could bring suit against the conspirators (here, members of an industry serving on a board) seeking equitable and monetary relief. But this analogy leads to an important normative question: Does this regime create incentives that ensure optimal enforcement of antitrust norms? This subsection argues that, for the most part, it does.

Since anticompetitive licensing restrictions often further local state interests, federal enforcement will be essential to police self-dealing. The DOJ and the FTC will be able to bring suits based on the claim that a given licensing regulation violates the Sherman Act. Without the bar of state action immunity, the agencies will also be able to seek equitable relief under § 4 of the Sherman Act<sup>329</sup> and § 15 of the Clayton Act<sup>330</sup> to invalidate and prevent a board from implementing an anticompetitive regulation. Federal agencies will bring the knowledge, expertise, and resources for empirical investigations necessary to identify anticompetitive targets.<sup>331</sup>

That said, licensing boards and private cartels should be treated differently under criminal law despite their many similarities. Just as the potential benefits of licensing make per se condemnation inappropriate, they should also preclude criminal prosecution. State licensing board activity, while full of anticompetitive potential, is hardly among the hard-core violations that serve as the primary target for criminal enforcement.

Lifting the state action ban on suits against boards will also allow private individuals capable of showing antitrust injury to bring suit. These plaintiffs, like other antitrust plaintiffs, can be divided into two categories: consumers and competitors. Although consumers of a professional service may not have enough financial incentive to bring a suit individually, they could use class action suits to aggregate damages to a litigable amount. And § 15 of the Clayton Act, of course, strengthens the incentive to sue by providing plaintiffs with treble damages.<sup>332</sup>

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(1908), individual board members could be sued in federal court in their official capacities. *See Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1039-41 (5th Cir. 1998) (noting that the *Ex parte Young* rule has been viewed as allowing a federal court to entertain suits against individual officials).

<sup>329</sup> 15 U.S.C. § 3 (2012).

<sup>330</sup> 15 U.S.C. § 15 (2012).

<sup>331</sup> In fact, even without the added incentive created by the power to bring suits, the FTC has invested in numerous studies of the economic impact of professional regulation. *See, e.g.*, COX & FOSTER, *supra* note 23, at 31 (summarizing the percentage increase in prices due to business-practice restrictions); LIANG & OGUR, *supra* note 20, at 44-47 (providing empirical results on dental restrictions).

<sup>332</sup> 15 U.S.C. § 15(a) (2012).

Similarly, competitors—most likely would-be professionals—could sue to receive three times the wages they would have earned but for the anti-competitive barrier to entry. These wages may be difficult to prove but not necessarily more difficult to prove than lost earnings caused by cartel activity. Would-be professionals could also use the Sherman Act as a shield rather than a sword; lifting Sherman Act immunity would mean that would-be professionals could defend against a board's enforcement action by invoking the invalidity of the board's regulation.<sup>333</sup>

If lifting state action immunity would allow competitors and consumers to sue for monetary damages, who would pay? In cartel cases, the industry members who conspire must financially compensate their victims. So, too, should be the case in licensing board suits: the industry members on the board would be liable for treble damages to competitors and consumers harmed by their agreement.<sup>334</sup> This is the result under current law when courts deny professional associations state action immunity; *Goldfarb v. Virginia* is an example.<sup>335</sup>

Individual financial liability for board members may seem like an unjust or unworkable regime, but § 1983 imposes similar liability on individual state actors for violations of constitutional rights.<sup>336</sup> States have responded to the prospect of financial ruin for their employees by indemnifying them against § 1983 suits as a term of employment.<sup>337</sup> With the deeper pockets of

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<sup>333</sup> The Supreme Court used state action doctrine to reject such a defense in *Bates v. State Bar of Arizona*, 433 U.S. 350, 359 (1977). In *Bates*, lawyers who advertised their services in contravention of the Bar's rules argued that the rule was invalid under the Sherman Act. *Id.* at 354-56. But the Sherman Act challenge failed on state action grounds because the Arizona rules against lawyer advertising "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (alteration in original) (quoting *Bates*, 433 U.S. at 362).

<sup>334</sup> John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 292 (2003) ("[A]ny hybrid restraint that violates the antitrust laws and fails the tests for immunity leaves private parties exposed to the whole panoply of antitrust remedies.").

<sup>335</sup> The plaintiffs in *Goldfarb*, a class of consumers of legal services, sued the state bar association for Sherman Act violations. The Supreme Court, in holding that the Bar acted in contravention of state policy—and therefore without adequate state delegation—remanded the case to allow the class to hold individual members of the Bar liable for treble damages. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975).

<sup>336</sup> 42 U.S.C. § 1983 (2012) (providing a private right of action for money damages to compensate victims of constitutional violations).

<sup>337</sup> In the case of law enforcement, the state or local government that employs the officer typically promises to indemnify him in the case of a § 1983 suit. *See, e.g.*, Jonathan Day & Jeffrey W. Jacobs, *Opening the Deep Pocket—Sovereign Immunity Under Section 1983*, 31 BAYLOR L. REV. 389, 408 (1979) ("[V]oluntary assumption of employees' liability by governmental entities . . . ha[s] already been adopted in most jurisdictions, at least to the extent of assuming the burden of

the government available, victims have a meaningful opportunity for compensation. Moreover, even though individual employees may not be personally liable, the indemnification structure gives states the incentive to train employees, tightly control conduct, and create disciplinary systems to deter violations.<sup>338</sup> States might choose to adopt a similar indemnification structure for individual board members in case of a treble damages suit under the Sherman Act.

### 3. The Defense: Boards as Single Entities?

Board activity easily fulfills the § 1 requirement of agreement because board members meet face-to-face and explicitly agree on licensing restrictions, often by formal majority vote. Again, these agreements are among competitors; licensing boards often have only nominal representation from nonprofessionals. Boards may argue, however, that their rules and restrictions are not the products of conspiracies because they operate as single entities. Conspiring with others on the board, so the argument would go, is like conspiring with oneself.

This argument is likely to fail. The Supreme Court has held that professional associations, similar to boards in composition and incentives, can be conspiracies under § 1. Recently, the Supreme Court rejected the National Football League's argument that individual teams could not conspire with one another since they had a single economic incentive to maximize profits from licensing team merchandise and ticket sales.<sup>339</sup> The Court held that the teams, absent the agreement, would have had individual profit incentives to compete with one another, so the agreement "deprives the marketplace of independent centers of decisionmaking" in violation of § 1.<sup>340</sup> To the extent that there was a unitary financial goal among the teams, it was to suppress competition among themselves.<sup>341</sup>

Although the Supreme Court has not considered whether a state licensing board is a single entity under § 1, the FTC has rejected this defense to Sherman Act liability on several occasions. In *FTC v. Massachusetts Board of*

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defending civil rights claims."); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 63-64 & n.83 (2005).

<sup>338</sup> *But see generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that governments do not internalize costs in the same way that private firms do).

<sup>339</sup> *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

<sup>340</sup> *Id.* at 2212 (citation omitted).

<sup>341</sup> *Id.* at 2213 ("[I]llegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties.").

*Registration in Optometry*, the FTC explained that the optometry board was not acting as a single entity in passing advertising restrictions: “Each optometrist on the Board is principally engaged in the private practice of optometry in the market that the Board regulates . . . . [I]n the absence of those regulations, the Board optometrists would compete with each other by individually deciding whether to advertise.”<sup>342</sup> Similarly, federal courts and the Supreme Court have held that private professional organizations, in promulgating standards of practice, certification, and licensing, cannot claim to be acting as a single entity under the antitrust laws.<sup>343</sup>

### B. Possible State Responses and Their Likely Effects

Applying Sherman Act pressure to state licensing boards will alter the equilibrium of a complex system of regulation, so a thorough analysis of its benefits must also consider how that system will likely adjust. As this Section illustrates, states wishing to regulate professions without having to answer to an antitrust suit will have several options. Each option will require a departure from the current practice of using practitioner-dominated administrative boards to promulgate rules and regulations—and thus a step toward politically accountable, procompetitive regulation.

#### 1. Actively Supervising Board Activity

If the Court requires occupational boards to show supervision in order to enjoy immunity from antitrust suits, then the most straightforward way for states to insulate boards from antitrust scrutiny is to actively supervise them. Supervision, at least in theory, will complete the link between a board’s anticompetitive restrictions and the accountable, elected body that

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<sup>342</sup> 110 F.T.C. 549, 582 (1988). Likewise, after the NFL case, the FTC held that the single-entity defense was not available to the North Carolina Board of Dental Examiners for the same reason. The FTC explained that since board members “stand to reap economic gains when the Board takes actions to exclude non-dentists from competing to provide certain services,” it could not be said to be acting to further a financial goal independent of those of the individual members. *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 628-29 (2011).

<sup>343</sup> See, e.g., *Daniel v. Am. Bd. of Emergency Med.*, 802 F. Supp. 912, 924-25 (W.D.N.Y. 1992) (holding that a private certification association can be a § 1 conspiracy); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1477 (3d ed. 2006) (“Trade associations are routinely treated as continuing conspiracies or ‘combinations’ of their members, as are bodies promulgating rules or standards for the competitive conduct of their members, such as the National Society of Professional Engineers. The most significant attribute of trade associations dictating that conclusion is that the individual members continue to have business separate from the association itself.” (footnote omitted)).

demanded them.<sup>344</sup> Formal review and approval by the state will afford consumers and would-be professionals a stronger voice against heavy-handed restrictions since they could vote out officials approving unjustifiable regulations.

Although consumer interests will likely always be more diffuse than those of practitioners, forcing states to answer for and stand behind a board's restrictions exposes these decisions to at least some political accountability. As the Court explained in *Ticor*, "For States which do choose to displace the free market with regulation . . . insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control."<sup>345</sup>

## 2. Changing Board Composition

Another way in which a state could protect a licensing board from antitrust scrutiny would be to change its composition. A state could limit a board's exposure to antitrust liability by reducing practitioner representation and filling the rest of the board seats with members representing other interests. Having a diverse membership that includes consumers, civil servants, labor economists, and members from adjoining professions may serve as a prophylactic against liability. Such a board's decisions are more likely to have considered and resolved the concerns of the antitrust laws.

## 3. Moving Licensing to the Interior of State Government

States may, however, find cutting professional participation to token levels or implementing costly mechanisms for supervision unattractive. An alternative would be to directly regulate through sovereign branches of the state itself. Even under the current regime, some professional entry and practice requirements are passed as state statutes, and these acts of sovereign authority are always immune under *Parker*.<sup>346</sup> Such decisions would not be subject to antitrust scrutiny, even under the change proposed in this Article.

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<sup>344</sup> See, e.g., Inman & Rubinfeld, *supra* note 273, at 1257 (concluding that *Midcal's* supervision prong "gives meaning to the first [prong], for without supervision, interested individuals cannot be assured that their initial participation in the political process will be meaningful."). But see Havighurst, *supra* note 50, at 599 (disagreeing with the federal antitrust agencies' apparent belief that "giving greater weight to the active-supervision requirement is the best way to discourage state licensing and regulatory boards from acting in anticompetitive ways").

<sup>345</sup> *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

<sup>346</sup> See *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) ("[U]nder the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State, and ipso



This change, like adding meaningful state supervision over board activity, would facilitate competition by deterring regulation that benefits only practitioners. Elected officials would be made to answer for and stand behind decisions restricting entry and practice. Restrictions would be proposed and debated openly in the legislature, allowing for more participation from the constituents currently absent from professional licensing boardrooms. Requiring that the state place its imprimatur on regulation is at least better than the status quo, in which states too often delegate self-regulation to professionals and walk away.

### CONCLUSION

Licensed occupations have been free to act like cartels for too long without Sherman Act scrutiny. With nearly a third of workers subject to licensing and a continuing upward trend, it is time for a remedy. We do not propose an end to licensing or a return to a Dickensian world of charlatan healers and self-trained dentists. But the risks of unregulated professional practice cannot be used to rationalize unfettered self-regulation by the professionals themselves. The law needs to strike a balance.

That balance is the same one sought in any modern rule of reason case: a workable tradeoff between a restriction's salutary effects on the market and its harm to competition. Immunity from the Sherman Act on state action grounds is not justified under antitrust federalism when those doing the regulation are the competitors themselves, where they are not accountable to the body politic, where they have too often abused the privilege, and where the anticompetitive dangers are so clear. The threat of Sherman Act liability can provide the necessary incentives to occupational regulators trading off competition for public safety and welfare. Without it, self-dealing occupational boards will continue to be cartels by another name.

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facto are exempt from the operation of the antitrust laws . . . . [A] state supreme court, when acting in a legislative capacity, occupies the same position as that of the state legislature." (citation omitted)).

## APPENDIX: FLORIDA

Occupational Board	Statutory Citation	Majority Licensed Professionals	Appointing Body	Rulemaking Authority	Criminal Enforcement
Board of Acupuncture	§ 457.101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Athletic Training	§ 468.70 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Chiropractic Medicine	§ 460.401 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Clinical Laboratory Personnel	§ 483.800 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling	§ 491.002 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Dentistry	§ 466.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Hearing Aid Specialists	§ 484.0401 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Massage Therapy	§ 480.031 <i>et seq.</i>	Yes	Governor	Yes	Yes
Advisory Council of Medical Physicists (under authority of Department of Health)	§ 483.901 <i>et seq.</i>	No	FL Surgeon General	No	Yes
Board of Medicine	§ 458.301 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)

Board of Nursing	§ 464.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Nursing Home Administrators	§ 468.1635 <i>et seq.</i>	No	Governor	Yes	Yes
Board of Occupational Therapy Practice	§ 468.201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Opticianry	§ 484.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Optometry	§ 463.0001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Orthotists and Prosthetists	§ 468.80 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Osteopathic Medicine	§ 459.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Pharmacy	§ 465.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Physical Therapy Practice	§ 486.011 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Podiatric Medicine	§ 461.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Psychology	§ 490.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Respiratory Care	§ 468.35 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Speech- Language Pathology & Audiology	§ 468.1105 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Architecture and Interior Design	§ 481.201 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)

Board of Auctioneers	§ 468.381 <i>et seq.</i>	Yes	Governor	Yes	Yes
Barbers' Board	§ 476.014 <i>et seq.</i>	Yes	Governor	Yes	No
Building Code Administrators and Inspectors Board	§ 468.601 <i>et seq.</i>	Yes	Governor	Yes	Yes
Regulatory Council of Community Association Managers	§ 468.431 <i>et seq.</i>	Yes	Governor	Yes	Yes
Construction Industry Licensing Board	§ 489.101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Cosmetology	§ 477.011 <i>et seq.</i>	Yes	Governor	Yes	No
Electrical Contractors' Licensing Board	§ 489.501 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Employee Leasing Companies	§ 468.520 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Landscape Architecture	§ 481.301 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Pilot Commissioners	§ 310.001 <i>et seq.</i>	No	Governor	Yes	Yes
Board of Professional Geologists	§ 492.101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Veterinary Medicine	§ 474.201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Professional Engineers	§ 471.001 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)

Board of Funeral, Cemetery, and Consumer Services	§ 497.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Professional Surveyors and Mappers	§ 472.001 <i>et seq.</i>	Yes	Commissioner of Agriculture	Yes	Yes
Board of Accountancy	§ 473.301 <i>et seq.</i>	Yes	Governor	Yes	Yes
Real Estate Commission	§ 475.001 <i>et seq.</i>	Yes	Governor	Yes	Yes
<hr/> Total Boards: 41		90%		98%	95%

## APPENDIX: TENNESSEE

Occupational Board	Statutory Citation	Majority Licensed Professionals	Appointing Body	Rulemaking Authority	Criminal Enforcement
Board of Accountancy	§ 62-1-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Examiners for Architectural and Engineering Examiners	§ 62-2-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Barber Examiners	§ 62-3-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Cosmetology	§ 62-4-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Funeral Directors and Embalmers	§ 62-5-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board for Licensing Contractors	§ 62-6-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Real Estate Commission	§ 62-13-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Examiners for Land Surveyors	§ 62-18-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Auctioneer Commission	§ 62-19-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Collection Service Board	§ 62-20-101 <i>et seq.</i>	No	Governor	Yes	Yes
Private Investigation and Polygraph Commission	§ 62-26-301 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)

Board for Licensing Alarm System Contractors	§ 62-32-301 <i>et seq.</i>	Yes	Governor	Yes	Yes
Real Estate Appraiser Commission	§ 62-39-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Motor Vehicle Commission	§ 55-17-103 <i>et seq.</i>	Yes	Governor	Yes	Yes
Soil Scientist Advisory Committee (under authority of Commissioner of Commerce and Insurance)	§ 62-18-201 <i>et seq.</i>	Yes	Commissioner of Commerce & Insurance	No	No
Geology Advisory Committee (under authority of Commissioner of Commerce and Insurance)	§ 62-36-101 <i>et seq.</i>	Yes	Commissioner of Commerce & Insurance	No	No
Home Inspectors Advisory Committee (under authority of Commissioner of Commerce and Insurance)	§ 62-6-301 <i>et seq.</i>	Yes	Commissioner of Commerce & Insurance	No	No
Advisory Committee for Acupuncture	§ 63-6-1001 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Athletic Trainers	§ 63-24-101 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Alcohol and Drug Abuse Counselors	§ 68-24-601 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Chiropractic Examiners	§ 63-4-101 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)

Committee for Clinical Perfusionists	§ 63-28-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Communications Disorders and Sciences	§ 63-17-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Dentistry	§ 63-5-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Dietitian/Nutritionis t Examiners	§ 63-25-101 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Dispensing Opticians	§ 63-14-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Emergency Medical Services Board	§ 68-140-301 <i>et seq.</i>	No	Governor	Yes	Yes
Council for Licensing Hearing Instrument Specialists	§ 63-17-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Massage Licensure Board	§ 63-18-101 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Medical Examiners	§ 63-6-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Medical Laboratory Board	§ 68-29-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Nursing	§ 63-7-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Examiners for Nursing Home Administrators	§ 63-16-101 <i>et seq.</i>	No	Governor	Yes	No
Board of Occupational Therapy	§ 63-13-201 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Optometry	§ 63-8-101 <i>et seq.</i>	Yes	Governor	Yes	Yes

(continued)



Board of Osteopathic Examination	§ 63-9-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Pharmacy	§ 63-10-301 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Physical Therapy	§ 63-13-301 <i>et seq.</i>	Yes	Governor	Yes	Yes
Committee on Physician Assistants (under authority of Board of Medical Examiners)	§ 63-19-101 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Podiatric Medical Examiners	§ 63-3-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Polysomnography Professional Standards Committee (under authority of Board of Medical Examiners)	§ 63-31-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board for Professional Counselors, Licensed Marital and Family Therapists, and Licensed Clinical Pastoral Therapists	§ 63-22-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Examiners in Psychology	§ 63-11-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Respiratory Care	§ 63-27-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Board of Social Worker Licensure	§ 63-23-101 <i>et seq.</i>	Yes	Governor	Yes	No
Board of Veterinary Medical Examiners	§ 63-12-101 <i>et seq.</i>	Yes	Governor	Yes	Yes
Total Boards: 46		93%		93%	76%