Appendix B

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

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ABSTRACT

It has been over a hundred years since George Bernard Shaw wrote that "All professions are a conspiracy against the laity." Since then the number of occupations and the percentage of workers subject to occupational licensing has 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, or florists, with the authority to decide who may practice their art. It can't surprise when licensing boards comprised of competitors exclude competition and regulate in ways that raise their profit. The result for consumers is higher prices and less choice, as licensing raises wages by 18% 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 great accomplishment of the Sherman Act 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 creations of states, to be exempted from antitrust scrutiny by the state action doctrine, leaving would-be competitors and consumers no recourse against their cartel activity.

We contend that the state action doctrine should not prevent antitrust suits against state licensing boards that are composed of private competitors deputized to regulate their own competition and to outright exclude those who compete with them, 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 case under the rule of reason. We argue that the Fourth Circuit's recent case upholding an FTC antitrust suit against a licensing board—creating a circuit split and becoming the only circuit to deny state action immunity to a licensing board—is a step in the right direction but not 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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INTRODUCTION

The Sherman Act has 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.[1] Unless that industry is a profession and that cartel is a state licensing board. Little noticed, licensing boards have grown into a massive exception to the ban on cartels.

Licensing boards are dominantly comprised of active members of the industry who meet to agree on ways to limit the entry of new competitors.[2] Some boards use their power to limit price competition or restrict the quantity of services available.[3] But professional boards, unlike cartels in commodities or consumer products, are sanctioned by the state—even considered *part* of the state[4]—and so are often assumed to operate outside the reach of the Sherman Act under a line of Supreme Court cases starting with *Parker*.[5]

When only five percent of American workers were subjected to licensing requirements,[6] the anticompetitive effect of these state-sanctioned cartels was relatively small. Now, nearly a third of American workers need a state license to perform their job legally, and this trend is continuing.[7] The service sector—the most likely to be covered by licensing—now represents four-fifths of U.S. GDP and is the sector with the strongest job growth.[8] Some of the recent additions

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[1] 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.
[2] *See* Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189, 191 (2000); *see also infra*, TAN 38&39 and Appendix.
[3] *See* MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 65--67 (2006).
[4] *See* Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 275 (9th Cir. 1982).
[5] Parker v. Brown, 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.")
[6] KLEINER, *supra* note 3, at 1.
[7] Morris Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LABOR ECON., (2013, forthcoming)..
[8] CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html

include locksmiths, bee keepers, auctioneers, interior designers, fortune tellers, tour guides and shampooers.[9]

Boards have abused their power to insulate incumbents from competition. On average, cosmetologists are required to have ten times as many days of training as EMTs.[10] In Louisiana, unlicensed floral design is a criminal offense.[11] 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.[12] Even the 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.[13] In many states dentists cannot legally employ more than two hygienists each, a restriction that raises demand for dentists.[14] In some states, nurse practitioners must be supervised by a physician,[15] even though there is no empirical evidence that supervision improves patient outcomes.

Labor economists have shown that the net effect of licensing on quality is equivocal.[16] 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 the annual cost of

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[9] Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, A1 (citing examples of locksmiths and shampooers); Clark Neily, *Watch Out for That Pillow*, WALL ST. J., April 1, 2008, at A17 (citing example of interior designers); J. Freedom du Lac, *Regulating Guides' Right to Talk to Tourists?*, WASH. POST, Sept. 27, 2010, B04 (citing example of tour guides); Dick Carpenter and Lisa Knepper, *Do Barbers Really Need a License?*, WALL ST. J., May 11, 2012, at A13 (citing example of auctioneers); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976) (citing example of bee keepers); Emily Sweeney, *Town Denies Fortune-teller License*, BOSTON GLOBE, May 9, 2004.

[10] The Institute for Justice, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 29 [LICENSE TO WORK], *available at*: www.ij.org/LicenseToWork (reporting that states require an average of thirty-three days of training for EMTs, but 372 days for cosmetologists). Arkansas, for instance, requires 28 days of training for EMTs and 350 for cosmetologists. *Id.* at 42.

[11] Neily, *supra* note 9. (observing that unlicensed businesses can be "effectively shut down with threats of fines, injunctions or even criminal prosecution.").

[12] *See Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

[13] LexisNexis 50 State Comparative Legislation/Regulations, *Attorney Advertising* (May 2011) ("Every state regulates the advertising of its attorneys."). Ohio Rules of Professional Conduct, Rule 7.1 comment 4, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf.

[14] BUREAU OF ECONOMICS STAFF REPORT TO THE FEDERAL TRADE COMM'N, RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 6 (May 1987), *available at* http://www.ftc.gov/be/econrpt/232032.pdf;

[15] *See* SHARON CHRISTIAN & CATHERINE DOWER, SCOPE OF PRACTICE LAWS IN HEALTH CARE: RETHINKING THE ROLE OF NURSE PRACTITIONERS 3 (January 2008) (noting that 30 states require at least some degree of physician supervision or collaboration), *available at* http://www.chcf.org/~/media/MEDIA%20LIBRARY%20Files/PDF/S/PDF%20ScopeOfPracticeLawsNursePractitionersIB.pdf; Tracy A. Klein, *Scope of Practice and the Nurse Practitioner: Independent, Collaboration, Supervision: How is Your Scope Regulated?*, MEDSCAPE (June 15, 2005), http://www.medscape.org/viewarticle/506277_5 (last updated October 17, 2007) ("[Twenty-three] states require no physician involvement for the licensed NP to diagnose and treat, while the remainder of states require some degree of written or formal physician involvement in NP practice.")

[16] *See* CAROLYN COX & SUSAN FOSTER, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21-27, 40 (1990), *available at* http://www.ramblemuse.com/articles/cox_foster.pdf.

licensing to consumers at $116 billon.[17] And consumers are not the only losers, since more licensing means fewer jobs.[18] All this said, we make no claim that all licensing rules are harmful. Some no doubt improve quality and public safety enough to be worth the costs. The point is that many do not.

Thanks in part to a spate of stories in mainstream news outlets like the New York Times,[19] the Wall Street Journal,[20] NPR,[21] and even the Daily Show,[22] politicians are taking notice of the growing problem. 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 his state.[23] Patrick only proposed modest changes[24] perhaps because an attempt at more dramatic licensing reform by Florida Governor Rick Scott failed in 2011.[25] The White House has also taken a stand against excessive licensing. President Obama recently 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, and Krueger has taken an interest in loosening up licensing regulations. And as a part of her "Joining Forces" initiative, Michelle Obama has successfully lobbied 24 states to sign legislation recognizing interstate reciprocity for professionally licensed military spouses.[26] Even Congress has started paying attention. In 2010 the House 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.[27]

Despite wide recognition of the potential for economic harm from 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 like and act like §1's

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[17] KLEINER, *supra* note 3, at 115.
[18] *See* Kleiner and Krueger, *supra* note *7, at 8.*
[19] Jacob Goldstein, *So You Think You Can Be a Hair Braider*, N.Y. TIMES MAG., June 17, 2012, at 20.
[20] Simon, *supra* note 9.
[21] *Morning Edition: Why It's Illegal to Braid Hair Without a License*, National Public Radio (June 21, 2012).
[22] The Daily Show with Jon Stewart, The Braidy Bill (Comedy Central June 3, 2004), available at http://www.thedailyshow.com/watch/thu-june-3-2004/the-braidy-bill.
[23] Press Release, Massachusetts Governor's Office, *Governor Patrick Builds on Regulatory Reform Successes; Files Legislation to Improve Business Climate For Licensed Professionals* (January 07, 2013, *available at* http://www.mass.gov/governor/pressoffice/pressreleases/2013/0107-regulatory-reform.html
[24] Patrick proposed combining the cosmetology and barbering board under one roof and eliminating the board of radio and television technicians. *Id.*
[25] Chip Mellor and Dick Carpenter, *Want Jobs? Cut Local Regulations*, Wall St. J., July 28, 2011, at A15. Michigan governor Rick Snyder has made similar promises. *See* Carpenter & Knepper, *supra* note 9.
[26] Executive 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, May 31, 2012, *available at* http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf.
[27] U.S. Dep't of Health and Human Services, Health Resources and Services Administration, *Health Licensing Board Report to Congress*, http://www.hrsa.gov/ruralhealth/about/telehealth/licenserpt10.pdf

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 towards cartelized labor markets.

Last year, in North Carolina Board of Dental Examiners v. FTC,[28] the Fourth Circuit upheld an FTC decision holding a state licensing board liable for Sherman Act abuses, creating a circuit split and becoming the only circuit to actually expose a licensing board to antitrust scrutiny. The case is a step in the right direction, but because it relied on the method of appointment of the board—not just on the identity of its members as competitors—it does not go far enough. The Supreme Court should take the split as an opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how its members were appointed. This test—the *Midcal* test—requires that, to enjoy state action immunity from antitrust liability, private actors must act pursuant to the state's clearly articulated purpose to displace competition and be subject to active supervision by the state. Where a board fails either prong of this test, courts should subject the board's actions to antitrust scrutiny applying a modified rule of reason..

Our proposal would recognize the potential benefits of licensing—preventing charlatanism and injury to the public—but reject the idea that potential benefits can justify total antitrust immunity for licensing. We advocate for an approach that uses the potential benefits of licensing to influence *how* restrictions will be reviewed, not *whether* they will be reviewed at all. And although our proposal involves a shift in the dominant interpretation of state action doctrine, the Supreme Court's unanimous opinion last term in *FTC v. Phoebe Putney* demonstrated its appetite for stopping cartel-like abuses of antitrust immunity.[29] So the time is right.

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[28] 717 F.3d 359 (4th Cir. 2013)

[29] Last term the Supreme Court decided 9-0 to narrow state action immunity in FTC v. Phoeby Putney 568 U.S. ___ (2013). In this case, a local government entity (the Hospital Authority of Albany-Dougherty County) purchased a hospital, thereby changing a market from two competing hospitals to monopoly provision. The state of Georgia granted the Hospital Authority a variety of powers including the power to buy hospitals. Because *Hallie* held that substate governmental entities do not require supervision to trigger immunity, the question in Phoeby Putney was whether the state had clearly articulated a policy of anticompetitive merger to monopoly when it granted the Authority the authority to buy hospitals. The Court took the position that the state had done no such thing, reasoning that although the Authority was entrusted with the provision of medical care and the means to provide medical care, which may involve purchasing hospitals, that power could be exercised without raising competitive issues so the grant of this power did not implicitly and necessarily contemplate anticompetitive use. The court also emphasized that state action exemptions should be disfavored, quoting its prior language from Ticor to this effect. ("state-action immunity s disfavored, much as are repeals by implication." FTC v. Ticor Title Ins. Co. 504 U.S. 621, 636).

How does *Phoeby Putney* affect future cases involving licensing boards?
To the extent that licensing board cases are about supervision, which is our focus, *Phoeby Putney*'s relevance to state action immunity for licensing boards is indirect. It mainly demonstrates an appetite for narrow readings of state action and a reiteration of *Ticor*'s language that state action immunities are disfavored and should be narrowly construed. The FTC's success in its argument that the "clear articulation" prong was not met would be much more difficult in the context of professional licensing.

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. In the next Part, we make our normative case for Sherman Act liability for state licensing boards, arguing that there is a logical fit between antitrust policy and the economic harm of heavy-handed licensing. We also address antitrust federalism, claiming that deference to state decision-making is especially difficult to justify in the context of occupational licensing. Part IV details the mechanics of the regime we propose. We suggest that in the licensing context, the rule of reason should be modified to allow defendants to place on the pro-competitive side of the scale evidence that the restraint improves safety or quality, an argument traditionally out-of-bounds in a §1 case. Part 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 regime. Part V concludes.

I. OCCUPATIONAL LICENSING BOARDS: THE NEW CARTELS

Once limited to a few learned professions, licensing now covers over 800 occupations.[30] Once limited to minimum educational requirements and entry exams, 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 economic health.

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

State-level occupational licensing is certainly on the march. In fact, it has eclipsed unionization as the dominant organizing force of the American labor market. While at their peak, unions claimed 30% of the country's working population, that figure has shrunk to below 15%.[31] Over the same period of time, the number of workers subject to state-level licensing requirements has doubled; today 29% of the American workforce is licensed and 6% certified by government.[32] Conservative estimates suggest that licensing raises consumer prices

Unlike the authority to purchase hospitals, the state-granted ability to restrict professional entry and practice will almost always have an anticompetitive effect in the sense that it limits the entry of competitors. Thus, we don't see *Phoeby Putney* as directly widening the path for challenges to licensing board immunity; the battleground, in the case of occupational boards, remains *Midcal*'s supervision prong. Still, the decision is in the spirit of narrowing state action immunity and it reiterates the principle several times that state action immunity is disfavored; so in that sense it accords with our thesis.

[30] KLEINER, *supra* note 3, at 5.

[31] Kleiner, *supra* note 2, at 190.

[32] Kleiner & Krueger, *supra* note 18.

by 15%.[33] There is also evidence that professional licensing increases the wealth gap; it tends to raise the wages of those already in high-income occupations[34] 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 towards service, the number of workers in licensed professions swelled, accounting for a greater proportion of the workforce. Second, the number of licensed professions has increased. Where once licensing was reserved for lawyers, doctors, and other "learned professionals," now floral designers,[35] fortune-tellers, and taxidermists[36] are among the jobs that, at least in some states, require licensing. Although ubiquitous, the extent of professional licensing differs dramatically between states. For example, Massachusetts licenses almost three times as many occupations as Rhode Island.[37]

This dramatic shift has put roughly a third of American workers under a regime of self-regulation, since boards are typically dominated by active members of the very profession they are tasked with regulating. Our study of the composition and powers of all occupational licensing boards in Florida and Tennessee revealed that 90% of boards in Florida and 93% of boards in Tennessee are comprised by a majority of license-holders active in the profession.[38] Our empirical findings which we report in Appendix A corroborate the anecdotal references to "practitioner dominance" in the legal and economic scholarship on occupational boards..[39] Unsurprisingly given this composition, boards often succumb to the temptation of self-dealing, creating regulations that insulate incumbent professionals from competition rather than ensure public welfare.

B. The Anticompetitive Potential of Occupational Licensing

This section will illustrate the anticompetitive potential of licensing regulations as well as showing the breadth of occupations subject to licensing. A

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[33] *Id.* ("[L]icensing's influence on wages with standard labor market controls show a range from 10 to 15 percent for higher wages associated with occupational licensing.").

[34] Kleiner, *supra* note 2, at 194-96; *see* Timothy Muzondo & Bohimer Parderka, *Occupational Licensing and Professional Incomes in Canada*, 13 CAN. J. ECON. 659 (1980); Robert J. Thornton & Andrew W. Weintraub, *Licensing in the Barbering Profession*, 32 INDUS. & LAB. REL. REV. ECON. 242 (1979)..

[35] *See* Meadows v. Odom, 360 F.Supp.2d 811, 813 (M.D.La 2005).

[36] LICENSE TO WORK, *supra* note 10, at 10.

[37] Kleiner, *supra* note 2, at 199; *See* Charles Wheelan, Politics or Public Interest? An Empirical Examination of Occupational Licensure (1999) (unpublished manuscript, University of Chicago).

[38] For a table reporting our findings with respect to the composition and rulemaking authority of boards in Florida and Tennessee, please see Appendix.

[39] *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 (2010); Kleiner, *supra* note 2 at 191; Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State*, 31 J. HEALTH POL. POL'Y & L. 587, 596. *See also* COX & FOSTER, *supra* note 16, at 36--38; Jared Ben Bobrow, *Antitrust Immunity for State Agencies: A Proposed Standard*, 85 COLUM. L. REV. 1484, 1496 (1985); *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.").

complete picture of state licensing activity is impossible—there are thousands of professional boards operating in the United States—but a few snapshots will 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; a few examples will help illustrate the phenomenon.

In Louisiana, all flower arranging must be supervised by a licensed florist.[40] So when flower shop owner Monique Chauvin's only licensed employee passed away, she found her business in violation of state law.[41] Despite the fact that Chauvin ran 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 in operation. The florist board 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 their quality and safety requirements.[42] Constitutional challenges against Louisiana's licensing scheme have proved unsuccessful. A federal court recently upheld the scheme, evidently persuaded by an expert who claimed that licensing "prevents the public from having any injury" from exposed picks, broken wires, or infected flowers.[43] But the court also noted that *even without* a public health justification, the regulation could stand, holding that "industry protectionism" is itself a legitimate state interest.[44]

Minnesota, along with several other states,[45] now define 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 for generations his family had practiced this routine, non-invasive and painless

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[40] La. Rev. Stat. Ann. § 3:3808 (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.").

[41] Institute for Justice, *Freeing Louisiana Florists: Licensing Law is Blooming Nonsense, available at* http://www.ij.org/freeing-louisiana-florists-licensing-law-is-blooming-nonsense.

[42] The Louisiana Horticulture Commission, the body that governs licensure for landscape architects and horticulturists, irrigation contractors, arborists, and florists, held fourteen meeting between March 2008 and December 2011, in which they considered 64 cases. In 62, 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, visit https://wwwprd.doa.louisiana.gov/boardsandcommissions/viewMeetingMinutes.cfm?board=475.

[43] *Meadows*, 360 F.Supp.2d, at 824.

[44] *Id.* at 824--25.

[45] *See* American Veterinary Medicine Association, *State Summary Report* (updated January, 2013), *available at* https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-dental-procedures.aspx

procedure[46] for satisfied customers, the Minnesota veterinary board sent Chris a cease-and-desist letter. Since his business did not employ veterinarians to supervise the floating, continued operation would be considered an unlicensed practice of veterinary medicine, carrying severe penalties in Minnesota. Chris lost a constitutional challenge against the rule.[47]

Several states prohibit the sale of caskets by anyone other than licensed funeral directors.[48] This restriction outlawed businesses like the Benedictine monks' woodshop at Saint Joseph Abbey in Louisiana. For years, the monks made simple pine coffins to bury their departed. But when they opened their shop to the public to help cover the costs of healthcare for the monks, the State Board of Embalmers and Funeral Directors, a body with only two members from outside the industry, found the competition unwelcome. It served the monks with a cease and desist letter, threatening jail time and a fine. The monks never handled bodies or planned services; they 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.[49]

For a final set of examples, 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, with demands that braiders and threaders obtain cosmetology licenses before lawfully practicing their craft.[50] 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 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.[51]

For Texas entrepreneur Ashish Patel, this has meant shuttering his successful brow threading business and firing his employees, after the state upheld the licensing requirements against his constitutional challenge.[52] For hair braider Amber Starks, it means crossing the boarder daily from her native Oregon, where

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[46] A domesticated horse's modern diet is not coarse enough to naturally wear down its teeth, which never stop growing, and so periodically horse teeth require filing, or "floating." *See* Institute for Justice, *Challenging Barriers To Economic Opportunity: Challenging Minnesota's Occupational Licensing Of Horse Teeth Floaters, available at* http://www.ij.org/minnesota-horse-teeth-floating-background#_ftn1.

[47] Johnson v. Minnesota Board of Veterinary Medicine, No. 27-CV-06-16914 (Minn. Dist. Ct. 4th Judicial Cir.).

[48] See LA.REV.STAT. §§ 37:831(37)-(39).

[49] After several years of litigation, the monks finally won a constitutional challenge against the restriction. *See* St. Joseph Abbey v. Castille, 700 F.3d 154 (5th Cir. 2012).

[50] Goldstein, *supra* note 19, at 20.

[51] *Id.*

[52] *See* India West, *Threading Licensing in Texas Tied Up in Debate, Lawsuit* (March 28, 2012) *available at* http://indiawest.com/news/3739-Threading-Licensing-in-Texas-Tied-Up-in-Debate--Lawsuit.html.

hair braiders are explicitly required to have a cosmetology license, to Washington, where they are not.[53] The majority of her clientele come from Oregon as well, but, like her, they must make the trip over the border to get their preferred hair style at a price they can afford.[54] For the millions of customers living far away from the eleven states that exempt hair braiders from the cosmetology license requirements,[55] they must either find a practitioner willing to flout the board or pay cartel prices.

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 restrictions are necessary to ensure quality and public safety, a close examination of restrictions on these professions suggests that these 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.[56] The anticompetitive effects of this restriction are well-known; in 1987 the FTC published a policy paper showing that dentists-to-hygienists ratios raise prices but not quality.[57] According to the American Dental Association, the ratio restrictions are necessary to prevent "hygiene mills," practices offering low-cost dental cleanings without advanced dental services like exams, diagnosis, and surgery. The ADA calls such practices unsafe, but since dental hygienists must themselves possess a license requiring extensive education on safe cleaning techniques, 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 took the hygienist restrictions further. The South Carolina Board of Dentistry required that exams performed by a licensed dentist must accompany all cleanings.[58] The rule ended a program to extend in-school dental cleanings to rural and other underserved children. When the FTC brought suit against the Board, the political pressure led the South Carolina legislature to pass a bill eliminating the requirement.

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[53] The Oregonian, *Braiding African American hair at center of overregulation battle in Oregon* (August 11, 2012), *available at* http://www.oregonlive.com/politics/index.ssf/2012/08/braiding_african_american_hair.html.

[54] *Id.*

[55] For a breakdown of hair-braiding licensing by state, visit http://media.oregonlive.com/pacific-northwest-news/photo/gs11braid12-03jpg-cb31f441f0a667ab.jpg .

[56] J. NELLIE LIANG AND JONATHAN D. OGUR, RESTRICTIONS ON DENTAL AUXILIARIES 6 (1987).

[57] *Id.* From these data, the authors estimate the deadweight loss that results from the restrictions to be $680-710 millon in 1982 dollars. Relatedly, Kleiner and Kudrle showed empirically that, at least for uninsured individuals, stricter licensing restrictions for dentists has only very little impact on quality. *See* Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547 (2000).

[58] In re South Carolina Board of Dentistry, 138 F.T.C. 229 (2004).

Similarly, the advent of nurse practitioners and physician's assistants has ignited a turf war between these "physician extenders"[59] and doctors. Nurse practitioners and physicians assistants are trained in some of the same skills as family practice physicians, but need not learn the more advanced skills essential to a medical degree. Thus, a nurse practitioner's education is cheaper than that of a medical doctor, and their fees can reflect that cost savings. For many procedures, outcome studies reveal that the extender is as safe and effective as the physician. Extenders have been essential to low-cost convenience clinics like CVS's MinuteClinics or public health initiatives aimed at serving low-income individuals with restricted access to medical care.

Undoubtedly influenced by powerful lobbying from the AMA, twelve states, including such populous states as California, Texas, and Florida require physician supervision over all nurse practitioner activity.[60] Several states outlaw prescribing by nurse practitioners.[61] For the most part, the reins of competition are held by state medical boards made up primarily by physicians, who 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 lawyers who can claim better average outcomes for clients. For example, Alabama requires all attorney advertising to include a disclaimer: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."[62] Many states define title certification and abstraction as the "practice of law," in effect inflating demand for legal services by requiring attorney representation at all real estate transactions.[63] And the state ethical rules against "champerty," or selling an interest in the outcome of a lawsuit, helps contingency fee lawyers prop up the price of representation at 30% of the award.[64]

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[59] For a definition of "physician extender," see http://medical-dictionary.thefreedictionary.com/physician+extender.

[60] *See* American Association of Nurse Practitioners, *2013 Nurse Practitioner State Practice Environment, available at* http://www.aanp.org/legislation-regulation/state-practice-environment.

[61] *Id.*

[62] Alabama Rules of Professional Conduct Rule 7.2, *available at* http://www.sunethics.com/al_7_2.htm.

[63] The FTC has written letters to states and their bar associations considering restrictions on who may participate in loan closings, urging them to avoid "the anticompetitive consequences of rules that prevent nonlawyers from conducting closings." F.T.C. OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE [STATE ACTION TASK FORCE] 68 (2003).

[64] Max Schanzenbach & David Dana, *How Would Third Party Financing Change the Face of American Tort Litigation? The Role of Agency Costs in the Attorney-Client Relationship* (Sept. 14, 2009), *available at* http:// www.law.northwestern.edu/searlecenter/papers/Schanzenbach_Agency%20Costs.pdf. Professors Dana and Schanzenbach explore the efficiencies of allowing third-party assignment highlighting 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," since allowing champerty would create a competitive market for legal claims that would likely reduce fees to below the traditional (and suspiciously stable) 30% that

Each state has its own bar exam and licensing procedure, reducing lawyer mobility across state lines. Segmentation of the market means that lawyers in each state are insulated from out-of-state competition, allowing for higher legal fees than would obtain in a nation-wide market. The justification for this is colorable—that state law differs between the states and so a different exam is essential for each jurisdiction—but it fails to account for practices like California's requirement that lawyers qualified in other states must retake the multi-state portion of the exam when sitting for the California bar.[65]

Licensing bodies have also devised ways to restrict competition between law schools and among law professors. In 1995 the DOJ challenged the ABA's 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.[66] Although the ABA entered a consent degree that eliminated some of the most anti-competitive rules, they were replaced with standards that allow the ABA to achieve the same anticompetitive effects.[67] In the same vein, the ABA refused to accredit Massachusetts School of Law at Andover for allegedly pretextual reasons. MSLA sued the ABA accusing it of enforcing a group boycott and conspiring to monopolize legal education in violation of the Sherman Act.[68] It lost on state action grounds.[69]

Another device that many professions now use to restriction competition is the apprenticeship. Many state licensing boards require apprenticeships for would-be professionals, essentially guaranteeing incumbents low-cost labor[70] while raising barriers to entry. For example, most states' funeral and mortuary licensing boards require an applicant to complete a one-year apprenticeship under a licensed funeral director on top of educational and testing requirements.[71] Similarly, some states require lengthy apprenticeships for aspiring psychotherapists. California requires a total of 3,000 hours of therapy provided under the supervision of a licensed

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contingency lawyers currently charge. This pay cut, argue Dana and Schanzenbach, partially explains why legislation allowing champerty lacks attorney support.

[65] Fourteen other states also require retaking the MBE. *See* http://barreciprocity.com/bar-exam-mbe-transfer/.

[66] United States v. American Bar Association, 934 F. Supp. 435 (D.D.C. 1996). For the DOJ's competitive impact statement, visit http://www.justice.gov/atr/cases/f1000/1034.htm.

[67] *Id.* For example, where the 1995 standards limited teaching load to eight hours per week, the modern standards emphasize that professors should have enough time, in addition to teaching, for research and scholarship, "keeping abreast of developments in their specialties," and performing obligations to the law school, university community, profession, and the public. 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, visit http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter4.authcheckdam.pdf.

[68] Massachusetts School of Law at Andover v. ABA, 107 F.3d 1026 (3d Cir. 1997).

[69] *Id.* at 1038.

[70] Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 410 (1993-94).

[71] For a state-by-state breakdown, see http://www.nfda.org/licensing-boards-and-requirements.html.

therapist at that therapist's place of work.[72] Interns cannot receive compensation directly from patients, but rather can only be paid (if they get paid at all) by their employers.[73] And the statute actually *limits* supervision to five hours a week, restraining competition among therapists for interns.[74]

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. Licensing was justified by the idea that the public benefits of regulation outweighed its costs in the form of higher prices and reduced economic liberty.[75] But unlike other regulatory bodies, licensing boards became dominantly comprised of practitioners themselves,[76] on the theory that only members of a profession had the expertise necessary to define efficient rules for entry and practice. With the regulated acting as regulators, self-dealing was inevitable. 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 that yield little benefit to anyone but incumbent practitioners are socially wasteful. But, as detailed in Section B, state licensing boards have virtually free rein to enact such 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.[77] But the past twenty years has 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. Kleiner's work and that of his contemporaries reveal a consensus in the

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[72] Business and Professional Code of California, §4980.43, *available at* http://www.bbs.ca.gov/pdf/publications/lawsregs.pdf.
[73] *Id.*
[74] *Id.*
[75] KLEINER, *supra* note 3, at 44-48; *see* Lee Benham, *The Demand for Occupational Licensure, in* OCCUPATIONAL LICENSURE AND REGULATION 13, 17 (Simon Rottenberg ed., 1980); Wheelan, supra note 37.
[76] *See supra,* TAN 38&39 and Appendix A. *See also* COX & FOSTER, *supra* note 16, at 36--38; Kleiner, *supra* note 2, at 191 ("Generally, members of the occupation dominate the licensing boards.").
[77] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). *See also* ADAM SMITH, THE WEALTH OF NATIONS, Book I, Chapter 10, Part II (1776), *cited in* KLEINER, supra, note 3, at 3 (observing that guilds raise earnings by limiting apprenticeships and lengthening their duration).

academy: a licensing restriction can only be justified where it leads to better quality professional services, and for many restrictions, proof of that enhanced quality is lacking.[78]

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

Licensing restrictions can effect price along four dimensions. First, professional licensing can act as a barrier to entry into the profession.[79] Second, licensing can establish rules of practice, like advertising bans, that restrict competition.[80] Third, state boards can suppress interstate competition by recognizing licenses only from their own state. Finally, a profession can prevent competition by broadening the definition of its practice, bringing more potential competitors under its licensing scheme.[81] These "scope-of-practice" limitations tend to oust low-cost competitors that operate at the fringes of an established profession.

To begin, it is worth pointing out what is different about a professional licensing cartel from a typical cartel. A typical price-fixing cartel will only be effective if an industry has a small number of firms in the industry; otherwise the temptation to cut price and expand output will be too great. Licensing boards can effectively raise price, however, despite allowing 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 to be effective. Limiting the number of licensed professionals by making entry difficult, and unauthorized entry illegal, raises price because it limits supply, and it does so even if licensed participants compete vigorously. Unlike firms which may be able to expand without bound, a licensed professional can only provide so much service

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[78] *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."); Morris M. Kleiner & Charles Wheelan, *Occupational Licensing Matters: Wages, Quality, and Social Costs*, 8 CESIFO DICE REPORT, Autumn 2010, at 29, 29 ("Of course, these labor market distortion 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 & HWIKWON HAM, REGULATING OCCUPATIONS: DOES OCCUPATIONAL LICENSING INCREASE EARNINGS AND REDUCE EMPLOYMENT GROWTH? 5 (2005) ("The evidence from empirical literature suggests that the quality impacts are unclear..."); 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) ("The general rationale for licensing is the health and safety of consumers. Beyond that, the quality of service delivery... [is] sometimes invoked."); 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 and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, 7 LAW & HUMAN BEHAVIOR 139, 145 (1983).

[79] Kleiner, *supra* note 2, at, 192; *see* Simon Rottenberg, *Introduction*, *in* OCCUPATIONAL LICENSURE AND REGULATION 1, 1-10 (Simon Rottenberg ed., 1980).

[80] John E. Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211, 216 (1984).

[81] *See* Kleiner & Krueger, *supra* note 7, at 5 ("For example, the work of 'hair braiders', which is unlicensed, could be brought under the control of the cosmetology board and limited to only licensed cosmetologists or barbers.").

herself. Boards can further limit supply by controlling what can be produced by unlicensed workers supervised by a licensed worker; 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. Where the studies have the statistical power to determine an effect, they tend to show an increase in price and reduction in quantity.[82] Mandatory entry requirements—such as examinations or educational prerequisites—tend to raise consumer prices, although estimating the effect with any certainty has proved difficult.[83] One 2005 study examining wage differences between similarly educated professionals estimates that licensing requirements raise wages 10 to 12 percent.[84] Newer data suggest that licensing raises wages by 18%.[85] A 2000 study showed that tougher licensing, in the form of lower pass rates on the qualifying exam, increased prices 11 percent for dental services.[86]

Similarly, most studies examining practice restrictions show that the more heavy-handed a licensing board is in dictating hours, advertising, or levels of supervision within a profession, the higher the consumer prices. 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%, resulting in an estimated $700 million cost (in 1987 dollars) to consumers per year.[87] Restrictions on advertising by lawyers is associated with a 5-11 percent increase in price,[88] and in optometry, restrictions on advertising have been shown to increase price by 20 percent.[89] Geographic restrictions like non-reciprocity between states also tend to increase consumer prices.[90]

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[82] *See* KLEINER, *supra* note 3, at 8-12. Since licensing the professions is mostly the prerogative of individual states, economists have used the U.S. as a kind of natural experiment to observe price differences under different licensing regimes. Studies of licensing's price effects 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 have compared wages (as a proxy for price) between licensed professions and unlicensed professions that require similar education levels and similar day-to-day responsibilities and lifestyle. *See generally* Kleiner & Kudrle, *supra* note 57, at 549; Kwoka, *supra* note 80, at 216.

[83] Kleiner, *supra* note 2, at 197.

[84] KLEINER & HAM, *supra* note 78, at 5.

[85] Kleiner & Krueger, *supra* note 7.

[86] Kleiner & Kudrle, *supra* note 57, at 573.

[87] LIANG & OGUR, *supra* note 56, at 43.

[88] Kwoka, *supra* note 80, at 216.

[89] *See* FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

[90] For example, a 1978 study found a 12 to 15 percent premium on dental services in states that did not allow dentists licensed in another state to practice. Another study estimated that universal reciprocity between states for dentists would result in a geographical reallocation of dentists worth $56 million (1978 dollars) in consumer surplus. Bryan L. Boulier, *An Empirical Examination of the Influence of*

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 licensing's 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, real estate agents, optometrists, sanitarians, and veterinarians found that licensing reduces the number of practitioners in a given field.[91] But other studies have failed to measure an effect of licensing on the supply of barbers[92] and nurses.[93]

If licensing increases consumer prices, then some consumers must go without professional services, as compared to a world without licensing restrictions on a profession. These are the consumers who could afford the service at the price that would obtain without licensing.[94] Some would-be practitioners lose out as well; these are the individuals that do not have licenses but would like to compete with the licensed professionals by offering low-cost services.[95] A state's ability to cite and even prosecute unlicensed practitioners deters these low-cost transactions from occurring. In antitrust terms, these deterred low-cost transactions make up the deadweight social welfare loss from licensing.[96]

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.[97] Advocates of licensing argue that for professional services, the free market does a poor job of efficiently allocating service to consumers because without licensing, service quality would be too low. 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.[98] First, absent licensing, the asymmetry of information between professional providers and consumers about

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Licensure and Licensure Reform on the Geographical Distribution of Dentists, in OCCUPATIONAL LICENSURE AND REGULATION 73, 95 (Simon Rottenberg ed., 1980).

[91] Carroll & Gaston, *supra* note 78, at 142.

[92] Thornton & Weintraub, *supra* note 34, at 249..

[93] *See* William D. White, *Mandatory Licensure of Registered Nurses: Introduction and Impact, in* OCCUPATIONAL LICENSURE AND REGULATION 47, 70--71 (Simon Rottenberg ed., 1980).

[94] *See* Tom Rademacher, *Don't Try This at Home: Man Does Own Root Canals*, Ann Arbor News, Feb. 9, 1997, at A11, *cited in* KLEINER, *supra* note 3, at 43 (relating a news story about a fruit farmer who performed his own root canals on himself because he was unable to afford dental services).

[95] *See* Kleiner, *supra* note 2, at 192--93.

[96] *See* Kleiner, *supra* note 78, at 4. *See also* Kleiner & Wheelan, *supra* note 78, at 29, 31 (noting that "[w]hen members of the legal professional told Milton Friedman that every lawyer should be a Cadillac, he famously replied that many people would be better off with a Chevy.").

[97] *See* KLEINER & HAM, *supra* note 78, at 7 ("The focus of the analysis is to examin the counterfactual of what would be the impact on the earnings of individuals in an occupation if that occupation ceased to be regulated"); Kleiner & Wheelan, *supra* note 78, at 29, 30 (comparing certification regime with licensure regime).

[98] Benham, *supra* note 75 ("Almost all licensed occupations have claimed they will successfully cope with undesirable market failures.").

the quality of service[99] would create what economists call the lemons problem. Second, free markets for professional services will result in sub-optimal levels of quality because the market participants (provider and consumer) do not internalize all the costs of bad service. 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 the consumers cannot reliably distinguish good products from bad.[100] If consumers cannot distinguish good professional service from bad, then the high quality, high price providers will be unable to attract even those customers who want and can pay for better quality service.[101] Unable to obtain a premium for their higher quality service, they will either exit the market or reduce the quality of the service to match their low-quality, low-cost competitors. This leads to deadweight loss in the form of deterred transactions between high-quality providers and high-demand consumers. 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 the costs of bad service (treatment in a public hospital for infection from a careless barber or a nuisance settlement of a frivolous suit filed by an unscrupulous lawyer) are not visited in their entirety on the consumer of the service. Licensure can improve public safety by imposing quality standards on professionals again through education or examination and by setting rules of professional practice.

So 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 pro-competitive licensing scheme should avoid more deadweight loss than it creates. Directly 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 against the market failures it is designed to address, then it should improve service quality. Put simply, if licensure works, quality of service will improve.[102]

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[99] Alex R. Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors, in* OCCUPATIONAL LICENSURE AND REGULATION 26, 26 (Simon Rottenberg ed., 1980).

[100] George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970).

[101] *See* COX & FOSTER, *supra* note 16, at 5--6.

[102] Kleiner, *supra* note 2, at, 191--92.

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,[103] at least for some kinds of consumers, but some are unable to show any effect of licensing on quality.[104] A few studies even claim to show that licensing reduces quality.[105] Part of the explanation for the mixed results may be the difficulty of assessing the quality of professional services;[106] indeed this is the very source of the lemons problem licensing is partly designed to address. In the last few decades, researchers have used a variety of ingenious methods for evaluating quality of professional services, but none is without its flaws.

Alex Maurizi used the number of consumer complaints lodged with the California Contractors' State License Board as a proxy for quality of service from professional contractors.[107] He hypothesized that if barriers to entry (here a licensing examination) were effective in eliminating low-quality providers, then stricter (lower) pass rates should be associated with higher quality service.[108] In fact he found the opposite.[109] Similarly, economists have used malpractice litigation rates to measure quality of professional outcomes.[110] Using consumer dissatisfaction to gauge quality has obvious limits, since consumers may not take the initiative to formalize their unhappy experience in a complaint or a lawsuit.[111]

Sometimes quality can be measured directly by looking at actual outcomes from professional service. For example, Kleiner used test scores[112] to measure the effect of licensing requirements for public school teachers on student performance. His study did not show an effect from licensing.[113] Using a similar outcome-based

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[103] *See* KLEINER, *supra* note 3, at 53 tbl.3.2; *see also* Carroll & Gaston, *supra* note 78, at 145 (concluding that licensing results in better delivered quality but not better quality received by society as a whole); Kleiner & Kudrle, *supra* note 57, 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, 856 (1986) (finding that consumers who value quality relatively little are worse off with licensing).

[104] *See* KLEINER, *supra* note 3, at 53 tbl.3.2 (2006); *see also* Morris M. Kleiner & Daniel L. Petree, *Unionism and Licensing of Public School Teachers: Impact on Wages and Educational Output, in* WHEN PUBLIC SECTOR WORKERS UNIONIZE 305, 317 (Richard B. Freeman & Casey Ichniowski eds., 1988); Joshua D. Angrist & Jonathan Guryan, *Teacher Testing, Teacher Education, and Teacher Characteristics*, 94 AM. ECON. REV. 241, 246 (2004); Thomas Kane, et al., *What Does Certification Tell us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615, 629 (2007); Robert Gordon et al., *Identifying Effective Teachers Using Performance on the Job* 28 (The Hampton Project, Discussion Paper No. 2006-01, 2006).

[105] *See* KLEINER, *supra* note 3, at 53 tbl.3.2; *see also* Carroll & Gaston, *supra* note 78, at 145; Maurizi, *supra* note 99, at 34-35.

[106] *See* Kleiner, *supra* note 2, at, 198.

[107] Maurizi, *supra* note 99, at 27-29.

[108] *Id.* at 32 tbl.2.

[109] *Id. at* 31--32.

[110] KLEINER, *supra* note 3, at 57.

[111] Maurizi, *supra* note 99, at 27-28; *see also* KLEINER, *supra* note 3, at 56 ("[L]icensing makes an occupation more visible and sets up rules and regulations that make law suits easier to file.").

[112] *See* Kleiner, *supra* note 78, at 7-8; *see also* KLEINER, *supra* note 3, at 54 (calling test scores "a generally recognized measure of 'quality' in education.").

[113] *See* Kleiner, *supra* note 78, at 7-8; *see also* Thomas Kane, et al., *What Does Certification Tell us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615, 629 (2007).

technique, Kleiner and Kudrle (2000) used dental exam results from new enlistees into the U.S. Air Force. Kleiner and Kudrle found that for uninsured individuals, the strictness of licensing in their home state had no impact on the health of their teeth at the time of entering the Air Force.[114]

B. The Legal Landscape of Professional Licensing

Where researchers have been able to show that licensing improves quality, regulation may be reducing market failures caused by information asymmetry and negative externalities. If so, and if licensing's benefits 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 pro-competitive benefits of a restriction against its anticompetitive effects. All other combinations of competitors operate in Sherman's shadow, where their agreements must improve economic efficiency to escape condemnation. Licensing boards, in contrast, have mostly been treated as exempt from 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 proved to be weak against self-dealing boards.

1. Barriers To Entry: 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. The practitioners reap the rewards of weaker competition in the form of higher prices and higher profits. This conduct sounds, on its face, like a perfect target for Sherman Act §1 liability. But with *Parker v. Brown*[115] and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,[116] 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. In the line of cases flowing from *Parker*, the Court defined the contours of the immunity to include all bodies "clearly authorized" by the state to restrict competition. In most cases, these bodies must also be subject to "active

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[114] However, for those with insurance coverage (which was also associated with higher income) tougher state regulations on dentistry improved their average dental health. *See* Kleiner & Kudrle, *supra* note 57, at 575-76. The results of the Air Force study exemplify an interesting finding of some studies of quality: that positive quality effects, where found, tend to be limited to higher-end consumers. *See also* Carroll & Gaston, *supra* note 78, at 145 (examining a variety of professions from plumbers to dentists, showing that licensing improved the quality of practitioners but decreased the overall quality received by consumers by creating a shortage of them).

[115] 317 U.S. 341 (1943).

[116] 365 U.S. 127 (1961).

supervision" by the state itself.[117] State action immunity bars suits by aggrieved competitors and public enforcers alike. In *Noerr*, the Court held that private people 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.[118] Together, these doctrines "are complementary expressions of the principle that the antitrust laws regulate business, not politics."[119]

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 it had been blessed by the state of California.[120] In holding that the Sherman Act does not apply to state government action, the Court made essential the identity of the actor—the state or private citizens—but provided no guidance on how to draw the line. This created serious problems for lower courts trying to apply *Parker* since states rarely regulate economic activity directly through an act of legislature. Rather, states delegate rulemaking and rate-setting to agencies, councils or boards dominated by private citizens. Were these non-state, quasi-governmental 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,*[121] providing a test to distinguish private from state action. To enjoy state action immunity, the Court held, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy" to restrict competition and that the policy must be "actively supervised by the State itself."[122] The *Midcal* rule thus shifted the battleground from the public/private boundary to the meaning of "clear articulation" and "active supervision." In no fewer than ten decisions refining *Midcal's* two-step,[123] the Court has made clear that virtually any colorable claim to state authority will do.[124] In contrast, the supervision

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[117] California Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97, 105 (1980).
[118] *Noerr*, 365 U.S. at 136.
[119] City of Columbia v. Omni Advertising, 499 U.S. 365, 499 (1991);
[120] *Parker*, 317 U.S. at 351.
[121] 445 U.S. 97 (1980).
[122] *Id.* at 105.
[123] F.T.C. v. Phoebe Putney Health System, Inc., 2013 WL 598434 (U.S. Feb. 19, 2013); F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621 (1992); *Omni*, 499 U.S. at 383 (1991); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Fisher v. City of Berkeley, 475 U.S. 260 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Community Communications Co., Inc. v. City of Boulder, Colo., 455 U.S. 40 (1982).
[124] "Clear articulation" need not be an affirmative statement about abrogating competition policy. *See* STATE ACTION TASK FORCE, *supra* note 63, 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 can be all the articulation necessary under *Midcal's* first prong. *See Hallie*, 471 U.S. at 45 (1985). Indeed since *Midcal*, the Supreme Court has rejected a "clear articulation" claim only once. In *Community Communications Co. v. City of Boulder*, Boulder argued unsuccessfully that Colorado's "home rule" statute giving Boulder the right to self-govern was a "clearly

requirement can have real bite, but since *Midcal*, the Court has created a category of entities that are not subject to the supervision requirement at all.[125] These entities, which include municipalities,[126] enjoy immunity if they can meet the "clear articulation" prong alone.

b. *Noerr* and Petitioning Immunity

While *Parker* immunity is used to insulate public or quasi-public bodies from antitrust scrutiny, *Noerr* immunity shields private actors petitioning governments for restraints benefiting them at the cost of competition.[127] *Noerr* and *Parker* immunities are, as Justice Scalia has observed, "two faces of the same coin;"[128] by disallowing suits against the private parties influencing 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.[129] Even though the railroads had used deception in their campaign to influence the state legislature,[130] the Court found their actions to be immune to antitrust liability on federalism[131] grounds. Later cases extended *Noerr* immunity to government petitioning of all avenues, including lawsuits[132] and executive branch lobbying.[133]

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,[134] the question may be more open than it appears, especially following the Fourth Circuit's 2013 decision in *North Carolina Board of Dental Examiners v. FTC* which held a state licensing board to account for its

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articulated and affirmatively expressed state policy" that allowed them to interfere with competition in the local cable market.

[125] STATE ACTION TASK FORCE, *supra* note 63, at 18.

[126] *See Hallie*, 471 U.S. at 45.

[127] *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 Corporation 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.").

[128] *Omni*, 499 U.S. at 383.

[129] *Noerr*, 365 U.S. at 129--30.

[130] The defendants deceived the legislature by attributing their own anti-trucking statements and studies to "bogus independent civic groups." Marina Lao, *Reforming the* Noerr-Pennington *Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 972 (2003).

[131] *Noerr* 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.").

[132] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 365 (1991).

[133] United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[134] *See, e.g.*, Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISCIPLINARY L. J. 565, 569 (2010) ("Most licensing boards were created or are managed by the 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) (observing that the Supreme Court suggested "that the supervision requirement is probably inapplicable to state agencies, a suggestion with which the lower courts have virtually all agreed.").

anticompetitive restrictions on practice. The law here is complicated and influx; thus a comprehensive treatment of its details are necessary.

Certainly licensing restrictions passed directly by a state's legislature or supreme court enjoy state action immunity as a matter of course.[135] Most licensing regulations, however, become law when promulgated by an unelected administrative board, and the Supreme Court has never determined the status of practitioner-dominated boards under *Midcal*. Boards likely meet *Midcal*'s first prong requiring clear articulation from the state, but their decisions are not typically subject to the kind of state review that courts have required to find "active supervision." Thus, the question turns on whether state licensing boards are among the entities that do not have to show supervision at all.

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.[136] The Ninth Circuit's opinion in *Benson v. Arizona State Board of Dental Examiners*[137] 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 permitting the Board "in its discretion," to adopt reciprocity rules.[138] Contrary examples involve boards acting in *contravention* of state policy. In *Goldfarb v. Virginia*,[139] the Supreme Court held that although a state bar association was a state agency for purpose of "investigating and reporting the violation" of ethical rules promulgated by the Supreme Court of Virginia,[140] it could not enjoy immunity for its price-fixing because it acted contrary to the state's clearly articulated competition policy.[141]

As clear as it is that licensing boards pass the first prong, it is equally clear that many would fail the second if subjected to it. The Supreme Court has recognized the necessary supervision only where states actually "exercise ultimate control over the challenged anticompetitive conduct,"[142] overturning schemes

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[135] *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); Massachusetts School of Law at Andover v. American Bar Association, 107 F.3d 1026, 1036 (3d Cir. 1997); STATE ACTION TASK FORCE, *supra* note 63, at 6; Bobrow, *supra* note 39, at 1487.

[136] See, e.g. *Earles*, 139 F.3d at 1044. *See also* Havighurst, *supra* note 39, at 599. ("[F]ew things are more foreseeable than that a trade or profession empowered to regulate itself will produce anticompetitive regulations.").

[137] 673 F.2d 272 (9th Cir. 1982).

[138] *Id.*, at 275.

[139] 421 U.S. 773 (1975).

[140] *Id.* at 777 (quoting Virginia Code Ann. § 54-49 (1972)).

[141] *Id.* at 791. See also *FTC v. Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (F.T.C. 1988) (refusing to find the requisite "clear articulation" necessary under *Midcal* for an optometry board that had passed onerous advertising restrictions despite contrary instructions from the state).

[142] *Patrick*, 486 U.S. at 101. See also *Midcal*, 445 U.S. at 105--06 (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 in finding immunity. *Parker* 317 U.S. at 352.

where states had the potential to review but never used it.[143] Even schemes where the State provides the final authorization of a restriction can be found lacking in supervision if the state uses a "negative option" that allows a state's silence to pass for approval.[144] For most licensing boards, their restrictions become operational upon, at most, a rubber stamp from the state. The typical case falls short of the "pointed reexamination" and affirmative pronouncement by the state, required by *Ticor*, that signals that "the State has played a substantial role in determining the specifics of the economic policy."[145]

Thus boards' status under *Parker* turns on whether they are subject to the requirement of supervision at all. In *Town of Hallie v. Eau Claire*, the Court found a municipality immune under *Parker* because it was acting pursuant to the state's "clear articulation," despite being unsupervised. The court reasoned that for municipalities, it was not necessary to ensure that the actor seeking immunity was actually following the articulated state policy, since there was no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State."[146] Although *Hallie* did not provide a test for determining which entities were entitled to this fast track to immunity, it provided a hint in a footnote: "In cases in which the actor is a state agency, it is likely that active state supervision would not be required, although we do not here decide that issue."[147]

Many lower courts have applied *Hallie*'s footnote 10, although dicta, like law.[148]But by and large these courts have not interpreted Hallie's footnote 10 to mean that all entities that have a colorable claim to being a "state agency" (which probably includes occupational licensing boards) are automatically exempt from the supervision requirement. Rather, most lower courts analyze the function, composition, and accountability of the entity claiming immunity when considering its status under Hallie's footnote. The circuits are split on this question of how state occupational licensing boards fare under this analysis.

Some courts have concluded that occupational boards are among the "state agencies" to which the Court was referring, and thus exempted boards from *Midcal*'s supervision prong.[149] For example, in *Earles v. State Bd. of Certified*

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[143] *See, e.g., Ticor*, 504 U.S. at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State.").

[144] *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).

[145] *Ticor*, 504 U.S. at 635. Boards are typically subject to several lesser mechanisms that improve their accountability to the state, like member disclosure requirements, adherence to state administrative procedure acts, and public access to meetings and minutes. But at least one lower court has held these devices inadequate to establish supervision under *Midcal*'s second prong. N.C. Bd. of Dental Exam'rs, 151 F.T.C. at 630--32.

[146] *Hallie*, 471 U.S. at 47.

[147] *Hallie*, 471 U.S. at 46 n. 10.

[148] Elhauge, *supra* note 134, at 693. For collections of cases relying on footnote 10, see 1A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 212.7, at 166 (3d ed. 2006) and C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirements for State Action Antitrust Immunity: The Case of State Agencies*, 41 B. C. L. Rev. 1059, 1063--64 (2000).

[149] *See, e.g., Earles*, 139 F.3d at 1041; *Hass v. Oregon State Bar*, 883 F.2d 1453, 1459 (9th Cir. 1989).

Public Accountants of Louisiana,[150] the Fifth Circuit declined to apply *Midcal*'s supervision prong to a state board, and thus rejected Sherman Act claims against it.[151] The opinion reasoned that Louisiana's Board of Certified Public Accountants "is functionally similar to a municipality" since "the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition." Similarly, in *Hass v. Oregon State Bar*, the Ninth Circuit held that the state bar, as an agent of the state Supreme Court, "is a public body, akin to a municipality for the purposes of the state action exemption." The court cited the board's three (of fifteen) non-lawyer members and its public meetings and open records as evidence of the board's "public" nature. 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 to its claim of immunity.[152]

Not all courts have been comfortable eliding *Midcal*'s second prong when considering action by a state agency, especially when that agency is an occupational licensing board. But these holdings are either weak or narrow, and so offer litigants little hope in succeeding in an antitrust suit against a professional board.

Before last year, the precedents supporting the requirement of supervision for licensing boards were weak because they at most implied, without squarely holding, that supervision would apply. For example, In *FTC v. Monahan*,[153] then-Judge Breyer writing for the First Circuit rejected a licensing board's claim that state action immunity automatically prevented it from having to comply with a federal subpoena in an antitrust case. The court explained that whether the state supervision condition applied "depend[ed] on how the Board functions in practice," which in turn depended on the information requested in the subpoena. 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.[154] Similarly, the Ninth Circuit, in an opinion that does not cite its somewhat contrary opinion in Hass, observed that a board "may not qualify as a state agency" because it has private members with "their own agenda which may or may not be responsive to state labor policy."[155] As in Monahan, there was no merits opinion after the remand.

Without a case squarely holding a licensing board to antitrust scrutiny, precedent like, *Hass* and *Earles* had been enough to cause scholars to assume away the possibility of an antitrust suit against a licensing board and to deter litigants from pursuing such suits in significant number.[156] If they acknowledged that

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[150] 139 F.3d 1033 (5th Cir. 1998).
[151] *Id.* at 1041.
[152] 883 F.2d 1453, 1459 (9th Cir. 1989).
[153] 832 F.2d 688 (1st Cir. 1987).
[154] *Id.* at 690.
[155] Wash. State Elec. Contractors Ass'n, Inc. v. Forest, 930 F.2d 736, 737 (9th Cir. 1991).
[156] *C.f.* Havighurst, *supra* note 39, at 597 (observing that despite the FTC's success in a case against the Texas State Board of Accountancy, "[t]here were few follow ups of this kind.").

question of *Parker* immunity for occupational boards was technically open as a matter of doctrine,[157] they seemed to assume that as a practical matter the courtroom door was closed.

Last year, the Fourth Circuit took these holdings out of the hypothetical realm and squarely held a licensing board to Midcal's second prong, thus creating a circuit split with the Ninth and Fifth Circuits. But its holding, unfortunately from our point of view, is very narrow; it would leave many boards as presently comprised immune from suit. In *North Carolina State Board of Dental Examiners v. FTC*, the Fourth Circuit upheld an FTC decision that struck down North Carolina's dentistry board's claim for immunity based on its failure to show adequate supervision.[158] In a lengthy opinion below, the Commissioner had explained that whether an entity must satisfy *Midcal*'s supervision prong depended 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,"[159] 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." The panel concluded that a board dominated by practitioners who were elected by other industry members fit that description.

But as the concurrence highlighted, under the rule of the case, practitioner-dominance is not sufficient to show that a board is a "private actor" in need of state supervision. The concurrence explained that the case's holding "turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market." Under the Fourth Circuit's rule, boards comprised of private competitors appointed by a governor (ubiquitous among licensing boards[160]) would not be subject to Midcal's supervision prong and therefore would almost always enjoy Parker immunity. Thus while North Carolina Dental Examiners, Hass, and Earles do form a circuit split, the law on the side of holding boards to both Midcal prongs is relatively narrow and weak, offering antitrust plaintiffs little hope of holding a board to strictures of the Sherman Act.

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 wishing to challenge the actions of state licensing boards is to make a constitutional claim.[161] Like all state regulation,

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[157] Some scholars have recognized the doctrinal uncertainty. *See, e.g.*, Bona, *supra* note 39, at 42; Bobrow, *supra* note 39, at 1489.

[158] N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607 (2011).

[159] *Id.*, at 8. In this respect, the opinion echoes the FTC's State Action Task Force Report, which advocated requiring supervision for "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." STATE ACTION TASK FORCE, *supra* note 63, at 55, *quoting* AREEDA & HOVENKAMP, *supra* note 148, ¶ 224 at 501. See also *id.* at ¶ 227b, ¶ 224a.

[160] Almost all the licensing boards we surveyed are appointed by the governor. See Appendix A.

[161] Katsuyama, *supra* note 134, at 567--69.

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.[162] Similarly, equal protection requires that states distinguish licensed professionals from those excluded from practice on some rational basis related a legitimate state goal.[163] The two analyses typically conflate into one question: did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest?[164]

That burden is easily met, as is illustrated by the leading Supreme Court case on the constitutionality of professional licensing schemes. In *Williamson v. Lee Optical*,[165] the Supreme Court upheld a state statute preventing opticians from fitting patient's existing lenses in new frames without a prescription from an ophthalmologist or optometrist.[166] 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. The Court implicitly recognized a liberty right under the due process clause to pursue one's chosen occupation.[167] But since that right is not sufficiently "fundamental" to give rise to strict scrutiny, and because opticians are not a protected class under the equal protection clause,[168] both claims were subject to rationality review.[169] The Court rejected the challenge, making clear that any possible justification for the restriction, however thin, was enough.[170] Other cases have further held that, to survive rationality review, the proffered justification need not have actually motivated the legislature; it may be post-hoc and prepared only for litigation.[171]

The Supreme Court has only once found an occupational licensing restriction to fail rationality review, and then only because an otherwise valid licensing requirement was unlawfully applied to an individual. Like most states, New

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[162] Anthony B. Sanders, *Comment: Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 671--74 (2003-2004).

[163] *Id.* at 674--78.

[164] Katsuyama, *supra* note 134, at 567--69.

[165] 348 U.S. 483 (1955).

[166] *Id*, at 486. 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.

[167] Although the *Lee Optical* court did not make this explicit, subsequent cases have. *See, e.g. Meadows*, 360 F.Supp.2d at 813 ("The right to pursue to '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)).

[168] *See* Craigmiles v. Giles, 312 F.3d 220, 223--24 (6th Cir. 2002) ("Although the licensing requirement has disrupted the plaintiffs' business, the regulations do not affect any right now considered fundamental and thus requiring more significant justification.").

[169] *Lee Optical*, 348 U.S. at 487--88.

[170] *Id.* at 487 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." 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.*

[171] Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 905--07 (2005).

Mexico requires attorneys to exhibit good moral character in order to sit for the bar exam. In *Schware v. New Mexico*,[172] the Court found such a licensing requirement, on its face, to pass rationality review, but it found that the New Mexico Supreme Court had acted irrationally when it denied a recovered communist permission to sit for the exam. Because of its politically-charged subject matter, *Schware* has largely been limited to its facts, and in any case it expressly approved of a state's ability to require even so subjective a quality as "good moral character" of its professionals.[173]

In applying this Supreme Court precedent 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*,[174] 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.[175] Similarly, a California district court upheld the California Structural Pest Control Board's requirement that exterminators of rats and pigeons, but not those of skunks and squirrels, obtain a state license.[176]

One circuit has 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*,[177] distinguished *intrastate* protectionism, which it considered constitutionally permissible, from *interstate* protectionism, which it acknowledged was illegitimate under the dormant commerce clause.[178]

Contrary holdings are rare. The Sixth Circuit gave the campaign to invalidate anticompetitive state licensing on constitutional grounds[179] its most significant victory in *Craigmiles v. Giles*.[180] Using reasoning explicitly rejected by *Powers*, the court invalidated Tennessee's restriction on unlicensed casket sales. The *Craigmiles* court was unusually skeptical about justifications advanced by the state board, who argued that shoddy caskets presented a public health risk.[181] The court

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[172] 353 U.S. 234 (1957).
[173] *Schware*, 353 U.S at 239.
[174] 360 F.Supp.2d 811, 813 (M.D.La 2005).
[175] The court quoted the testimony of a retail florist, testifying as an expert, to support the notion 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 have a broken wire... and I think that because of this training, that prevents the public from having any injury." *Id.*
[176] Merrifield v. Lockyer, 388 F.Supp.2d 1051 (N.D.Cal. 2005). It was enough to pass rationality review that the covered pests were more commonly found inside structures than the non-covered pests, suggesting they were a more natural target for regulation. *Id.*
[177] 379 F.3d 1208 (10th Cir. 2004), *cert. denied* 544 U.S. 920 (2005).
[178] *Id.* at 1219.
[179] The public interest law firm Institute for Justice is at the forefront of this movement, and many of the cases cited in this section were argued by their attorneys. *See* www.ij.org.
[180] 312 F.3d 220 (6th Cir. 2002).
[181] *Id.* at 225.

found that only one justification did not reek with "the force of a five-week-old, unrefrigerated fish,"[182] and that was the monopoly profits it allowed funeral directors to collect in selling coffins.[183] Unlike the *Powers* court, the Sixth Circuit deemed such economic protectionism "illegitimate" and invalidated the restrictions because it failed even "the slight review required by rational basis review."[184]

Powers' condemnation of *interstate* protectionism suggests that the "dormant" commerce clause may be an alternative means of attacking the constitutionality of occupational licensing restrictions,[185] but cases brought on this theory have failed. Most states do not recognize occupational licenses from other states, and plaintiffs have argued that such "non-reciprocity" discriminates against out-of-state commerce in favor of in-state interests in violation of the commerce clause. But courts have rejected this claim, explaining that states have a legitimate interest in applying their own particular requirements to professionals. "Non-reciprocity" licensing schemes pass rationality review as long as they apply the same licensing requirements to applicants applying from within the state and to those coming from outside.[186]

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 boards' authority. Constitutional suits have done little to solve the problem. This section makes the normative case for lifting antitrust immunity for state licensing boards. It begins by illustrating the close fit between the Sherman Act's purpose and the economic harm from heavy-handed licensing regulation. We argue that it is antitrust, not constitutional law, that provides the most logical and effective mechanism to evaluate the costs and benefits of occupational licensure.

We then contend the 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* revealed, concerns for federalism are at their height when federal laws displace state regulations enacted by a locally

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[182] *Id.* at 225 (quoting *US v. Searan*, 259 F.3d 434 (6th Cir. 2001)).

[183] *Craigmiles*, 312 F.3d 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.

[184] *Id.* at 228--29.

[185] *See also* 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.").

[186] *See, e.g.*, Locke v. Shore , 634 F.3d 1185 (11th Cir. 2011), Kirkpatrick v. Shaw, 70 F.3d 100, 103 (11th Cir. 1995); Scariano v. Justices of the Supreme Court of Indiana, 38 F.3d 920, 928 (7th Cir. 1994).

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[187]—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. At bottom, both the *per se* rule and the rule of reason ask a single question: Is competition (and therefore 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.

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 context should be the same: Does the combination, on net, improve consumer welfare?[188] To ensure that this important question is asked and answered in the licensing context, antitrust law and its tools for balancing anti- and pro-competitive 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 illustrated by showing that many restrictions promulgated by occupational boards are functionally identical to business practices held unlawful under §1. To cut hair legally in Georgia, a candidate must pass a test designed by her would-be competitors proving she can file and polish nails.[189] But when a gas burner manufacturer was denied approval by a private standard-setting association that used a test "not based on objective standards," but rather influenced by his competitors, the Supreme Court found Sherman Act liability

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[187] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

[188] *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).").

[189] GEO. STAT. § 43-10-1 et seq. *available at* http://sos.georgia.gov/acrobat/PLB/laws/28_Cosmetology_43-10.pdf.

appropriate.[190] Similarly, Ohio attorneys cannot advertise their services using the words "cut rate" or "discount" or "lowest" to describe their fees without facing sanction from the licensing board.[191] But similar restrictions on truthful price advertising, when imposed by private associations of competitors rather than as a licensing requirement, have been found *per se* illegal.[192] And all lawyers must prove their "good moral standing" to join a state bar, but when a multiple listing service 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. It failed Sherman Act scrutiny because it gave the listing service the power to exclude competitors in arbitrary and anticompetitive ways.[193]

Sometimes the match between a licensing restriction and an unlawful private restriction on trade is more analogical than literal, but even here the anticompetitive risk is the same. For example, non-recognition of out-of-state licenses subdivides the national market for services and insulates professionals in one state from competitors in another. Market allocation, *per se* illegal under §1 of the Sherman Act when agreed to by private competitors, has a similar economic effect. Similarly, when a licensing board dominated by practitioners tightly controls the standards of professional practice, it acts like 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.[194]

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 decision-making 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—against professionals who break the rules. Finally, most cartels must fend off entry by new competitors from outside the cartel hoping 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.

The similarities between cartel activity and licensing restrictions are highlighted here to suggest that licensing implicates some of the same

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[190] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

[191] Ohio Rules of Professional Conduct, Rule 7.1 comment 4, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf.

[192] *See* AREEDA & HOVENKAMP, *supra* note 148, ¶2023 (collecting cases).

[193] United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

[194] AREEDA & HOVENKAMP, *supra* note 148, ¶ 2230. *C.f.* C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952).

anticompetitive risks that private activity does, and so is a natural target for 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 be the same. As we explain in detail in Part IV, *per se* condemnation of board activity is inappropriate, and under our proposed modification to the rule of reason to fit the licensing context, some restrictions will be approved that would be condemned if used by a private cartel. 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 such a 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 importantly, they are almost impossible to win.[195] Second, successful challenges vindicate an individual's right to work, not a consumer's right to low prices driven down by robust competition. It is a happy coincidence that often times these interests are 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. It is antitrust, 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."[196] A law for which "there is any conceivable state of facts that could provide a rational basis," will survive constitutional challenge;[197] even the flimsiest justification will do. The legitimizing rationale may be post-hoc, unsupported by facts or evidence,[198] and even supplied by the judge himself[199] if the state fails to articulate a sufficiently 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."[200] With so many ways to validate a statute, plaintiffs are forced to prove a negative, a nearly impossible task.[201]

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[195] *See generally* Neily, *supra* note 171.
[196] Sanders, *supra* note 162, at 692.
[197] Beach Communications v. FCC, 508 U.S. 307, 313 (1993).
[198] Neily, *supra* note 171, at 905--07.
[199] 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 (2011-2012) (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").
[200] Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).
[201] Sandefur, *supra* note 188, at 500 n. 234.

When constitutional suits are successful, the right vindicated is 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 the right to work means more competitors in the profession, which in turn could mean lower prices for consumers. But the campaign to invoke constitutional rights against heavy-handed professional regulation has been framed as a revival of the right to livelihood,[202] 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* to justify a hands-off approach.

Nowhere is it more apparent that constitutional law and antitrust law serve different purposes than in the *Powers v. Harris* decision. 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. The court noted that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[203] Although other circuits have held otherwise, the Supreme Court denied certiorari to resolve the circuit split, essentially blessing 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*. 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, showing that although the various accounts differ in other ways, they all agree that self-dealing, unaccountable decision-makers should face antitrust liability. We argue that state licensing boards fall squarely in this category. Therefore, all practitioner-dominated

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[202] *See, e.g.* McCormack, *supra* note 70.
[203] *Powers*, 379 F.3d at 1221.

boards should be subjected 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.[204] Likewise, much ink has been spilled in the law reviews over the normative commitments behind the Court's handwringing. Do we require state supervision because without it federalism, as the underlying justification for immunity, is not implicated? Or do we require supervision because we trust governments, but not private entities, to restrict competition only to the extent that it serves the public interest? Since *Parker,* justifications for antitrust federalism resting solely on comity have come in for harsh treatment by both commentators and courts.

Instead, the law reserves state action immunity for bodies whose structure and process ensure they act in the public interest. In other words, political accountability is the price a state must pay for antitrust immunity.[205] So held the Court in *FTC v. Ticor Title Insurance Company*,[206] explaining that "[s]tates must accept political responsibility for actions they intend to take."[207] The Court emphasized that deference to state regulation is justified only when the state can be held to account for its decisions: "Federalism serves to assign political responsibility, not to obscure it."[208]

This sentiment is echoed in the scholarship interpreting *Midcal*. Probably the three most cited commentators from the debate are William Page, John Shepherd Wiley, and Einer Elhauge, all writing within a decade after *Midcal*, and all calling for reforms to state action doctrine that would more effectively sort captured from politically legitimate state regulation. Each proposes a different theory and disagrees with the others in significant ways, but all their arguments would deny immunity for licensing boards, at least as they presently operate.

In the year following *Midcal*, William Page applauded the "clear articulation" requirement as protection against industry self-dealing through state agency capture.[209] 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. To Professor Page, these legislative statements assured "valid popular consent" for anticompetitive

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[204] Note 123, *supra*, lists the cases decided after *Midcal*. The cases between *Parker* and *Midcal* include: City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); and *Goldfarb*, 421 U.S. 773 (1975).

[205] *See* Havighurst, *supra* note 39,, 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.").

[206] 504 U.S. 621 (1992).

[207] *Id.*, at 636.

[208] *Id.*

[209] William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 BOSTON U. L. REV. 1099 (1981).

regulations, even if the details were later hashed out by an unelected agency or committee. Five years later, John Shepard Wiley, Jr. took an opposing view in criticizing *Midcal*,[210] but like Professor Page, he assumed that an essential ingredient of antitrust federalism is public participation. His prescription allowed for Sherman Act scrutiny for state restrictions that resulted 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.

Einer Elhauge disagreed with the framing of the *Midcal* debate (by the Court in post-*Midcal* cases like *324 Liquor Corp. v Duffy*[211] and *Fisher v. City of Berkeley*[212] and by commentators like Page and Wiley) precisely because it obscured the role that politically-unaccountable self-dealing played in antitrust federalism. 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."[213] 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.[214]

When the FTC published its State Action Task Force Report in 2003, it adopted what had become the consensus view: antitrust federalism was defensible only when a state could be held to account for an anticompetitive restriction.[215] According to the report, the purpose behind state action immunity is to exempt laws and regulations that restrict competition and thus harm some market participants but that also, on balance, benefit the public and so are attractive to voters. Immunity is necessary because nearly all government action changes the

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[210] John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986).
[211] 479 U.S. 335 (1987).
[212] 475 U.S. 260 (1986).
[213] Elhauge, *supra* note 134, at 685.
[214] Many other scholars have writing on this topic have said that separating politically accountable decision making from self-dealing should be the main goal of the state action test. *See, e.g.*, Hovenkamp, *supra* note 185, at 633 (arguing that "antitrust need not countenance restraints in which the effective decision makers are the market participants themselves."); 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 if 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 (1998); 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"); David McGowan & Mark A. Lemley, *Antitrust Immunity: State, Action and Federalism, Petitioning and the First Amendment*, 17 Harv. J. L. & Pub. Pol'y 293 (1994); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227 (1987); Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291 (1987).
[215] STATE ACTION TASK FORCE, *supra* note 63, at 14.

competitive environment and creates some market losers. But the report recognized that meaningful voter support is necessary to justify immunity.

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

These perspectives on *Parker* and *Midcal* suggest that where the temptation of self-dealing is especially high and the potential for holding officials accountable especially low, state action immunity is not appropriate. For state licensing boards, both conditions hold, to which the absurdity of some licensing restrictions can attest. First, and most importantly, under the current regime, occupational licensing is left up to members of the profession themselves. Second, the group most hurt by excessive professional restrictions—the consumer—is particularly ill-represented in the political process of licensure. When *Parker* is used to protect incumbent professionals in their efforts 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."[216]

Most state licensing boards, as our study of boards in Florida and Tennessee confirms, are dominated by practitioners in the field.[217] On the one hand, practitioner-dominance is inevitable. Tailoring restrictions to inure to the benefit of the public (restrictions that tend to encourage safe and competent practice) usually requires expertise in the profession. Lay people are unable to make judgments about the quality and risks of professional service; indeed that is one of the pro-competitive justifications behind professional regulation in the first place. But the need for expertise creates a problem. It means the fox guards the hen-house; 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.

Public participation in state board activity is very low. The typical state board is comprised of appointed members[218] and board meetings are technically open to the public but usually unattended by nonmembers, although most states' sunshine laws require the publication of minutes. Individual consumers lack the incentive to participate in 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 a cheaper haircut. Lobbying groups could fill that void by aggregating the interests of consumers, but even with this mechanism, meaningful consumer participation in the political process is difficult, as public choice theory illustrates. The most motivated public participants are the practitioners at the margins of the profession hoping for entry. As discussed above, sometimes the incentives of would-be professionals are aligned with consumers, but not always.

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[216] *Midcal*, 445 U.S. at 943.

[217] *See supra*, TAN 38&39 and Appendix.

[218] Often nominees are selected from a lists provided by the professional group itself. Havinghurst, *supra* note 39, , 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. at 627.

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. His normative vision of antitrust federalism, modest compared to Wiley's and Page's in its call for exposing state regulation to antitrust liability, would deny immunity to entities whose members stand to financially profit from anticompetitive regulation. This would certainly describe the typical practitioner-dominated licensing board. As Elhauge's observed, "antitrust 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."[219]

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 a subtle and debatable fact; some would argue that the Federal Reserve Board and staff is captured by Wall Street because so many of its members come from or go back to Wall Street banks, or because the banks are allowed so much access that members of the board begin to think like bankers. Whether the Fed is captured in these senses depends 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, they are literally and explicitly captured since practitioners enjoy a majority—often a supermajority—among the decision makers.[220] Licensing boards are born captured.

Cases like *Hass* and *Earles* that exempt state licensing boards from *Midcal*'s supervision prong are wrong because they fail to recognize this basic feature of board decision-making. These cases analogize licensing boards to municipalities because boards are "public," citing open meetings, public-minded mandates, and an affiliation with the state. But the cases 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 citizens. A more searching, case-by-case approach, and one advocated by the FTC in *North Carolina Board of Dental Examiners*, 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 pursing their own interests rather than state policy."[221] The FTC, echoing Elhauge's argument, finds that risk whenever the entity "consists in whole or in part of market participants," and we agree.[222]

Such an entity differs significantly from the municipality in *Hallie*. In that case, the Court found that when a municipality regulates "there is little or no

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[219] Elhauge, *supra* note 134, at 672.

[220] Here we have, to use Wiley's terminology, direct evidence of capture. He suggests judges "demand plaintiffs... identify producers who profit from the regulation's competitive restraint and who played a *decisive* political role in its adaptation." Wiley, *supra* note 210, at 769.

[221] STATE ACTION TASK FORCE, *supra* note 63, at 15.

[222] *Id.* at 55.

danger that it is involved in a *private* price-fixing arrangement."[223] Although the Court does not provide the reasoning for this conclusion, it is easily supplied. A municipality makes decisions through elected officials and civil servants. These decision-makers are charged with the public good,[224] and although only a very antiquated view of government would hold that their own self-interest is irrelevant, their actions achieve the minimum level of accountability and democratic legitimacy that we require to grant immunity.

The flaw of *Hallie*'s footnote is its failure to articulate what state agencies have in common with municipalities that justifies the assumption that "there is little or no danger" of self-dealing in both cases.[225] There is a diversity of state agencies[226] and for many it is undoubtedly true that they can be presumed to pursue the state's governmental interest, but no one could seriously think the same of a group of competitors appointed to regulate their profession.[227] It would require blindness to Adam Smith's sage 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."[228]

Further, *North Carolina Board of Dental Examiners*'s reliance on industry-election is fatal to its ability to meaningfully curb occupational licensing abuses. To be sure, election by fellow competitors is probably even worse for the fate of competition under the board's authority, since industry members can be sure to select members who are most likely to protect incumbent interests. But the notion that governor-appointment can meaningfully solve the problem of self-dealing is unrealistic. Indeed all influential accounts of antitrust federalism, from Professor Wiley's focus on capture to Professor Elhague's focus on financial self-interest place the identity of the decision-makers, not their means of appointment, central to the question of immunity. *North Carolina*'s narrow 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 responsibility to oversee their activities.

Sound public policy dictates that any consortium of competitors be supervised by disinterested state agents, be subject to antitrust, 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, but simply more powerful and therefore more dangerous. Supervision by disinterested state agents

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[223] *Hallie*, 471 U.S. at 47.

[224] *See generally*, Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J. L. & PUB. POL'Y 203 (2000-2001).

[225] Bobrow, *supra* note 39, at 1500.

[226] As the FTC has noted, "[w]hatever the case may be with respect to state agencies generally, however, the Court has always been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory boards consisting of market participants." *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 619. Clark Havighurst has also advocated a case-by-case analysis of state agencies. *See* Havighurst, *supra* note 39,, at 598.

[227] *See id.*, at 596--99.

[228] ADAM SMITH, WEALTH OF NATIONS, 1776.

should be a minimum for a state board to receive antitrust immunity under *Hallie* and *Midcal*, the flourish in *Hallie's* footnote notwithstanding. If true independence is impossible, as is arguably true in the licensing context where the expertise of the regulated is essential to the agency's decision-making process, the need for active supervision to justify immunity is at an apex. Such a move would adopt the very common sense view we advocate: that competition law cannot abdicate when a powerful consortium of competitors regulates its own industry, even if the state has granted that power. Thus the Supreme Court should use the circuit split as an opportunity to embrace the step taken by the Fourth Circuit in *North Carolina* and then take it further by clarifying that all practitioner-dominated boards are subject to both *Midcal* prongs, regardless of their appointment process.

In one sense, such a holding is 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 Insurance Commission, for example, has an elected politician as its current head (in this case, one who never worked in the insurance industry). Likewise, many state agencies are comprised dominantly of civil servants with only nominal participation from members of industry. But in another sense, the change would be significant. Requiring state supervision for licensing boards claiming state action immunity creates the potential for sweeping changes to how over a third of the nation's workforce is regulated, since most licensing boards would fail the supervision prong if subjected to it.

IV. THE MECHANICS OF ANTITRUST LIABILITY FOR STATE LICENSING BOARDS

Since such a holding 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 would proceed under this new regime. Since boards resemble private professional associations in their composition and incentives, the mechanics of subjecting them to antitrust scrutiny can be borrowed from that context: §1 of the Sherman Act provides the cause of action and the parties who sue and are sued parallel those in a traditional §1 suit. This section also recommends a modification to the rule of reason necessary in the licensing context; the standard should allow as procompetitive arguments gains to public safety and quality of service even when these gains flow directly from limitations on competition. It then addresses questions related to standing and the single entity doctrine. Section B then speculates about how states will react to this new regime and evaluates the competitive consequences of those reactions.

A. Imagining a New Regime

Some rules, like the traditional rule of reason, should be altered to accommodate arguments particular to licensing. But other doctrines, like 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 it, and since Standard Oil[229], only unreasonable restraints of trade are held illegal. Restraints without acceptable justification or whose justifications are too implausible are either held to be inherently unreasonable (i.e., per se illegal) or illegal under a quick-look rule of reason. The full-blown rule of reason is used to ferret out the good and the bad for restraints that might be justified to determine if the restraint is reasonable.

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."[230]. The central question under a section 1 rule of reason analysis is whether a restraint will tend to substantially limit competition. Justice Brandeis formulated the question as whether the restraint "is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[231] Modern courts frame the question as one of balancing pro and anticompetitive effects of the restraint to determine its central tendency. ("the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit," once the defendant establishes procompetitive benefit; U.S. v. Microsoft 253 F.3d 34 (D.C. Cir. 2001)).

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*[232] rejected a professional society's rule hindering comparison price-shopping for engineering services. The engineers argued that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare." The Court called the engineers' attempt to so justify the restraint "nothing less than a frontal assault on the basic policy of the Sherman Act."[233] In particular, public safety benefits that flow directly from a reduction of competition will not count according to *Professional Engineers*, because "the statutory policy precludes inquiry into the question whether competition is good or bad."

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[229] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[230] National Society of Professional Engineers v. United States, 435 U.S. 679
[231] Chicago Board of Trade v. United States 246 U.S. 231 (1918)
[232] 435 U.S. 679 (1978).
[233] *Id.* at 695.

Under a conventional rule of reason analysis, the agreement must actually directly enhance competition in some way such as when a group of copyright holders create a new and valuable product together.[234] Of course, the most plausible benefits of many and perhaps most restraints of licensing boards flow directly from their limitations on competition. Curing the lemons problem or eliminating externalities might not be seen as procompetitive under the Engineers holding.

The basic policy justifications for licensing boards flow from the belief that free and unfettered competition will injure the public by lowering the quality of service. Under *Professional Engineers*, such justifications might not be viewed as procompetitive, and as a result the boards actions might be held illegal under a quick-look rule of reason or even held illegal per se. This, we think, would be a step too far.

The argument that boards benefit the public by protecting them from charlatans is not inherently implausible and deserves respect. We therefore advocate a modified rule of reason that would allow public safety and quality enhancement justifications to be argued on behalf of licensing boards even when these alleged benefits flow directly from the elimination or limitation of competition. When courts balance the competitive effects of a licensing restriction, they should allow boards to place service quality and public safety benefits on their side of the scale.

Modifying the rule of reason in this way to incorporate public health and safety arguments may not be as large a shift in doctrine as it appears at first glance. Although courts often purport to reject public interest justifications out-of-hand as always as irrelevant to a §1 analysis, this rejection is neither universal nor complete. Especially in the context of reviewing restrictions imposed by professional associations, courts have displayed a willingness to consider appeals to health and safety.

Even in *Professional Engineers*, the Court acknowledges that *Goldfarb*, decided just three years earlier by the Court, "noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason" even if they would be viewed as violating the Sherman Act in another context.[235]

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, the Third Circuit in *United States v. Brown University*[236] remanded a suit challenging an agreement among elite universities that failed the district court's quick look. The appellate court called for a full-blown rule of reason analysis that placed, on the pro-competitive side of the scale, justifications the lower court had rejected as "social welfare justifications." The Court said that proper rule of reason analysis would consider the benefits of making higher education available to the "needy"

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[234] See the blanket licenses in Broadcast Music v. Columbia Broadcasting System 441 U.S. 1 (1979).
[235] *Id.* at 696.
[236] 5 F.3d 658 (3d Cir. 1993).

and of having a diverse student body at the elite schools.[237] 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 said that if that were the case, it would survive Sherman Act scrutiny.[238]

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 *Brown University,* the Supreme Court in *California Dental Association v. FTC* remanded a challenge against a dental association's advertising ban that failed the lower court's quick look.[239] By calling for a not-so-quick 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.[240]

Cal Dental and *Brown University* set a foundation for the proper standard for Sherman Act analysis of licensing board restrictions. As discussed in Part II, *supra,* unregulated markets for professional services can harm social welfare in two ways. First, allowing consumers a choice between low quality, low price services and high quality, high quality services is inefficient because those consumers choosing the low quality option will not fully internalize its costs (the externalities problem). Second, 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 average or minimum quality of service will be higher than under an unlicensed regime.

First, courts should accept in the context of licensing, as "procompetitive" justifications, arguments that a restriction improves consumer information or raises quality of service. 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 pro-competitive effects to the suit; like in all Sherman Act cases, empirical data will be more convincing than a purely theoretical argument. Second, claims of quality improvement should be specific and tied to a theory of market failure that justifies government interference.[241] 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

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[237] *Id.* at 677--78.
[238] *Id.* at 677.
[239] 526 U.S. 756 (1999).
[240] *Id.* at 779--81.
[241] This is similar to one of Wiley's requirements for lifting state action – that it does not "respond[] directly to a substantial market efficiency." Wiley, *supra* note 210, at 756.

another way, courts should consider whether there are less restrictive alternatives to the challenged licensing restriction.

This system for analyzing a licensing restriction—identifying a legitimate reason to license, 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 (although it is more searching than the rationality review currently applied to licensing restrictions.) But it can also be understood as a framework for the balancing called for by traditional rule of reason. Under the first two prongs, a court places the benefits on the "pro-competitive" side of the scale. Under the last prong, the court places the restriction's competitive burden on the "anticompetitive" side of the scale, asking if there is a way less destructive to competition to achieve the same benefits claimed for the restriction.

Some specific examples will illustrate the kinds of arguments that will be persuasive to a court analyzing a state board's restriction under the rule of reason. Louisiana's rule forbidding casket sales by anyone other than a licensed funeral director would fail the first prong of the test. There is no empirical evidence that, in states without such a restriction, caskets are of poor quality or that consumers are unable to determine the value of a casket. Further, the state would have difficulty raising even a theoretical argument that inferior quality caskets present a public health and safety issue since 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, in states where retail casket sales are legal, one can comparison shop for them on websites like Amazon where one finds consumer reviews, detailed specifications, and photos. The restriction fails the first prong because there is no significant market failure—in practice or theory—that the restriction is designed to address.

Restrictions on the practice of nurse practitioners would fail the same 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, where the effects of poor care are felt everywhere from emergency rooms and inner-city clinics, to schools and the workplace. But although the state could make out a good 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 unsupervised ones. Licensing restrictions that limit a nurse's ability to perform these tasks unsupervised would fail the first prong because there is no available data suggesting that such restrictions improve the quality of care.

State cosmetology boards' attempts to bring African hair braiding under their jurisdiction would fail the second prong of the analysis. Whatever health and safety issues arise from the unlicensed practice of braiding, they are not addressed by requiring practitioners to attend up to 1,800 hours of schooling on use of chemicals,

dyes, and other beauty techniques that do not relate to African 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 school teaches nothing about the practice.[242]

If the restriction survives the first two prongs, the court will 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. But making teeth floaters attend veterinary school is an outsized requirement. Perhaps the state could justify a less restrictive licensing requirement, specific to horse teeth floaters, that 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 regulation 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.[243] Certification is similar to licensing in that the state sets educational or testing criteria for professionals, and passing these hurdles affords the professional a certification from the state that signals minimum quality and competency to consumers. But unlike under licensing schemes, uncertified practitioners may still practice, as long as they do not claim the title of "certified." Certification thus solves the information asymmetry problem, since consumers seeking high quality service can pay more for service from 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. Louisiana's restriction on unlicensed flower arranging would likely fail this test, since at best the market failure in the flower industry is information asymmetry, not externalities, and so could be easily addressed by offering state certification programs to florists hoping to attract the most discerning customers.

2. The Parties: Standing to Sue and Available Damages

Changing the state action regime for licensing boards raises several logistical questions: Who would sue? And what would be the remedy? Would board members pay damages? As a descriptive matter, the answer is relatively easy: lifting state action immunity for state boards means that the parties who sue and are

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[242] *See* Institute for Justice, *Challenging Barriers To Economic Opportunity: Challenging Minnesota's Occupational Licensing Of Horse Teeth Floaters, available at* http://www.ij.org/minnesota-horse-teeth-floating-background#_ftn1.

[243] Michael Pertschuk, *Needs and Licenses, in* OCCUPATIONAL LICENSURE AND REGULATION 343, 347 (Simon Rottenberg ed., 1980); KLEINER, *supra* note 3, at 152-57.

sued would be the same as in a run-of-the-mill §1 case.[244] Government enforcement agencies (such as the DOJ and the FTC) as well as private individuals capable of proving antitrust injury could bring suit against the conspirators, in this case members of an industry serving on a board, seeking equitable and monetary relief. But this raises an important normative question: Does this regime assign incentives to ensure optimal enforcement of antitrust norms? This sub-section argues that, for the most part, it does.

Since local state interests are often furthered by anticompetitive licensing restrictions, federal enforcement will be essential to policing self-dealing. The FTC and the DOJ will be able to bring suits arguing that a given licensing regulation violates the Sherman Act. They will be able to seek equitable relief under Sherman Act §4 and Clayton Act §15 to invalidate an anticompetitive regulation and prevent a board from implementing it. Federal agencies will bring the knowledge, expertise and resources for empirical investigation necessary to identify anti-competitive targets.[245]

Despite their many similarities, licensing boards and private cartels should be viewed differently by criminal law enforcement. 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.

Public enforcement, while essential to effective enforcement of Sherman Act policy, may not be insufficient by itself. 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 individually have enough financial incentive to bring a suit, they could use the class action vehicle, as is common in other areas of antitrust enforcement, to aggregate damages to a litigable amount. And Clayton Act §4, of course, provides plaintiffs with treble damages, thereby strengthening their incentive to sue.

Similarly competitors, most likely would-be professionals, could sue to receive three times the wages they would have earned but for the anticompetitive 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 immunity would mean that professionals could invoke the invalidity of a

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[244] Of course, under the 11th Amendment, federal courts could not entertain suits against the boards as "arms" of the state. But under *Ex Parte Young*, the individual board members could be sued in federal court. *See* Earles v. State Bd. Of Certified Pub. Accountants, 139 F.3d 1033 (5th Cir. 1998).

[245] In fact, even without the added incentive that the power to bring suits provides, the FTC has invested in numerous studies of the economic impact of professional regulation. *See, e.g.*, COX & FOSTER, *supra* note 16; LIANG & OGUR, *supra* note 56. As discussed in Part II, the economics of professional licensing can be complicated, and the DOJ and FTC have access to the necessary data and expertise to properly analyze it.

board's regulation under the Sherman Act as a defense to an enforcement action against them.[246]

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, in licensing board suits: the industry members on the board will be liable for treble damages to competitors and consumers harmed by their agreement.[247] This is the result that obtains under current law when courts deny professional associations state action immunity; *Goldfarb v. Virginia* is an example.[248]

Individual financial liability for board members may seem like an unjust or at least workable regime, but similar liability is imposed on individual state actors for violations of constitutional rights under Section 1983. States have responded to the prospect of financial ruin for their employees by indemnifying them against 1983 suits as a term of their employment.[249] With the deeper pockets of the government available, victims have a meaningful opportunity for compensation. And although individual employees are not personally liable, the indemnification structure gives states the incentive to train and tightly control employee conduct and create disciplinary systems to deter violations. So, too might states chose to indemnify 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 §1's requirement of agreement, since board members meet face-to-face and explicitly agree on licensing restrictions, often by formal majority vote. And these agreements are among competitors; licensing boards often have only nominal representation from non-professionals. Boards may argue, however, that their rules and restrictions are not the product of a conspiracy, since as a board they operate as a single entity. Conspiring with others on the board, so the argument would go, is like conspiring with one's self.

This argument is likely to fail. The Supreme Court has held that professional associations, similar to boards in composition and incentives, are conspiracies under §1. Recently, the Supreme Court rejected the National Football League's argument that individual teams could not conspire since together they were a single

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[246] The Supreme Court used state action to reject just such a defense in *Bates*, 433 U.S. 350 (1977), where lawyers, advertising their services in contravention of the bar's rules, argued that the rule was invalid under the Sherman Act. But in a regime where state licensing boards could not invoke state action immunity, such a defense to board enforcement would be available.

[247] Page & Lopatka, *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 test for immunity leaves private parties exposed to the whole panoply of antitrust remedies.").

[248] The plaintiffs, a class of consumers of legal services, sued the state bar association for treble damages for Sherman Act violations. The Supreme Court, in holding that the bar acted in contravention of state policy and so without adequate state delegation, remanded the case to allow the class to hold individual members of the bar liable for treble damages. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[249] In the case of law enforcement, the state or local government that employs the officer typically promises to indemnify police officers in the case of a 1983 suit.

entity that had a united economic incentive to maximize joint profits from licensing team merchandise and ticket sales. 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"[250] in violation of §1. To the extent that there was a unitary financial goal among the teams it was to suppress competition among themselves.[251]

Although the Supreme Court has not considered whether a state licensing board is a single entity under §1, the FTC has on several occasions rejected this defense to Sherman Act liability. In *Massachusetts Board of Registration in Optometry v. FTC*,[252] the FTC explained that the optometry board, in passing restrictions on advertising, was not acting as a single entity: "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."[253] 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.[254]

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 consider how that system will likely adjust. As this section illustrates, states wishing to regulate the professions without having to answer to an antitrust suit will have several options. But 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 towards politically accountable, procompetitive regulation.

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[250] Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2212 (2010) 2212.

[251] *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.").

[252] 110 F.T.C. 549 (1988).

[253] *Id.* at 43. 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 had a personal financial interest in excluding non-dentist teeth whitening services," it could not be said to be acting to further a financial goal independent of those of the individual members. In the Matter of The North Carolina Board of Dental Examiners, 2011 WL 6229615 at *20 (F.T.C. 2011).

[254] See *Daniel v. American Board of Emergency Medicine* 802 F.Supp. 912 (W.D.N.Y. 1992) (holding that private certification association can be a §1 conspiracy).

1. Actively Supervising Board Activity

If the Court requires occupational boards to show supervision in order to enjoy immunity from antitrust suit, 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 demanded them.[255] 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 of unjustifiable regulation.

The political process is never perfect and consumer interests will probably always be more diffuse that those of current practitioners, but forcing states to answer for and stand behind a board's restriction on entry and practice exposes these decisions to at least the minimum political accountability that antitrust federalism demands. As the Court explained in *Ticor*, "[f]or 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 is has sanctioned and undertaken to control."[256]

2. Changing Board Composition

Another way in which a state could protect a licensing board from antitrust scrutiny would be to change its composition. As discussed in Part IV.B.3., *supra*, meeting the conspiracy requirement of §1 depends on there being at least two members of a profession on the board. A state could create a kind of safe-harbor for its professional licensing boards by appointing only one professional member to its ranks, and filling out the rest of the board 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 since such a board's decisions are likely to have considered and resolved the concerns raised by a Sherman Act suit.

3. Moving Licensing to the Interior of State Government

States may, however, find that altering board membership to avoid suit is unattractive since the only way to guaranty immunity is to cut down professional participation to token levels or to implement costly mechanisms for supervision. An alternative would be to do more regulation directly through the 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

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[255] *See, e.g.*, Inman & Rubinfeld, *supra* note 214, at 1257 (1997) (concluding that the second *Midcal* prong (requiring state supervision) "gives meaning to the first, for without supervision, interested individuals cannot be assured that their initial participation in the political process will be meaningful."); *but see* Havighurst, *supra* note 39,, at 599 (disagreeing with the federal antitrust agencies apparent belief that "giving greater weight to the supervision requirement is the best way to discourage state licensing and regulatory boards from acting in anticompetitive ways").

[256] *Ticor*, 504 U.S. at 635.

authority are always immune under *Parker*.[257] Such decisions would not be subject to antitrust scrutiny, even under the change proposed in this Article.

This change, like adding meaningful state supervision over board activity, would benefit 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 that are currently absent from professional licensing boardrooms.

Even direct regulation through legislation does not preclude the influence of combinations of private competitors. State legislatures are free, and would also be under our proposed change, to elicit proposals for restrictions from private professional associations. This creates a risk that states will effectively hand over regulatory power to groups like the AMA or the ABA and give collusive private arrangements a rubber stamp in the legislature. Under Supreme Court precedent, these rubber stamps, as sovereign acts, enjoy antitrust immunity.[258]

Parker itself offers a back-stop to these abuses. Where the state delegates rulemaking to a private organization, that organization is subject to *Midcal*'s two-step. As the Court said in *Parker*, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it."[259] Thus in *Goldfarb*, the Court held that the state bar association needed to prove its compliance with state policy in order to enjoy immunity.[260] Further, the legislature's rubber stamp itself will be subjected to political pressures. The electorate may recognize that legislatures lack the expertise to create efficient professional regulation without consulting members of the profession itself. But that does not imply that a mere rubber-stamp of a profession's self-dealing will pass political muster. Requiring that the state place its imprimatur on regulation is at least better than the status quo in which a state may delegate self-regulation to professionals and walk away.

V. CONCLUSION

Licensed occupations have for too long been free to act like cartels while immune from Sherman Act scrutiny. With nearly a third of workers subject to licensing, and the trend upward, 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

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[257] Hoover v. Ronwin, 466 U.S. at 567—68 ("[U]nder the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State, and *ipso facto* are exempt from the operation of the antitrust laws....[A] state supreme court, when acting in a legislative capacity, occupies the same position of that of the state legislature.").

[258] *See Bates*, 433 U.S. at 359.

[259] *Id.* at 341.

[260] *Goldfarb*, 421 U.S. at 790. *Goldfarb* predated *Midcal*, and so did not discuss the supervision prong articulated in that case.

rationalize unfettered self-regulation by the professionals themselves. A balance needs to be struck.

That balance is the same one sought in any modern rule of reason case: a balance 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 any theory of antitrust federalism when those doing the regulation are the competitors themselves, where they are not accountable to the body politic, where they have 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 engaged in trading off competition for public safety and welfare. Without it, self-dealing occupational boards with continue to be cartels by another name.

Appendix C