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ANTITRUST SCRUTINY FOR THE OCCUPATIONS: *NORTH CAROLINA DENTAL* AND ITS IMPACT ON U.S. LICENSING BOARDS

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Introduction

The American system of occupational licensing is under attack. The current regime – which allows for almost total self-regulation – has weathered sustained criticism from consumer advocate groups, academics, politicians, and even the White House itself. But the recent U.S. Supreme Court opinion in *North Carolina Board of Dental Examiners v. FTC*,[1] portends a sea change in how almost a third of American workers are regulated. The case has made it possible for aggrieved individuals and government enforcers to bring suits against most state licensing boards, challenging their restrictions as violating federal competition law. The case has prompted two responses: a flood of antitrust suits against boards, and a panic among states as they scramble to protect licensing boards from antitrust liability. This article describes the current system of professional regulation in the U.S., explains the *North Carolina Dental* opinion and its legal impact, and discusses states' likely responses. The upshot is that in order to protect occupational licensing from antitrust suit, states will have to reform their regulatory systems in ways that will improve the fairness and efficiency of American occupational licensing laws.

1. Occupational Licensing in the United States

Occupational licensing is ubiquitous in the United States: nearly thirty percent of American workers must have a government-issued professional license to legally

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1 135 S. Ct. 1101 (2015).

perform their jobs.[2] The legal institutions that form this complex web of regulation, however, are relatively obscure. For the most part, states, not the federal government, regulate occupational licensing. They do so through boards that create and implement entry requirements, rules of ethics, and standards for discipline. Each state has a separate board for most occupations, with some states having up to forty-nine separate boards. This decentralized system of professional regulation has resulted in a proliferation of state licensing boards – currently there are 1,740 operational boards nationwide – permitting each individual board to operate in relative obscurity.[3] In the aggregate, these nearly invisible institutions deliver a hefty bill to consumers – economists estimate the annual cost of licensing restrictions at around $116 billion[4] – while providing perhaps little in the way of public health and safety.

1.1. Professionally-Dominated Boards

My investigation into the state statutes creating the 1,740 American licensing boards revealed that the vast majority—85%—are required by statute to be staffed by a majority of license-holders in the profession the board regulates.[5] In other words, most American occupational licensing regimes amount to self-regulation: doctors regulate doctors, and barbers regulate barbers. For example, Ohio's state medical board, which is typical, is comprised of twelve members: seven physicians, one osteopathic physician, one podiatrist, and three "public" (non-licensee) members.[6] This composition gives license-holders the ability to vote as a bloc to set the terms of competition even when other board members disagree. This overwhelming degree of professional control would be bad enough, but the empirical data likely understates the problem. Anecdotal investigation into actual board practices reveals that member absences, position vacancies, and even violations of statutory requirements often lead to professionally dominated decision-making even where dominance is not required by statute.[7]

Self-regulation carries with it the familiar risk of self-dealing. Licensing regulations inherently exclude some would-be professionals from the market and set the terms of competition among professional providers. These kinds of restrictions are justified on theoretical grounds as protecting consumer safety, but of course they also can

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2 See Morris M. Kleiner – Alan B. Krueger: Analyzing the Extent and Influence of Occupational Licensing on the Labor Market. *J. Lab. Econ.,* Vol. 31. (2013) 173., 198. (estimating that, as of 2008, 29% of U.S. workers were licensed and noting that licensing is a growing phenomenon in the U.S. economy).

3 Rebecca Haw Allensworth: Foxes at the Henhouse: Occupational Licensing Boards Up Close. *Cal. L. Rev.,* (forthcoming 2017) manuscript at 3.

4 See Morris M. Kleiner: *Occupational Licensing*., *14 J. Econ. Persp.,* Vol. 14. 189, 115 (2000) 189., 115. (estimating the cost of occupational licensing to consumers at $116–$139 billion a year).

5 Allensworth (forthcoming 2017) op. cit. manuscript at 4.

6 *Ohio Rev. Code Ann*., § 4731.01 (West 2016).

7 See Allensworth (forthcoming 2017) op. cit. manuscript at 4.

lead to a less competitive professional environment, which manifests itself in higher prices and lower service availability. Self-regulation means entrusting the delicate balance between competition and regulation to the license-holders themselves – those who have the most to gain from inefficiently restrictive rules.[8] The dominance of professionals on licensing boards means that the fox is asked to guard the hen house. These results should surprise those under the impression that occupational licensing in the U.S. is governmental, which is to say that it is in any measure public or public-regarding. In reality, licensing schemes are run by entities that look more like cartels than governmental agencies.

1.2. Anticompetitive Regulations

The result of self-regulation has been disappointingly predictable. Many licensing requirements seem aimed more at relaxing competition among professionals than at improving public health and safety.

Licensing restrictions can be theoretically justified as addressing market failures that would occur in an unregulated market for professional services. These failures typically involve asymmetrical information about service quality or market externalities in a transaction between a provider and a consumer. The first kind of market failure occurs when the service provider is unable to credibly communicate the quality of his services, and consumers are therefore unwilling to pay a premium for excellent service. Services providers in these circumstances will have little incentive to provide excellent service, since they cannot command a premium for their special efforts, and will therefore provide only the minimum quality the market can bear. This market – famously dubbed the "Market for Lemons" by economist George Akerlof – is inefficient if there are professionals willing to provide, and consumers willing to pay for, high quality service.[9] Licensing regulations can prevent this inefficiency by establishing a "floor" of service quality through strict entry requirements (such as education or examination) and professional standards of practice.

The second kind of market failure occurs as a result of market externalities, which are costs that are visited on society at large, not just the transacting parties. Without externalities, the costs and benefits of an exchange are borne by the parties to that transaction. For example, if I buy a bad cup of coffee, I suffer the harm, and will likely visit a consequence on the seller in the future by not returning with my business. But in some markets, the consequences of poor quality transactions are not fully internalized by the provider and the patient. For instance, the cost of poor quality medical care may be visited not only on the patient but also on the patient's employer, family, and local emergency room. Where transactions create negative externalities, low-quality, low-price transactions may be inefficient. Licensing can

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[8] See Aaron Edlin – Rebecca Haw: Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? *U. Pa. L. Rev.,* Vol. 162. (2014) 1093., 1156.

[9] See George A. Akerlof: The Market for "Lemons": Quality Uncertainty and the Market Mechanism. *Q. J. Econ.,* Vol. 84. (1970) 488., 489.

prevent these inefficiencies by creating a minimum service quality through licensing requirements and rules.

From an efficiency perspective, restricting competition by limiting entry and dictating the terms of practice can only be justified in the presence of these market failures. Further, a licensing restriction can only be justified to the extent that its benefits (in terms of addressing a market failure) outweigh its costs (the higher prices charged to consumers). In other words, licensing is efficient only if it actually improves quality, and only if it does so without too high a price tag for consumers.

With competitors controlling their own competitive environment, it is unsurprising that many American professional licensing regulations cannot be justified as efficient. The licensing of many professions in America cannot even pass the laugh test. Occupations currently licensed in at least one state include locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers. And the excesses of licensing go beyond these examples of regulatory overreach. Some commonly licensed professions, such as barbering and cosmetology, lack a plausible market failure justification. It is hard to say that consumers are unable to assess the quality of these services, or that low quality service creates widespread harm. Further, licensing restrictions that do address a plausible market failure often do so with too heavy a hand. For example, the requirement that nurse practitioners be supervised by doctors, a requirement in many states,[10] theoretically addresses externalities in the market for healthcare. But in light of empirical evidence that supervised nursing is more expensive to consumers, yet provides no added quality or safety benefits,[11] it seems clear that the supervision requirement goes too far.

Anecdotal evidence of licensing run amok is easy to find, but so is empirical evidence that licensing often goes too far in benefiting professionals at the expense of consumers. Licensing has an obvious effect on consumer prices, as a theoretical matter and as a matter of fact. Labor economists estimate that when a profession goes from unlicensed to licensed status, wages rise at least 10%.[12] Of course, if that wage premium bought higher quality services, it may be efficient. But while licensing has a significant effect on consumer prices and professional wages, its effect on service quality is dubious. Economic studies of service quality paint a murky picture.[13] Most of the empirical studies measuring the impact of licensing on quality evidence is

[10] See Sharon Christian – Catherine Dower: Scope of Practice Laws in Health Care: Rethinking the Role of Nurse Practitioners. Cal. HealthCare Found., (January 2008) 3, available at http://www.chcf.org/publications/2008/01/scope-of-practice-laws-in-health-care-rethinking-the-role-of-nurse-practitioners (noting that thirty states require at least some degree of physician supervision or collaboration).

[11] See *id.* at 6 (listing multiple studies finding no material difference in quality of care).

[12] See Morris M. Kleiner: Regulating Occupations: Quality or Monopoly? *Emp't Res.,* Vol. 13., N. 1. (2006), *available at* http://research.upjohn.org/empl_research/vol13/iss1/1.

[13] See Morris M. Kleiner: Licensing Occupations: Ensuring Quality or Restricting Competition? 53 tbl.3.2 (2006) (showing varying levels of quality improvements in a number of licensed professions).

equivocal,[14] and one study even claims to show that licensing *reduces* quality.[15] By any measure, the American system of professional self-regulation does not achieve an efficient balance of regulation and competition.

2. Antitrust Liability and *North Carolina Dental*

Practitioner-dominated licensing boards came under attack in a recent U.S. Supreme Court case decided in May 2015. The case, *North Carolina State Board of Dental Examiners v. FTC*, completed a revolution in the American federal-state balance of power that previous cases in this area had foreshadowed. In the process, it placed a wide swath of American occupational regulation – perhaps the vast majority of it – in the crosshairs of antitrust law. States should interpret this case as an existential threat to how they regulate the professions. It will no doubt precipitate regulatory reforms.

2.1. State Action Immunity and the Antitrust Laws

To understand *North Carolina Dental* and its impact, a few words should be said about a relatively obscure area of American law known as antitrust state action immunity (or sometimes *Parker* immunity, for the case that established it). The Sherman Act,[16] the major federal antitrust statute outlawing unreasonable restraints of trade and monopolistic conduct, does not limit its reach to private actors. Nothing in the text of the statute prevents someone from challenging a state law restricting competition as "unreasonable" under the Act. Most regulation, state or otherwise, creates competitive winners and losers. Yet the wholesale application of federal competition law to state action would threaten to invalidate all or most state regulatory activity, a result that would offend principles of federalism. Thus, in 1943, the U.S. Supreme Court recognized "state action immunity" from federal antitrust law. In *Parker v. Brown*,[17] the Court held that conduct by the state would be untouchable by federal antitrust suits. The opinion, however, included an important caveat: a state could not merely authorize private actors to violate the Sherman Act. Allowing states to selectively repeal the Sherman Act in this way would undermine the national policy in favor of competition.[18]

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[14] See, *e.g,* Sidney L. Carroll – Robert J. Gaston: Occupational Licensing and the Quality of Service. *Law & Hum. Behav.*, Vol. 7. (1983) 139., 145. (concluding that licensing results in better delivered quality but not better quality received by society as a whole). See Joshua D. Angrist – Jonathan Guryan: Teacher Testing, Teacher Education, and Teacher Characteristics. *Am. Econ. Rev.,* Vol. 94. (2004) 241., 246. (finding "no evidence that testing hurdles have raised the quality of new and inexperienced teachers").

[15] See Carroll–Gaston op. cit. 145 (suggesting that "excessive restriction" reduces the quality of services available to the "lower middle income classes").

[16] 15 U.S.C. § 1 (2016).

[17] 317 U.S. 341 (1943).

[18] Ibid. at 351 (explaining that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful").

That caveat in *Parker* has become the source of decades of controversy as the Court has struggled to define the contours of state action immunity. What is the precise line between "state action" and action merely authorized by the state? How close of a relationship must the regulating entity have to the sovereign branches of a state before it can invoke immunity? These questions have proved especially vexing as states have increasingly used entities other than its sovereign branches – such as municipalities, bar associations, and occupational licensing boards – to create and enforce regulation. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[19] the Court created a two-part test for whether an entity could claim immunity for its activity. The *Midcal* test confers antitrust immunity on entities that both act according to a state's "clearly articulated and affirmatively expressed" policy to displace competition, and are "actively supervised" by the state itself.[20]

Shortly after *Midcal*, the Court further complicated the question by creating a shortcut to *Parker* immunity for some kinds of regulatory entities. In *Town of Hallie v. Eau Claire*,[21] the Court held that cities enjoy immunity for their anticompetitive regulation as long as they meet *Midcal*'s first prong. In other words, even unsupervised municipal regulation is immune so long as it comports with the state's "clearly articulated" intent to displace competition.[22] The court justified the shortcut by appealing to a city's public nature, explaining that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement."[23]

Who, besides municipalities, can take the *Hallie* shortcut? The question turns out to be crucial to the status of licensing boards, because the "clear articulation" prong has proved to be easily met in the professional licensing context.[24] At the time the Court was set to hear *North Carolina Dental*, the question of whether an occupational licensing board was entitled to take the *Hallie* shortcut was very much in dispute. On the one hand, the *Hallie* opinion itself had suggested (without deciding) that state agencies would be entitled to the shortcut.[25] And because many states refer to their boards as "agencies," this gave boards a good claim to using the shortcut. On the other hand, scholars, some lower courts, and the Federal Trade Commission argued that what made municipalities special for immunity purposes was not their nominal claim to being governmental, but their public accountability. By this measure, occupational

19 445 U.S. 97 (1980).

20 Ibid. at 943.

21 471 U.S. 34 (1985).

22 Ibid. at 46 ("We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.").

23 Ibid. at 47 (emphasis omitted).

24 See, e.g., *Benson v. Ariz. State Bd. of Dental Exam'rs*, 673 F.2d 272, 275 (9th Cir. 1982) (holding that a statute which established the board of dentistry and gave it power to regulate professional practice and entry requirements satisfied the clear articulation prong).

25 *Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

licensing boards – which are controlled by self-dealing licensees and which operate outside of the public eye – should be held to both *Midcal* prongs.

2.2. North Carolina Dental

The latest chapter in the state action immunity saga specifically addressed the question of whether occupational regulation could be challenged under the Sherman Act. In 2006, the North Carolina State Board of Dental Examiners – a licensing board comprised of six dentists, one dental hygienist, and one public member – initiated a campaign to suppress competition from non-dentists in the market for cosmetic teeth whitening. The dentists were apparently vexed by the rise of a new, cheaper means of whitening teeth that was being performed in malls and at beauty salons, which reduced demand for the expensive teeth whitening services offered by licensed dentists. The Board "did battle" with the non-dentist teeth whiteners by issuing cease-and-desist letters characterizing teeth whitening as the practice of dentistry and threatening legal action if the non-dentists persisted.[26] The campaign worked. Within a few months of the Board's actions, the state's dentists had regained their monopoly over teeth whitening.

The Federal Trade Commission brought suit, charging that the letter campaign was an unreasonable restraint of trade in violation of the Sherman Act. The FTC argued that the board was not entitled to state action immunity because unlike municipalities, it was required to meet *Midcal*'s "active supervision" prong – a test that it would fail. In the FTC's view, the board was private because of the private interests that dominated its decision-making and private regulators were forbidden from taking the *Hallie* shortcut. To the FTC, it did not matter that the state of North Carolina believed the Board was a state entity, that state statutes referred to the board as a "state agency," or that the state itself had filed an amicus brief arguing for the board's immunity.

Ultimately, the U.S. Supreme Court sided with the FTC. The Court made clear that what made the municipality in *Hallie* unlikely to join a private price fixing cartel, and therefore merit the immunity shortcut, was not its claim to being governmental in a formal sense, but rather its lack of incentives to self-deal.[27] However, for an entity controlled by competing professionals and tasked with regulating the terms of their competition, state supervision was required. Otherwise, "the national policy in favor of competition [would be] thwarted by casting […] a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[28] The Court held that a state board on which "a controlling number of decisionmakers are active market

[26] *N.C. Dental*, 135 S. Ct. at 1108 (quoting App. To Pet. for Writ of Cert. at 103a, *N.C. Dental* (No. 13-534), 2013) (internal quotation marks omitted).

[27] *N.C. Dental*, 135 S. Ct. at 1111.

[28] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 98 (1980).

participants in the occupation the board regulates" must be actively supervised by the state or else face antitrust liability.[29]

North Carolina Dental left unanswered several questions that will spawn a new set of controversies, some of which are already working their way through the lower courts. The first open question – what constitutes "active supervision" – is as old as the case that created the supervision requirement in the first place. Although the Court has considered the issue in several cases, it has always been vague in its guidance. The second set of questions – who counts as "active market participants" and how many constitute a "controlling number" – are new to the state action immunity doctrine. Giving proper meaning of these new terms requires understanding what gives rise to the self-dealing risk in the first place.

2.2.1. Active Supervision

The Court has never been particularly clear about what constitutes active supervision. Notably, it has never found a supervisory scheme to pass muster. *North Carolina Dental* emphasized that "the inquiry regarding active supervision is flexible and context-dependent,"[30] making it difficult to predict how much state involvement is enough. The case recited two familiar requirements for supervision – first that it be more than a "negative option," or an unexercised power to review the board's actions,[31] and second that it be substantive and not merely procedural.[32] The case then added a new requirement, that the supervisor "have the power to veto or modify" the decision it reviews.[33]

Based on the Court's renewed emphasis on political accountability as a condition of antitrust immunity, it seems reasonable to predict that "active supervision" will entail a state review process that forces states to take transparent responsibility for the substantive content of the regulation. This almost certainly means that review must be non-deferential: a state must take a fresh look at the regulation and decide whether it comports with state policy without putting a thumb on the scale. And it may mean that state supervisors must identify, quantify, and approve the competitive consequences flowing from the regulation. Delegation of regulation to competitors creates both a theoretical and, as it turns out, a very real risk of self-dealing at the expense of consumers. If, as the Court has said, supervision seeks to "assign political responsibility, not obscure it,"[34] then supervision should force states to own the

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29 *N.C. Dental* at 1114.

30 Ibid. at 1117 ("In general […] the adequacy of supervision otherwise will depend on all the circumstances of a case.").

31 See ibid. at 1112 (explaining that the power to review must be actually exercised to be "active supervision"). See also *Ticor*, 504 U.S. at 622–23 (holding that the mere potential for review is inadequate).

32 See *N.C. Dental* at 1116; see also *Patrick*, 486 U.S. at 101.

33 *N.C. Dental* at 1116.

34 *Ticor* at 636.

economic impact of the regulations they tolerate. To this end, I have advocated for the use of competitive impact statements – identifying and at least attempting to quantify the economic and competitive consequences of a reviewed regulation – as a condition of finding that the state "actively supervised" the challenged regulation.[35]

Under the criteria set out in *North Carolina Dental* for active supervision, most states probably do not supervise their licensing boards. States typically allow boards to be sued for failing to comply with that state's Administrative Procedure Act, but this review is likely to be considered insufficiently substantive to qualify as supervision.[36] Some states have "rules review" procedures whereby substate regulations, such as those created by a licensing board, are reviewed by a state commission or committee before having the force of law,[37] but state legislatures typically cannot modify or veto the decision below. At the time *North Carolina Dental* was decided, no court or commentator had identified an example of state-level substantive review of all board activity, located in an executive agency not dominated by active market participants.

2.2.2. Competitor Control

As my survey of the statutory composition of the 1,740 licensing boards in the U.S. reveals, most boards are comprised of a majority of licensees. The *North Carolina Dental* opinion used a curious phrase to describe the dominance that triggers the supervision requirement. It held that a state board on which "a controlling number of decisionmakers are active market participants in the occupation the board regulates" must be actively supervised to enjoy immunity.[38] This sentence raises two questions. First, who counts as an "active market participant in the occupation the board regulates"? Second, how many is a "controlling number" and why did the court not simply say "majority"?

The courts will interpret "active market participant" to mean those most likely to self-deal, which in the licensing board context means members currently holding a license issued by the board itself. This interpretation comports with the antitrust state action principle that additional state involvement is necessary when the state relies on industry self-regulation, the most competitively risky form of governance. And it comports with substantive antitrust law. Under § 1 of the Sherman Act, naked agreements among competitors to restrict competition are *per se* illegal. This rule reflects the notion that competitors, when combining to decide the terms of their competition, inevitably benefit themselves at the expense of the consumer. The principal concern in an antitrust suit against a board is that board members who are

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[35] See Rebecca Haw Allensworth: The New Antitrust Federalism. *Virginia Law Review,* Vol. 102., Iss. 6. (2016).

[36] See Edlin–Haw op. cit. 1123 n.179. Further, because this review only occurs when someone brings suit these are likely the "negative option" found lacking by the Court. See ibid. at 1123.

[37] See, e.g., Conn. Gen. Assembly, Legislative Regulation Review Committee, https://www.cga.ct.gov/rr/; Ariz. Rev. Stat. Ann. § 41-1052 (2013).

[38] *N.C. Dental*, 135 S. Ct. at 1114.

currently in competition with one another will often that find that their interest in protecting consumers conflicts with their profit motives to keep competitors out and prices high.

The members of a licensing board with the strongest incentive to self-deal are those who hold a license issued by the board. When a board only issues one kind of license – for example, a dental license – the dynamics of self-dealing are simple. Board members who hold the same license are like horizontal competitors dealing in undifferentiated goods. A permissive licensing rule that either lets in more competitors or allows for more competition among incumbents threatens the bottom line of all license-holders. A more difficult question is raised by boards that issue multiple kinds of licenses and have representatives from each kind of license on the board. In this circumstance, there is an argument that because two board members must obtain separate licenses, they should not both be counted towards the dominance discussed in *North Carolina Dental*. But the reality of these boards – that the different licenses issued by the same board often have significant practical overlap, and that there is a risk of back-scratching among similar professions – suggests that all licensees holding *some* license issued by the board ought to count towards professional dominance.

Likewise, "controlling number" ought to be defined according to the reality of board practice and procedure. At the very least, it seems likely that "control" will mean that license-holders, voting as a bloc, can determine a board's vote without assent from non-professional members. In the simplest case (where the full board votes and every member has an equal vote) "controlling number" will be synonymous with "majority." But the voting practices of licensing boards reveals that in many cases, even a board without a majority of licensees can make decisions by a "controlling number" of professionals.

Quorum rules – such as the very common rule that a majority of the board constitutes a quorum – can allow a professional minority of the board to form a majority at meetings.[39] Similarly, voting rules, such as a rule that a non-professional member of the board cannot vote, can turn what by membership is a non-dominated board into one where the licensees enjoy a majority.[40] This may explain why the court used the term "controlling number" rather than "majority": "controlling number" captures circumstances where licensees do not formally make up a majority of the

[39] For example, physical therapists have enjoyed a majority at all of the last five meetings of the North Dakota Board of Physical Therapy, despite a statutory requirement that half the board's seats go to non-licensees. See *Board Minutes*, N.D. Bd. of Physical Therapy, https://www.ndbpt.org/minutes.asp (last visited July 29, 2016). Despite the attendance issues, the current composition of the board reflects the statutorily required membership. See N.D. Cent. Code § 43-26.1-02 (2015); *North Dakota Board of Physical Therapy Members*, N.D. Bd. of Physical Therapy, https://www.ndbpt.org/about_us.asp (last visited July 29, 2016).

[40] For an example of this, see the Arkansas State Board of Acupuncture, which disables one of its non-professional members from voting. Ark. Code Ann. § 17-102-201 (West 2016) ("[T]he ex officio member shall have no vote, shall not serve as an officer of the board, and shall not be counted to establish a quorum or a majority necessary to conduct business.").

board, but in practice exercise voting control. It seems likely that the Court will define "controlling number" to refer to those actually present and able to vote when a decision was made.

3. The Future of Occupational Licensing

The basic structure of occupational licensing in the U.S. – self-regulation with little or no governmental involvement – is endangered. States should see the holding of *North Carolina Dental* as both a threat and an opportunity. The threat, of course, is that their boards will be sued and individual board members held liable for treble damages for anticompetitive occupational regulation. These suits have already begun, and will likely continue to be filed in significant numbers. The opportunity is the chance to reform the regulatory infrastructure governing almost a third of American workers to make it more fair, efficient, and immune to antitrust suit.

3.1. Boards Under Scrutiny

North Carolina Dental has precipitated a legal crisis for states and their occupational licensing boards. Since the decision was handed down last year, at least thirteen suits have been filed against licensing boards. Perhaps unsurprisingly, North Carolina has been the hardest hit, with three suits against three different boards.[41] California is facing two suits[42] and Connecticut,[43] Georgia,[44] Louisiana,[45] Nevada,[46] Pennsylvania,[47] Mississippi,[48] Tennessee[49] and Texas[50] are each facing one suit. These thirteen boards are not unique; for every board that has been sued, there are more than one hundred others that are potentially vulnerable. The variety of suits reflects the spectrum of competitive risks posed by professional self-regulation. Several boards are accused of suppressing innovative new forms of professional practice that threaten the bottom line of traditional practitioners. Other suits allege unreasonable

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41 See *Jemsek v. N.C. Med. Bd.*, No. 5:16-cv-00059 (E.D.N.C. filed Feb. 2, 2016); *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15-cv-00831 (M.D.N.C. filed Oct. 7, 2015); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 1:15-cv-00439 (M.D.N.C. filed Jun. 3, 2015).

42 See *Kinney v. State Bar of Cal.*, No. 3:16-cv-02277 (N.D. Cal. filed Apr. 27, 2016); *Gonzalez v. Cal. Bureau of Real Estate*, No. 2:15-cv-02448 (E.D. Cal. filed Nov. 11, 2015).

43 See *Robb v. Conn. Bd. of Veterinary Med.*, No. 3:15-cv-00906-CSH (D. Conn. filed Jun. 12, 2015).

44 See *Colindres v. Battle*, No. 1:15-cv-02843-SCJ (N.D. Ga. filed Aug. 12, 2015).

45 See *Rodgers v. La. Bd. of Nursing*, No. 3:15-cv-00615 (M.D. La. filed Sept. 11, 2015).

46 See *Strategic Pharm. Solutions, Inc. v. Nev. State Bd. of Pharm.*, No. 2:16-cv-00171-RFB-VCF (D. Nev. filed Jan. 29, 2016).

47 See *Bauer v. Pa. State Bd. of Auctioneer Exam'rs*, No. 2:15-cv-01334 (W.D. Pa. filed Oct. 14, 2015).

48 See *Axcess Med. Clinic, Inc. v. Miss. State Bd. of Med. Licensure*, No. 3:15-cv-00307-WHB-JCG (S.D. Miss. filed Apr. 24, 2015).

49 See *WSPTN Corp. v. Tenn. Dep't of Health*, No. 3:15-cv-00840 (M.D. Tenn. filed Jul. 30, 2015).

50 See *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. filed Apr. 29, 2015).

and unfair entry barriers, and some concern occupational scope-of-practice, the issue in *North Carolina Dental*.

A finding of no antitrust immunity in these suits means that the board members are legally no different from members of a private cartel, and so are personally financially liable for three times the compensatory damages alleged by a plaintiff. Besides money damages, most of these suits ask for injunctive relief that would reverse the challenged regulatory action. Without state action immunity, any board regulation that does not comply with federal antitrust law is just a lawsuit away from invalidity.

3.2. State Responses

States are likely to make changes to how they regulate the professions in the wake of *North Carolina Dental*. They should embrace this opportunity to improve the substance and process of their licensing schemes. States are likely to regard the specter of ongoing antitrust scrutiny as untenable because many licensing rules run afoul of the Sherman Act and because personal financial liability for board members (with treble damages) is very likely to chill board membership. Boar immunity is probably the most efficient option for states.

North Carolina Dental provides states with two options for conferring immunity on licensing boards: active state supervision or modification of board membership. If states minimally comply with the requirements for state action immunity, that certainly stands to improve the state of licensing in the U.S.; both options require more state involvement and political accountability and discourage self-regulation. But states should go further than the floor set by federal antitrust law. The stakes of occupational licensing go beyond antitrust law. Inefficient licensing rules cost a state's consumers and can amplify income inequality. Since states must make changes in response to *North Carolina Dental* anyway, they should take the opportunity to further insulate occupational licensing from self-dealing and reform the substance of licensing rules.

3.2.1. Supervision

Even practitioner-dominated boards enjoy immunity from the antitrust laws, as long as the state actively supervises their activity. Active supervision would allow states to confer immunity on all licensing rules and regulations without making changes at the board level. Supervision has some distinct advantages over board reformation, including centralization: one umbrella supervisor could theoretically oversee all licensing board activity. It also has the advantage of ensuring accountability by forcing politically responsive state supervisors to examine, approve, and take responsibility for board regulations. And if the states use this opportunity – as I argue they should – to reform the substance of licensing regimes, centralized state supervisors can facilitate efficient reform.

The biggest disadvantage of using supervision to immunize boards is that the Court has been vague about what constitutes adequate supervision. States may not

feel confident that a proposed scheme will pass muster. Another disadvantage is that creating a supervisory body would require major legislation, and perhaps even state constitutional amendment. Finding the political capital to make that happen could be difficult, especially in states where small government is prized and supervisory structures would be seen as adding another layer of red tape. A supervisory body would also need significant funding, which again could encounter resistance in the political process. Despite these issues, at least one state has already passed legislation giving its governor's office a supervisory role.[51]

3.2.2. Board Reformation

For states wary of the legal uncertainties surrounding active supervision, the another route to immunity may be attractive. States could reform boards to avoid the dominance identified in *North Carolina Dental* by adding non-licensee members. These non-dominated boards would not need active supervision to be immune from antitrust suit. This solution is relatively cheap, simple, and politically attractive to legislatures hoping to avoid the creation of ever more regulatory infrastructure. It also presents an opportunity to add some diversity to the conversation about licensing. The nonprofessional member seats could be given to stakeholders, especially consumer advocates, who may push for a lighter touch in regulating the professions.

Board reformation has some disadvantages as well. It does not avoid all legal uncertainty, since the Court was unclear about what "controlling number" and "active market participant" could mean. It may be a more cumbersome solution, because while supervision could be created by a single act of the legislature, board reformation requires changing every board. Further, board reformation may be a less promising means than supervision to enact a state's vision of leaner occupational licensing. Reforming boards to avoid a professional majority may help curb the excesses of occupational licensing, but how much it will help remains an open question. States may want more regulatory reform, and to get it they may have to adopt a top-down solution. In the final analysis, it is unclear which route to immunity is the best – whether the goal is lighter licensing requirements or certainty of immunity. States will undoubtedly have to experiment with various solutions before anyone can confidently say which is best.

3.2.3. Policy Changes

Whichever route to immunity a state chooses, the goal should not only be antitrust immunity but sparer and more efficient licensing schemes. For some occupations, such as bee-keeping, shampooing, fortunetelling, and the like, licensing should be eliminated altogether. For others, licensing restrictions should be pared down

[51] See Ga. Code Ann. § 43-1C-3 (West 2016) (giving the governor authority to "review and, in writing, approve or veto any rule" proposed by a state professional licensing board before it becomes effective).

according to a cost-benefit analysis. More data is needed on how specific licensing requirements affect quality and price. Here, the decentralization of American licensing regulation can help; regulatory variety between states means economists can compare approaches and study the effectiveness of various licensing rules. Recognizing this opportunity, the U.S. Department of Labor has made $7.5 million available to states wishing to study their own licensing regulation and to develop and implement improvements.[52] Together with the changes mandated by *North Carolina Dental*, this research and advocacy could have real impact, provided the reforms are data-driven, and not, as has been the case for decades, the result of lobbying by licensees.

4. Conclusion

Labor economists have been arguing for decades that American occupational licensing has gone too far, but real reform has been elusive. The vast majority of licensing boards are dominated by licensees, and their regulations reflect the self-dealing one would expect from a cartel, not a governmental body. Now, with the Supreme Court's decision in *North Carolina Dental*, the states face a Hobson's choice: either change the way that nearly a third of the workforce is regulated, or expose licensing rules to antitrust suit. States should take the mandate for reform as an opportunity to introduce efficiency, transparency, and fairness into their occupational licensing schemes.

[52] See *Notice of Intent to Fund Project on Occupational Licensing Review and Portability: NOI-ETA-16-14*, U.S. Dep't of Labor, Emp't. & Training Admin., https://www.doleta.gov/grants/pdf/NOI-ETA-16-14.pdf (last visited Aug. 1, 2016).