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Foxes at the Henhouse: Occupational Licensing Boards Up Close

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The dark side of occupational licensing—its tendency to raise prices to consumers with dubious effects on service quality, its enormous payout to licensees, and its ability to shut many willing workers out of the workforce—has begun to receive significant attention. But little has been said about the legal institutions that create and administer this web of professional entry and practice rules. State-level licensing boards regulate nearly one-third of American workers, yet, until now, there has been no systematic attempt to understand who serves on these boards and how they operate. This Article undertakes an ambitious and comprehensive study of all 1,790 licensing boards in the U.S. and identifies their statutory membership. The results are clear: nearly all of them are controlled by professionals holding a license issued by the board itself.

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*This self-regulation is disturbing enough if one expects at least some governmental involvement in decisions that are known to redistribute income, block labor entry, and harm consumers. But now the practitioner-dominated licensing board is not just an urgent policy problem, but a legal one. A recent Supreme Court case has placed these boards and their members in the crosshairs of federal antitrust liability, precipitating a legal crisis for the states. This Article identifies the enormous scope of the Court's opinion in *North Carolina State Board of Dental Examiners v. FTC*, opines on the meaning of its somewhat cryptic holding, and suggests steps that states can take to reform their boards with an eye to both antitrust immunity and more reasonable occupational regulation.*

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INTRODUCTION

Any given state-level occupational licensing board is nearly invisible. This is true despite the fact that, together, 1,790 such boards form the most important labor institution in the country, controlling whether and how almost 30 percent of Americans work¹ and despite the fact that a movement against wasteful occupational licensing rules and regulations is gaining steam.² And it is still true even after a recent Supreme Court case put them in the crosshairs of antitrust litigation.³ They are invisible because they are so numerous—most states have several dozen boards, some have more⁴—and because the public impact of any single board is relatively small. Their power to raise price, to create service scarcity, and to limit gainful employment is apparent only in the aggregate: together, they cost American consumers an estimated \$116 billion dollars a year.⁵

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

2. The issue has recently received significant attention from the federal government in the form of a Senate hearing, see *License to Compete: Occupational Licensing and the State Action Doctrine: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016), <https://www.judiciary.senate.gov/meetings/license-to-compet-occupational-licensing-and-the-state-action-doctrine> [<https://perma.cc/RYK8-9FNX>], and a White House report, see DEP’T OF TREASURY, OFFICE OF ECON. POLICY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<https://perma.cc/5R7Q-QDP2>]. It has also captured media attention. See, e.g., Patricia Cohen, *Moving to Arizona Soon? You Might Need a License*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/business/economy/job-licenses.html> [<https://perma.cc/7UE5-CQ6B>]; Josh Zumbrun, *Occupational Licenses May be Bad for the Economy, But Good for Workers Who Have Them*, WALL ST. J. (Apr. 18, 2016), <http://blogs.wsj.com/economics/2016/04/18/occupational-licenses-may-be-bad-for-the-economy-but-good-for-workers-who-have-them> [<https://perma.cc/928B-H24M>].

3. See N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015).

4. The average state has thirty-nine boards; Alabama and Texas are tied for the most boards, with forty-nine each. See Appendix.

5. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 115 (2006) (estimating the cost of occupational licensing to consumers at

That occupational licensing goes too far, at the expense of consumers and entrepreneurs, has been a source of frequent and high-profile criticism from economists and policymakers for decades. Indeed, there is widespread agreement that many professions—such as beekeeping, fortune telling, and hair shampooing—ought not to be licensed at all. And there is a growing consensus among economists that even professions for which some licensing requirements are appropriate—such as law and medicine—are inefficiently regulated in ways that increase wages without addressing quality. But in contrast to what is known about the effect of onerous occupational licensing requirements, much less is known about the hundreds of state-level boards that are responsible for creating and enforcing those requirements.

A fifty-state, in-depth survey of these boards—which together make up the most powerful labor institution in the United States—is long overdue. This Article fills that gap by identifying all 1,790 state occupational licensing boards and describing their statutory composition.⁶ The results of this comprehensive survey may be disturbing to those under the impression that occupational regulation is governmental, which is to say that it is in any measure public or public-regarding. The dirty secret behind occupational licensing boards is that very little of what they do resembles governmental activity.

My research reveals that of the 1,790 total boards, 1,515, or 85 percent, are required by statute to be comprised of a majority of currently licensed professionals, active in the very profession the board regulates. This overwhelming degree of self-regulation would be bad enough, but further research into the actual practices of these boards—from rules that nonprofessional board members cannot vote,⁷ to chronic vacancies and absences of nonprofessional board members,⁸ to violations of their organic statutes⁹—shows that professional dominance on boards exceeds even this large percentage: it is nearly universal. Thin or nonexistent supervision from the states means that the licensed sector of the American workforce is almost entirely self-regulating. Such self-regulation may allow for expertise in decision making, but it comes at a very high price in the form of professional self-dealing.¹⁰

These facts about state licensing boards have triggered a legal crisis in the wake of the Supreme Court's recent decision in *North Carolina Board of Dental*

\$116–\$139 billion a year by using an econometrically derived licensing wage premium to measure the reallocation of wealth from consumers—in the form of higher-priced services—to practitioners—in the form of higher wages).

6. For a summary of my empirical findings, see Appendix.

7. See *infra* notes 36–39 and accompanying text.

8. See *infra* notes 27–35 and accompanying text.

9. See *infra* note 48 and accompanying text.

10. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1104–10 (2014) (discussing a range of examples of self-dealing occupational regulation created by mostly professionally dominated boards).

*Examiners v. FTC.*¹¹ In that case, the Court 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 by the state or else face antitrust lawsuits brought by private parties and government enforcers.¹² Because few states even arguably supervise their boards, and because, as my research reveals, “active market participants” control almost every board, states are confronting a serious threat to their coffers and to the way they regulate millions of workers.

North Carolina Dental prompted two responses: (1) a barrage of antitrust lawsuits against licensing boards,¹³ and (2) a panic among state officials seeking ways to immunize their boards from further suit. In addition to empirically identifying the scope of states’ legal exposure, this Article also provides guidance on how states may reform board composition to avoid the active supervision requirement. I explore the range of possible meanings of “controlling number of . . . active market participants,” from the formal, conservative definition I used in my empirical research to a nuanced, case-by-case definition of professional dominance. I advocate for—and predict the Court will ultimately adopt—a definition that both allows states to enjoy safe harbor though board composition and prevents them from using procedural machinations to pass off the status quo as real reform.

This Article proceeds in four parts. In Part I, I describe my empirical results, which reveal a picture of almost total self-regulation in licensed occupations. Here I discuss my comprehensive survey of all state statutes that create licensing boards, as well as the selective investigations I conducted into the on-the-ground operation of boards, as revealed by their websites and minutes. Part II describes the legal crisis precipitated by *North Carolina Dental*, surveying the lawsuits that have been filed since the case was handed down in 2015. This Part also provides a primer on the legal issues that underlie these suits—antitrust’s “state action immunity” doctrine and the Sherman Act’s prohibition on unreasonable restraints of trade. Part III discusses the next legal frontier as lower courts struggle to interpret “controlling number of . . . active market participants.” Finally, Part IV explains the urgent need for states to make changes in how they regulate the professions, and lays out a plan for how to reform boards into fairer and more efficient institutions while avoiding antitrust scrutiny of their decisions.

11. 135 S. Ct. 1101 (2015).

12. *Id.* at 1114.

13. See *infra* notes 49–72 and accompanying text.

I.

MOST PROFESSIONAL LICENSING BOARDS ARE CONTROLLED BY LICENSE HOLDERS

In *North Carolina Dental*, the Court held that a board with a majority of currently licensed, practicing dentists is controlled by “active market participants” and thus requires active state supervision to qualify for immunity from antitrust suit.¹⁴ Just how many licensing boards share this structure of self-regulation, where licensees form the majority of the board? Although this question goes to the heart of how a large portion of the American workforce is regulated, it has not been answered until now. My fifty-state survey reveals that the board structure in *North Carolina Dental* is far from exceptional—85 percent, or 1,515 boards, are required by statute to be comprised of a majority of currently practicing license holders. This study confirms that *North Carolina Dental*, and its requirement that dominated boards be supervised or face antitrust liability, reaches deep into the most powerful labor institution in the country.

A. *Empirical Results: Competitor Control*

I surveyed all the state statutes creating licensing boards and developed a comprehensive list of boards and their statutory requirements for membership. I defined “state occupational licensing board” as a substate entity created by statute and tasked with regulating occupational licensing, typically by creating and enforcing entry and practice regulations.¹⁵ “Regulating” included both creating self-executing rules—rules that by statute have the force of law without further action by another entity—and acting in an advisory capacity for another state regulator. The majority of boards have direct rulemaking authority.¹⁶

I defined “occupational licensing” as the imposition of educational, experiential, or examination requirements as a precondition of lawful provision of a service. Thus, I excluded boards that oversaw a certification scheme—whereby a practitioner without certification is prohibited from representing himself as “certified” but uncertified practice is lawful.¹⁷ Similarly, I excluded boards that established a “title use” scheme, where an individual is prohibited from using a professional title such as “accountant” without meeting some governmentally imposed requirements, but not prohibited from providing service identical to that of a titleholder. The survey also excluded boards that

14. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1114.

15. Private regulatory bodies such as state bar associations were excluded because they were not created by state statute. This choice obviously excluded additional practitioner-dominated regulatory entities, and therefore is another example where my study understates the degree of self-regulation among the professions.

16. Approximately 1,397 boards, or 78 percent, are explicitly granted by statute the authority to create rules.

17. See KLEINER, *supra* note 5, at 7 (noting that in a certification scheme, “any person can perform the relevant tasks, but the government or . . . nonprofit agency administers an examination and certifies those who have passed”).

outlawed practice without government approval but that did not impose significant educational, experiential, or examination requirements—such as schemes where workers must merely register with the government and pay a fee.¹⁸ Finally, I excluded business licenses, such as a license to operate a restaurant, because they did not attach to an individual (and because they often did not require education, examination, or experience).¹⁹ These definitions of “occupational licensing” comport with other work in the field, including empirical studies of the economic effects of licensure.²⁰ Not all statutes use words like “license” or “certification” in the ways I define them; thus, it was necessary to interpret the individual statutes to determine a board’s status.

To ensure that I captured all state licensing boards, I cross-referenced boards found in statutes with official governmental websites identifying the professional boards and regulated professions in a state. Both statutes and websites identified some boards that did not meet my criteria, but the use of governmental websites helped identify boards created in a corner of the state statutory code that I had not examined—not all states have well-organized codes. For each board, I listed the professional licenses it was tasked with regulating. In many cases, a board issues several different professional licenses, as when a medical board licenses physicians and chiropractors, or a nursing board licenses registered nurses and advanced practice registered nurses.²¹

I recorded the statutory membership requirements for all 1,790 boards.²² Where a board was comprised of a majority of license holders, it was coded as “dominated.” Where a board issued more than one kind of license, I counted all such license holders toward dominance. But if no single type of licensee made up a majority of the board, yet all licensees counted together did make up a majority, that board was recorded as “mixed” as well as “dominated.” For example, I recorded a dental board comprised of five licensed dentists, two licensed dental hygienists, and two consumer members as dominated but not

18. See ARK. CODE ANN. § 17-16-105 (2016) (registration of athlete agents); CAL. BUS. & PROF. CODE § 22350 (2016) (process servers); N.J. STAT. ANN. § 45:19-11 (West 2016) (private detectives); WASH. REV. CODE § 18.44.031 (2016) (escrow agents).

19. See HAW. REV. STAT. § 468M-2 (2016) (arrangers of air, land, or sea tours); ME. REV. STAT. ANN. tit. 32, § 14053 (2016) (employee leasing companies); N.H. REV. STAT. ANN. § 325-A:2 (2016) (crematories); N.Y. AGRIC. & MKTS. LAW § 96-b (McKinney 2016) (slaughterhouses); OHIO REV. CODE ANN. § 4712.02 (West 2016) (credit services organizations); VA. CODE ANN. § 35.1-18 (2016) (hotels and restaurants).

20. See KLEINER, *supra* note 5, at 2–3, 6–7 (describing characteristics of professional licensing).

21. See 225 ILL. COMP. STAT. 60/8 (2016) (establishing medical board to regulate physicians and chiropractors); N.D. CENT. CODE § 43-12.1-03 (2015) (providing for licensing of advanced practice registered nurses, specialty practice registered nurses, registered nurses, and licensed practical nurses).

22. I chose to measure professional dominance using statutory requirements in part because it was easier to measure. Determining actual dominance would require looking up the current members of each board and determining their occupational status; this information is not always available and certainly not centrally located. I also chose to use statutory dominance because it represented a conservative measure. If the overwhelming number of boards must be dominated by law, then *a priori* the overwhelming majority of boards are most likely dominated in fact.

mixed.²³ By contrast, I recorded a veterinary board comprised of four veterinarians, one veterinary technician, and three public members, as mixed and dominated, since neither veterinarians nor technicians alone constituted a majority.²⁴ A board member holding a license not issued by the board—for example, a physician serving on an acupuncture board—did not count toward dominance.²⁵ Where licensing status was ambiguous, for example, where a statute required “experience” in the profession but not explicitly a license, that member was not counted toward dominance.²⁶

The results of the study are stark. Eighty-five percent of occupational licensing boards in the United States are dominated by workers holding a license issued by the board itself. In other words, the holding of *North Carolina Dental* probably applies to at least 1,515 boards. Only about 16 percent of boards are dominated *and* mixed, meaning that even a conservative definition of dominance—one that only counts one kind of licensee toward *North Carolina Dental*’s “controlling number”—would yield about 69 percent, or 1,239 boards subject to the Court’s requirement that boards be supervised or face antitrust scrutiny. And this is only based on the dominance created as a matter of law. Because actual board membership can differ from the minimum statutory requirements, and because not all board members actually attend and vote at every meeting, these figures likely understate—perhaps dramatically—the amount of self-regulation that passes as state occupational licensing.

B. *The Reality of Board Meetings: Even More Competitor Control*

Recognizing that the statutory requirements for membership are only part of the story, I also reviewed hundreds of minutes that had been posted online for over eighty licensing boards, or about 5 percent of the total number of boards in the country. I discovered that it was common for a board to have one or more vacancies, some long-standing.²⁷ These vacancies were disproportionately lay- or consumer-member positions. In many instances, vacancies created professional dominance on a board we had not coded as dominated. For example, the Connecticut State Board of Examiners of Shorthand Reporters has left a lay member seat vacant for five years, allowing shorthand reporters to enjoy majority status at most of their meetings, despite being coded in our research as

23. See IOWA CODE § 147.14(d) (2016).

24. See CAL. BUS. & PROF. CODE § 4800 (2016).

25. See MINN. STAT. § 147B.05 (2016).

26. Cf. OR. REV. STAT. § 677.235 (2016) (providing that physician assistant member of medical board may be an unlicensed retiree), amended by S.B. 60, 79th Leg., Reg. Sess., 2017 Or. Laws Ch. 230 (Or. 2017).

27. For example, the Rhode Island Board of Hearing Aid Dealers and Fitters has left two of its six seats vacant since 2008. One of the vacancies stretches back to at least 2004—the earliest meeting for which minutes are publicly available. See *Board of Hearing Aid Dealers and Fitters*, R.I. DEP’T OF STATE, http://sos.ri.gov/openmeetings/?page=view_entity&id=176 [https://perma.cc/KE7K-T8ML] (scroll to “Recently Filed Meeting Minutes”).

nondominated.²⁸ Similarly, three nonlicensee seats were vacant on the Florida Council of Licensed Midwifery between 2012 and 2014, allowing for dominated decision making at most meetings during that interval.²⁹ The Maine Radiologic Technology Board of Examiners has had five long-standing vacancies, turning what appeared by statute to be a nondominated board of four licensees out of nine members into a dominated board of three licensees out of four members.³⁰ Several other boards I reviewed featured this vacancy-created professional dominance that was not apparent from the statute.³¹

The minutes also revealed that absences of lay board members often led to professionally dominated decision making, even on a board that appears by statute to have plenty of nonprofessional involvement. 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 nonlicensees.³² Since 2014, licensees have dominated 84

28. These meetings occurred between November 2011 and February 2016, the most recent meeting for which minutes are available. See *State Board of Examiners of Shorthand Reporters*, CONN. DEP'T OF CONSUMER PROTECTION, <http://ct.gov/dcp/cwp/view.asp?a=1624&Q=276082> [<https://perma.cc/Q2UV-F4AE>] (scroll to "Meeting Minutes").

29. See *Meetings*, FLA. DEP'T OF HEALTH, <http://www.floridahealth.gov/licensing-and-regulation/midwifery/meetings/index.html> [<https://perma.cc/6N8Q-S8MJ>] (scroll to "Past Agendas, Notices, Meeting Minutes and Audio Files" to access previous meeting minutes). The statute provides for a nondominated board of nine members, including four licensees. See FLA. STAT. § 467.004 (2016).

30. ME. REV. STAT. tit. 32, § 9853 (2016). The minutes from the meetings between October 2014 and March 2015 reflect this reduced membership. See *Archived Board Meeting Information*, ME. RADIOLOGIC TECH. BD. OF EXAM'RS, http://www.maine.gov/pfr/professionallicensing/professions/radiological/board_archives.html [<https://perma.cc/UW7C-2UV6>] (last updated March 6, 2017). All of the publicly available minutes show at least three board vacancies. See *id.*

31. The Wisconsin Radiography Examining Board, which by statute is not dominated, currently consists of a majority of licensees due to vacancies. See WISC. STAT. § 15.405(7e) (2016) (establishing seven-member board with three licensees); *Radiography Examining Board—Roster*, WIS. DEP'T OF SAFETY & PROF'L SERVS., <http://dsps.wi.gov/Boards-Councils/Agendas/Radiography-Examining-Board-Roster> [<https://perma.cc/J33E-WPH6>] (last updated Sept. 2, 2016) (current membership is five members, including three licensees). The Massachusetts Board of Registration of Physician Assistants—which by law consists of nine members, including four licensees—is also currently dominated because of vacancies. See MASS. GEN. LAWS ch. 13, § 11C (2016); *Board Members*, MASS. DEP'T OF HEALTH & HUMAN SERVS., <http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/dhpl/physician-assistants/about/board-members.html> [<https://perma.cc/R4P2-BASR>]. Licensees similarly dominate the Illinois Board of Orthotics, Prosthetics, and Pedorthics. See 225 ILL. COMP. STAT. 84/25 (2016) (establishing six-person board with three licensee members); *Board of Orthotics, Prosthetics, and Pedorthics*, ILL. DEP'T OF FIN. & PROF'L REGULATION, <http://www.idfpr.com/profs/Boards/orthot.asp> [<https://perma.cc/B7FR-RLM2>] (board currently consists of five members, a majority of whom are licensees).

32. These meetings took place between November 12, 2015 and June 21, 2016. See *Board Minutes*, N.D. BD. OF PHYSICAL THERAPY, <https://www.ndbpt.org/minutes.asp> [<https://perma.cc/2RAC-NLTD>]. Despite the attendance issues, the current composition of the board would otherwise reflect 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 [<https://perma.cc/2ZKY-743Z>].

percent of the meetings of the Massachusetts Board of Registration of Physician Assistants, despite the statute calling for only four PAs to serve on a board of nine.³³ Only lay members ever seem to miss meetings of the California Board of Accountancy; the board is not dominated by statute but had a majority of licensees at all the meetings for which minutes were available online.³⁴ Sometimes vacancies and absences combine to extreme effect. Between lay vacancies and absences, the New Jersey State Board of Court Reporting has made 100 percent of its decisions since 2014 with a professional majority. In several cases, there were only two board members present at all, both professional, making decisions on behalf of what by statute is supposed to be a six-member, nondominated board.³⁵

Special voting rules can also create professional control where statutory membership alone does not. It is not uncommon for statutes to relegate nonprofessional members to nonvoting status. For example, the Arkansas State Board of Acupuncture prohibits one of its nonlicensee members from voting, turning what by membership is a nondominated board into one where acupuncturists enjoy majority voting power.³⁶ It is especially common to limit the voting rights of nonmembers with respect to particularly competitive issues such as admission to the profession and professional discipline. For example, the lay member of the South Carolina State Board of Dentistry may not vote on any examinations, and the hygienist member cannot vote on dental entrance exams.³⁷ Another board takes the turf issue further: the Indiana State Board of Funeral & Cemetery Service prohibits members of the cemetery industry from voting on funeral director licensing issues, and funeral director licensees from voting on

33. Of these meetings, sixteen of the past seventeen—or 94 percent—have been attended by a majority group of licensees. See *Minutes and Agendas of Previous Board Meetings*, MASS. DEP'T OF HEALTH & HUMAN SERVS., <http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/dhpl/physician-assistants/about/minutes-and-agendas-of-previous-board-meetings.html> [https://perma.cc/MQ46-JZSN]. Similarly, eleven of the past thirteen meetings (85 percent) of the Florida Council of Licensed Midwifery have been dominated by licensees, despite the fact that they make up a minority of the board by statute. See FLA. STAT. § 467.004 (2016); *Meetings*, FLA. DEP'T OF HEALTH, <http://www.floridahealth.gov/licensing-and-regulation/midwifery/meetings/index.html> [https://perma.cc/S7JC-CFKA].

34. See CAL. BUS. & PROF. CODE § 5000 (2016); *CBA Meeting Materials*, CAL. BD. OF ACCOUNTANCY, <http://www.dca.ca.gov/cba/communications-and-outreach/meeting-materials.shtml> [https://perma.cc/SQ83-A52J].

35. See, e.g., *Public Session Minutes*, N.J. STATE BD. OF COURT REPORTING (Nov. 17, 2014), http://www.njconsumeraffairs.gov/cou/Minutes/crmin_111714.pdf [https://perma.cc/MGD7-DFHE] (noting only two licensees, who together constituted a quorum, as the only board members present).

36. See ARK. CODE ANN. § 17-102-201(a)(4)(B) (West 2016) (“However, the 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.”).

37. See S.C. CODE ANN. § 40-15-20(E) (2016) (“All members of the board have full voting rights except that the lay member is exempt from voting on examinations for licensure and the dental hygienists are exempt from voting on examination for licensure for dentists.”).

cemetery issues.³⁸ Some nondominated boards rely on dominated committees to make competitively sensitive decisions.³⁹

Using statutory requirements to measure dominance may also understate professional control because of ambiguity in the statutory language. Some statutes are clear that the nonprofessional seats must be held by individuals without a license,⁴⁰ but others establish a floor on the number of licensee members without setting a ceiling. These boards were not coded as dominated because the statute did not technically require dominance, but many of these boards are de facto dominated. For example, the licensing statute for real estate professionals in Hawaii states that “at least four” board members must be licensed real estate brokers; in reality, seven of the nine members are licensees.⁴¹ The statute establishing the Indiana Board of Respiratory Care Practitioners requires two licensees, but permits three, to serve on a board of five.⁴² At present, three respiratory care practitioners serve. With vacancies in the two remaining nonprofessional seats, this board is 100 percent dominated in fact, while according to its statute it is nondominated by law.⁴³

Examples of statutory membership understating professional dominance are easy to find, but it is difficult to know how far the problem goes—not just because there are almost 1,800 boards at work in the U.S., each typically meeting several times a year. The bigger problem is that boards tend to be opaque about their activities. For example, many boards do not post their minutes online;⁴⁴

38. See IND. CODE § 25-15-9-11 (2016). The effect of this voting restriction is to turn a nominally eleven-member, nondominated board into a seven-member, licensee-dominated board whenever it considers licensing matters. These responsibilities include, *inter alia*, determining the qualifications of applicants, establishing standards of practice, and investigating and prosecuting disciplinary violations. See *id.* § 25-15-9-9.

39. See *TPBE Board Committees*, TEX. BD. OF PROF'L ENG'RS, https://engineers.texas.gov/board_committees.htm [<https://perma.cc/3TXG-VUGM>]. While the Texas Board of Professional Engineers is not dominated by statute, its licensing committee consists of only licensed professional engineers. *Id.*

40. See, e.g., ALASKA STAT. § 08.01.025 (2016) (specifying that public members of state licensing boards may not practice or have a direct financial interest in the occupation the board regulates).

41. See HAW. REV. STAT. ANN. § 467-3 (West 2017); *Meet the Commissioners*, HAW. DEP'T OF COMMERCE & CONSUMER AFFAIRS, REAL ESTATE BRANCH, http://cca.hawaii.gov/reb/home_about/comm_bio [<https://perma.cc/7T2L-DNJM>] (identifying seven members of nine-person real estate commission as licensed brokers).

42. IND. CODE ANN. § 25-34.5-2-2 (West 2016).

43. See *Committee Minutes & Agendas*, IND. RESPIRATORY CARE COMM'N, <http://www.in.gov/pla/2627.htm> [<https://perma.cc/BR35-9F3N>].

44. See *Upcoming Board Meetings*, LA. STATE BD. OF PRACTICAL NURSE EXAM'RS, http://www.lsbpne.com/board_meetings.phtml [<https://perma.cc/G24A-A5TQ>] (listing agenda for upcoming board meeting only); *Orthotics, Prosthetics & Pedorthics*, ILL. DEP'T OF FIN. & PROF'L REGULATION, <http://www.idfpr.com/profs/orthotics.asp> [<https://perma.cc/8W86-BQ2J>] (click “Board Information” drop-down box, then follow “Meeting Notices & Minutes” hyperlink) (listing no previous meeting minutes); *Board of Licensing for Perfusionists*, ILL. DEP'T OF FIN. & PROF'L REGULATION, <https://www.idfpr.com/profs/Boards/pfusion.asp> (last visited Aug. 15, 2017) (listing no minutes); *General Board Information*, PENN. STATE BD. OF LANDSCAPE ARCHITECTS,

those that do are often incomplete or not up-to-date.⁴⁵ My research was further hindered by many boards' failure to list their current members and professional statuses.⁴⁶ Some states provided the option of looking up a licensee by name, but in many cases I had to resort to an internet search to determine a board member's professional status.⁴⁷

Worse still, my research revealed that boards do not always follow the laws that created them. In my limited inquiry into the minutes of a small fraction of the licensing boards in the United States, I found three such instances; in all cases, the violations were in favor of more extreme and entrenched professional involvement in board activity.⁴⁸ If the boards do not follow their own statutes, it

<http://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/LandscapeArchitects/Pages/General-Board-Information.aspx> [<https://perma.cc/4MYC-5FP5>] (providing link to third-party vendors from which to purchase previous meeting minutes); *General Board Information*, PENN. STATE BD. OF AUCTIONEER EXAM'RS, <http://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/AuctioneerExaminers/Pages/General-Board-Information.aspx> [<https://perma.cc/RCW8-63WH>] (last visited Aug. 15, 2017) (same).

45. See, e.g., *Board Meeting Minutes*, ARK. PROF'L BAIL BONDSMAN LICENSING BD., <http://apbblb.myarkansas.net/public/files/boardminutes.pdf> [<https://perma.cc/9APL-TAH9>] (providing list of nonfunctional links to board minutes from 2003–2010 only).

46. See *Contact Us*, ME. BD. OF COMPLEMENTARY HEALTH CARE PROVIDERS, <http://www.maine.gov/pfr/professionallicensing/professions/complementary/contactus.html> [<https://perma.cc/QK4Q-ZPTE>] (failing to list current members of the board and directing board-related inquiries to a generic email address); *Board Meeting Information*, ME. RADIOLOGIC TECH. BD. OF EXAM'RS, http://www.maine.gov/pfr/professionallicensing/professions/radiological/board_meetings.html [<https://perma.cc/M3ZB-NYG6>] (same); *List of Health Facility Administrator Board Members*, IN. STATE BD. OF HEALTH FACILITY ADMIN., <http://www.in.gov/pla/2809.htm> [<https://perma.cc/K6YN-7JCS>] (providing list of current board members, but not their professional credentials).

47. For example, the Wyoming Real Estate Commission's public website fails to identify its members' professional credentials or provide a way to verify their license status, such as through a database search. See *Wyoming Real Estate Commissioners*, WYO. REAL ESTATE COMM'N, <https://sites.google.com/a/wyo.gov/rec/real-estate-commission> [<https://perma.cc/K6MD-Z39M>].

48. The entire Rhode Island Board of Hearing Aid Dealers and Fitters—which has had the same four members since 2006—appears to be in violation of a statutory provision limiting consecutive terms of service. See 5 R.I. GEN. LAWS § 5-49-15 (2016) (“The term of office of each member shall be three (3) years. . . . No member of the board who has served two (2) or more full terms may be reappointed to the board until at least one year after the expiration of his or her most recent full term of office.”); R.I. DEP'T OF STATE, *supra* note 27. At least two of the entrenched members are current licensees. The Arizona Acupuncture Board of Examiners appears to be in violation of a statutory provision that mandates professional diversity in its membership. While two members must be licensed as chiropractors, physicians and surgeons, osteopaths, naturopaths, or homeopathic physicians, the statute plainly states these members “shall not be licensed pursuant to the same chapter.” ARIZ. REV. STAT. ANN. § 32-3902 (2016). Nonetheless, licensed chiropractors currently occupy both seats. See *Board and Staff Members*, STATE OF ARIZ. ACUPUNCTURE BD. OF EXAM'RS, <https://acupunctureboard.az.gov/about/board-staff-members> [<https://perma.cc/LV4X-7FKD>] (current board roster); *Meeting Notices and Agendas, and Minutes*, STATE OF ARIZ. ACUPUNCTURE BD. OF EXAM'RS, <https://acupunctureboard.az.gov/about/meetings> [<https://perma.cc/D3HL-W8FL>] (meeting minutes). Finally, and perhaps most egregiously, the Rhode Island Board of Examiners for Nursing Home Administrators appears to be in violation of a provision intended to prevent the board from becoming dominated by licensees. According to the statute, three members of the seven-person board “shall be persons licensed as nursing home administrators”; further, the statute prohibits a majority of members from “represent[ing] . . . a single profession or category of institution”—licensees

is impossible to know just how much worse the problem is in fact than it appears by law.

II.

THE CURRENT LEGAL CRISIS

The degree of professional dominance on state licensing boards is troubling enough as a matter of policy. But states now find themselves in legal hot water over their use of these de facto self-regulatory bodies after *North Carolina Dental*. The case has prompted suits against licensing boards challenging board conduct as anticompetitive, and claiming that the defendant board is not entitled to immunity from federal antitrust liability. This Part summarizes these suits, describes the current state of antitrust immunity after *North Carolina Dental*, and identifies the other legal questions relevant to antitrust liability for occupational licensing boards. The upshot is that a great many boards cannot claim antitrust state action immunity; some, undoubtedly, regulate in ways that run afoul of the antitrust laws. States ought to take these new suits seriously.

A. Pending Suits Against Licensing Boards in the Wake of *North Carolina Dental*

Since the Court's decision in *North Carolina Dental*, issued in February 2015, over a dozen suits have been filed against state licensing boards alleging Sherman Act violations and arguing that the board is not subject to state action immunity. Perhaps unsurprisingly, North Carolina has been the hardest hit, with three suits against three different boards.⁴⁹ California is facing two suits,⁵⁰ and Connecticut,⁵¹ Georgia,⁵² Louisiana,⁵³ Nevada,⁵⁴ Pennsylvania,⁵⁵ Mississippi,⁵⁶

included. See 5 R.I. GEN. LAWS § 5-45-1(a) (2016). The board currently consists of only four members, 75 percent of whom are active licensees. See *Board of Examiners for Nursing Home Administrators*, R.I. DEP'T OF STATE, <http://sos.ri.gov/govdirectory/index.php?page=DetailDeptAgency&eid=251> [https://perma.cc/TP24-KSAM] (scroll to "Membership"); *License Verification*, R.I. DEP'T OF HEALTH, <https://healthri.mylicense.com/verification> [https://perma.cc/9ELY-T3E7].

49. See *Jemsek v. N.C. Med. Bd.*, No. 5:16-cv-59-D (E.D.N.C. filed Feb. 2, 2016); *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15-cv-831 (M.D.N.C. filed Oct. 7, 2015); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 1:15-cv-439 (M.D.N.C. filed June 3, 2015).

50. See *Kinney v. State Bar of Cal.*, No. 3:16-cv-02277 (N.D. Cal. filed Apr. 27, 2016); *Gonzalez v. Dept. of Real Estate*, No. 2:15-cv-2448 GEB GGH PS (E.D. Cal. filed Nov. 11, 2015).

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

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

53. See *Rodgers v. La. Bd. of Nursing*, No. 3:15-cv-00615-JJB-SCR (M.D. La. filed Aug. 12, 2015).

54. See *Strategic Pharm. Sols., Inc. v. Nev. State Bd. of Pharm.*, No. 2:16-cv-00171 (D. Nev. Jan. 1, 2016).

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

56. 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).

Tennessee,⁵⁷ and Texas⁵⁸ are each facing one suit. As my empirical results show, these thirteen boards are not unique—for every board that has been sued, there are more than one hundred others that are potentially vulnerable. Because altering board composition or establishing supervision requires legislation, in most cases states have not been able to act quickly enough to insulate themselves from challenges.⁵⁹ With the passing of each legislative cycle, the states are exposing themselves to more of these disruptive and costly lawsuits.

The variety of the 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. In Texas, for example, a telemedicine provider has challenged the Texas Board of Medicine's rule that a "doctor-patient relationship" cannot be established without an in-person meeting.⁶⁰ The rule has made it impossible for Teladoc, Inc. to provide low-cost care to patients living in remote areas or to patients who, for health reasons, cannot easily travel to a doctor's office.⁶¹ In Nevada, a direct-ship veterinary pharmaceuticals provider is suing the State Board of Pharmacy for its interpretation of a *veterinary* board rule that would put the provider out of business.⁶²

Other suits allege unreasonable and unfair entry barriers. The Tennessee Council for Hearing Aid Specialists is currently defending accusations that the board uses an entry exam to prevent entry and competition—an exam written, administered, and scored by board members themselves.⁶³ According to Beltone, Inc., the plaintiff hearing aid company, the exam is deliberately designed to prevent its employees from entering the profession (with a 10 percent pass rate),

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

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

59. Georgia has been able to act quickly, passing legislation in response to *North Carolina Dental*. It sought to establish active supervision by giving the Governor the power and duty to review decisions by the state's occupational licensing boards. See Georgia Professional Regulation Reform Act, HB 952, 153rd Gen. Assemb., 2d Sess. (Ga. 2016) (codified at GA. CODE ANN. § 43-1C-3).

60. See Amended Complaint ¶ 112, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. July 6, 2015); 22 TEX. ADMIN. CODE § 190.8 (requiring "a face-to-face visit" to establish doctor-patient relationship before a doctor can issue a prescription and specifying that communications exchanged via email, text, chat, or phone "are inadequate" to establish such a relationship).

61. See Amended Complaint ¶¶ 52, 128, 131, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. July 6, 2015) ("For patients in underserved or rural areas, being forced to make an in-person visit to a physician when this is not medically necessary . . . creates a real and inappropriate burden. . . . [The rule] would end Teladoc's provision of telehealth services in Texas. . . . Some patients who would have sought treatment from Teladoc will, in its absence, delay or forgo receiving healthcare altogether, with potentially devastating consequences.").

62. See Complaint ¶ 4, *Strategic Pharm. Sols., Inc. v. Nev. State Bd. of Pharm.*, No. 2:16-cv-00171 (D. Nev. Jan. 29, 2016) (alleging that the Pharmacy Board has tried to stop plaintiff's "innovative competitive practices or face having its statutorily required pharmacy license revoked").

63. See Complaint ¶¶ 35–41, *WSPTN Corp. v. Tenn. Dep't of Health*, No. 3:15-cv-00840 (M.D. Tenn. filed July 30, 2015) (describing the practicum—created and administered by the board—as "exceptionally difficult," "arbitrary," and "subjective").

and admit employees of board members, who enjoy a significantly higher pass rate.⁶⁴ Restricted professional entry is likewise an issue in a currently pending suit against the Louisiana Board of Nursing; the suit alleges that the board decertified a nursing school in order to stifle competition.⁶⁵

Another set of suits concerns occupational scope-of-practice, the issue in *North Carolina Dental*. The practice of “dry needling” has ignited a professional turf war in North Carolina, where physical therapists have filed suit against the Acupuncture Board for its attempts to prevent physical therapists from using dry (solid, noninjectable) needles in the treatment of joint and muscle pain.⁶⁶ The Acupuncture Board issued cease-and-desist letters to the offending physical therapists, asserting that dry needling is the practice of acupuncture and outside the scope of physical therapy practice.⁶⁷ The physical therapists’ suit prompted the Acupuncture Board, in turn, to sue the Physical Therapy Board for a declaratory judgment that dry needling was outside the scope of physical-therapy practice. That suit was unsuccessful,⁶⁸ and the therapists’ antitrust suit against the Acupuncture Board is still pending. Scope of practice is also the central issue in an antitrust suit against the Pennsylvania State Board of Auctioneer Examiners. An individual who auctioned toy trains online has filed suit challenging the board’s decision to cite and fine him for the unlicensed practice of auctioneering.⁶⁹

64. *Id.* The suit also alleges harassment from employees of board members, one of whom allegedly donned a wig and harassed customers at the plaintiff’s business. *See id.* ¶ 62 (“Looney [an employee] provided false names and contact information regarding her identity . . . using the alias ‘Karen Hoover’ when appearing at the Johnson City location while wearing a long auburn/brown wig, and using the name ‘Penny Trexler’ when appearing at the Bristol office while wearing a different hairstyle.”).

65. *See* Complaint ¶¶ 9–17, *Rodgers v. La. Bd. of Nursing*, No. 3:15-cv-00615-JJB-SCR (M.D. La. filed Aug. 12, 2015) (arguing that the board’s use of a pass-rate cutoff to decertify nursing schools is an unreasonable restraint of trade).

66. *See* Amended Complaint ¶¶ 30–34, *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15-cv-00831 (M.D.N.C. filed Feb. 3, 2016) (“During dry needling, physical therapists insert needles into trigger points (taut bands in the muscles) to relieve patients’ pain or dysfunction. . . . Research has shown that dry needling improves pain control, reduces muscle tension, normalizes dysfunction, and accelerates rehabilitation.”) (internal quotation marks omitted).

67. *See id.* ¶ 106 (“[The letters] ordered the targets to immediately ‘CEASE AND DESIST’ providing dry needling services . . . [and] stated that practicing acupuncture without a license was a Class 1 misdemeanor.”).

68. David Quick, *Dry Needling Moves into Physical Therapy Mainstream*, POST & COURIER (June 26, 2016, 9:00 AM), <http://www.postandcourier.com/20160627/160629615/as-dry-needling-moves-into-physical-therapy-mainstream-ama-calls-for-a-standard-of-practice> [<https://perma.cc/6U52-RK5C>] (“In April, a North Carolina Superior Court judge dismissed a lawsuit filed by the N.C. Acupuncture Licensing Board seeking a declaration that dry needling by physical therapists is the unlawful practice of acupuncture and to require the N.C. Board of Physical Therapy Examiners to advise its licensees that dry needling is outside the scope of physical therapist practice.”) (internal quotation marks omitted).

69. *See* Complaint ¶¶ 37–39, *Bauer v. Pa. State Bd. of Auctioneer Exam’rs*, No. 2:15-cv-01334-NBF (W.D. Pa. filed Oct. 14, 2015) (describing how the board served a citation on Bauer and his business for the unlicensed practice of auctioneering and fined him \$1,500).

These suits not only expose states to significant financial liability, but they threaten to unravel the way that the occupations have been regulated for decades. A finding of no antitrust immunity 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 suffered by a plaintiff.⁷⁰ As amici in *North Carolina Dental* argued, this kind of liability is likely to chill board service unless states take steps to indemnify or immunize board members.⁷¹ And the problem goes beyond money damages; most of these suits ask for injunctive relief that would reverse the challenged regulatory action.⁷² Without state action immunity, any board regulation that does not comply with federal antitrust law is just a lawsuit away from invalidity. In short, these suits represent an existential crisis for the way almost a third of American workers are regulated.

B. A New Antitrust Federalism

The success of these suits will turn on whether the boards are able to claim immunity from federal antitrust law. That inquiry will be guided by a line of Supreme Court precedent, starting with *Parker v. Brown*⁷³ from 1943 and running through *North Carolina Dental* from 2015. These cases create a doctrine known as “antitrust federalism,” so named for the boundary immunity creates between state regulation and federal antitrust liability. The doctrine has many twists and turns, but the upshot is that state action is immune from antitrust law; after *North Carolina Dental*, only conduct for which the state has made itself accountable will be considered “state action” for immunity purposes.⁷⁴

70. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1152 (2014) (observing that without immunity, “the industry members on the board would be liable for treble damages to competitors and consumers harmed by their agreement”).

71. See Brief for West Virginia et al. as Amici Curiae Supporting Petitioner at 11, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534) (noting that without immunity, “qualified professionals may simply refuse to serve”).

72. See, e.g., Complaint at 21, *Strategic Pharm. Sols., Inc. v. Nev. State Bd. of Pharm.*, No. 2:16-cv-00171 (D. Nev. filed Jan. 29, 2016) (seeking permanent injunction); Amended Complaint ¶¶ 178–79, *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15-cv-00831-WO-LPA (M.D.N.C. filed Feb. 3, 2016) (requesting injunctive relief); Amended Complaint ¶ 17, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. July 6, 2015) (seeking preliminary and permanent injunctive relief).

73. 317 U.S. 341 (1943).

74. Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1408 (2016) (“acts of the state, for immunity purposes, are defined as a matter of federal antitrust law to include only those acts for which the state takes full and transparent political accountability”). See Sina Safvati, *Public-Private Divide in Parker State-Action Immunity*, 63 UCLA L. REV. 1110, 1110 (2016) (arguing that “the U.S. Supreme Court should formally adopt a rule of decision inspired by the principles of financial disinterest and political accountability to govern *Parker* immunity doctrine”).

1. *Parker Immunity and Midcal's Two-Step*

In 1943, the Supreme Court decided *Parker v. Brown*, creating what has come to be known as “*Parker* immunity”⁷⁵ or “state action immunity.”⁷⁶ The essential holding of *Parker* was that the Sherman Act was intended to reach only private price fixing and other anticompetitive conduct, not state activity such as regulation.⁷⁷ But *Parker* also held that a state cannot merely sanction private antitrust violations, 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.”⁷⁸ Several decades later, in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Court explained the meaning of this somewhat cryptic language when it observed that “the national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”⁷⁹

If a state’s blessing—the “gauzy cloak”—is not enough, what must a state do to claim regulation as its own? *Midcal* provided an answer: a state must either regulate directly through its sovereign branches or clearly delegate specific regulatory tasks to private actors and then actively supervise their rules and decisions. Thus *Midcal* created a two-pronged test for immunity for regulation created outside of the state’s sovereign branches: private regulators receive immunity if they act according to a state’s “clearly articulated and affirmatively expressed” policy to displace competition, and if they are “actively supervised” by the state.⁸⁰

2. *Hallie, North Carolina Dental, and the Public/Private Divide*

Shortly after *Midcal*, the Court further complicated the private/public distinction at the heart of *Parker* immunity when it decided that some substate entities—such as municipalities—were entitled to a shortcut to immunity. The Court held in *Town of Hallie v. Eau Claire* that cities enjoy immunity for their anticompetitive regulation as long as they meet *Midcal*’s first prong; even unsupervised municipal regulation is immune so long as it comports with the state’s “clearly articulated” intent to displace competition.⁸¹ The court justified the shortcut by appealing to a city’s public nature, explaining that “[w]here the

75. See, e.g., James F. Blumstein & Terry Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 DUKE L.J. 389, 404 (1978) (using the term “*Parker* immunity”).

76. See, e.g., Phillip Areeda, *Antitrust Immunity for “State Action” After Lafayette*, 95 HARV. L. REV. 435, 435 (1981) (using the term “state action immunity”).

77. *Parker*, 317 U.S. at 351 (noting that the Sherman Act does not mention the states at all).

78. *Id.*

79. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 98 (1980).

80. *Id.* at 97.

81. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (“We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.”).

actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement.”⁸²

Thus the Court’s state action immunity jurisprudence, from *Parker* to *Hallie*, has conditioned immunity on whether a regulator is private or public. *Parker* said that private cartels do not enjoy immunity. *Midcal* said that combinations of private actors need state articulation and supervision to be immune. And *Hallie* said that cities—not quite “the state” for immunity purposes, but public in nature—are immune without supervision. What was unclear until *North Carolina Dental* is what made a substate regulatory entity sufficiently public to enjoy the *Hallie* shortcut. The answer was essential to determining the status of occupational licensing boards. Boards typically meet the “clear articulation” prong easily; courts have held that the ubiquitous statutory language giving licensing boards the authority to create professional entry and practice requirements suffices.⁸³ But it would seem that the vast majority, including the board in *North Carolina Dental*, are not actively supervised by the state.⁸⁴ If occupational licensing boards are not entitled to *Hallie*’s shortcut, they are not immune.

Who, besides municipalities, can take the *Hallie* shortcut? Crucial to answering this question was understanding what made cities “public” and so entitled to immunity even without supervision. One possible interpretation, hinted at by a footnote in *Hallie* suggesting (without deciding) that state agencies are also entitled to the shortcut,⁸⁵ is that cities are governmental and so “public.” The board in *North Carolina Dental* seized on this possibility and argued that because the board was created by state statute, deemed a “state agency” by the state itself, and required an oath of office from its members, it was governmental, public, and entitled to immunity without supervision.⁸⁶

The *North Carolina Dental* Court quite appropriately rejected this formalist reading of *Hallie*, making clear that what made the municipality in that case unlikely to join a private price-fixing cartel was not its claim to being governmental in a formal sense, but rather the relative lack of incentives to self-deal among its members.⁸⁷ Whether or not local officials can always be counted on to govern in the public interest, their status as elected, accountable officials

82. *Id.* at 47 (emphasis omitted).

83. *See, e.g.,* *Benson v. Ariz. State Bd. of Dental Exam’rs*, 673 F.2d 272, 275–76 (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).

84. *See infra* notes 89–103 and accompanying text.

85. *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.”).

86. *See* Brief for Petitioner at 38–39, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534).

87. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1111. For this formulation of the public/private divide at the heart of *Parker* immunity, the Court was indebted to Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 697–729 (1991) (arguing that where regulators have a personal financial self-interest in the regulation, state action immunity is inappropriate).

without a direct financial stake in regulation makes them “public” for immunity purposes. In contrast, an entity controlled by “active market participants” in the very market the entity regulates poses a significant risk of cartelization, such that state supervision or antitrust liability is required.

3. *The New Antitrust Federalism and State Accountability*

North Carolina Dental stands for a new antitrust federalism, where states must take extra steps to insulate the most competitively risky form of regulation—self-regulation—from antitrust liability. The new paradigm turns not on whether the entity claiming immunity has some formal relationship with the state, but rather on whether that entity has an inherent incentive to self-deal and, if so, whether the state has taken transparent accountability for the regulation it authorizes.⁸⁸ Understanding the new antitrust federalism and its emphasis on state accountability is crucial to answering some questions the *North Carolina Dental* case left open. As I will discuss in Part III, it is key to understanding what the court meant by “controlling number” and “active market participant.” But before getting to these interpretive questions, a word or two about antitrust liability for boards will show that board composition is a determinative factor in the current legal crisis.

C. *The Reality of Antitrust Exposure*

The fact of dominance—or having “a controlling number of . . . active market participants,” in the words of the Court—does not itself mean a board faces antitrust liability. Even dominated boards may still enjoy immunity if they are actively supervised by the state. And immunity is just one part of the question. Antitrust liability also turns on whether the board’s conduct violates the Sherman Act in the first place. A full picture of board exposure, after *North Carolina Dental*, thus requires knowing whether states supervise their boards and whether board conduct is likely to violate the Sherman Act. The bottom line is that because states probably do not supervise their boards, and because a significant amount of board activity potentially runs afoul of the Sherman Act, these suits pose a real threat to the states and their licensing boards.

1. *Do States Supervise?*

Actively supervised licensing boards will not face antitrust liability. Unfortunately, the Court has not been clear about what constitutes adequate state supervision.⁸⁹ Although the Court has decided eleven antitrust immunity cases since *Midcal* created the active supervision requirement, the Court has had few

88. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (“Federalism serves to assign political responsibility, not to obscure it.”).

89. See, e.g., Joshua Rosenstein, *Active Supervision of Health Care Cooperative Ventures Seeking State Action Antitrust Immunity*, 18 SEATTLE U. L. REV. 329, 334 (1995) (observing that “[d]efining the ‘active supervision’ requirement . . . has proven to be problematic”).

occasions to define that term. The issue was conceded in several cases, including *North Carolina Dental*;⁹⁰ in others, the Court decided the case on the “clear articulation” prong alone.⁹¹ In two cases, the Court directly confronted the supervision question and found state supervision lacking.⁹² Thus, the Court has never explicitly approved of a supervisory regime. It has, however, provided some guidance about supervision, most notably in *North Carolina Dental*. Active supervision by the state itself must be more than a “negative option,” or an unexercised power to review.⁹³ It must be substantive; state review of its delegated regulation must consider more than procedural questions and must reach the question of whether the regulation substantively comports with state policy.⁹⁴ And the state “supervisor must have the power to veto or modify” the decision it reviews.⁹⁵ But the Court also emphasized that “the inquiry regarding active supervision is flexible and context-dependent,”⁹⁶ making it difficult to predict whether a state’s system of review will pass muster.

A full examination of the various mechanisms of state supervision of occupational boards is outside the scope of this Article, but there is reason to believe that most states do not actively supervise all their licensing boards. Most states do allow for review of board decisions for their conformity with a state’s Administrative Procedure Act, but this review is likely to be considered insufficiently substantive to qualify as supervision.⁹⁷ Some states create mechanisms whereby a rule can be challenged—either in court or by another state entity—but these are likely the “negative option” found lacking by the Court.⁹⁸ Some states have “rules review” procedures whereby a state commission or committee reviews substate regulations, such as those created by a licensing

90. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116; *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 79 (1985).

91. See *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1011 (2013); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 54–56 (1982).

92. See *Ticor*, 504 U.S. at 638 (holding that the “mere potential for state supervision is not an adequate substitute” for active supervision); *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (concluding that “we need not consider the ‘clear articulation’ prong . . . because the ‘active supervision’ requirement is not satisfied”).

93. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1112–13 (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).

94. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116 (“The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it . . .”); see also *Patrick*, 486 U.S. at 101 (“[S]tate officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”).

95. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116.

96. See *id.* at 1117 (“In general . . . the adequacy of supervision otherwise will depend on all the circumstances of a case.”).

97. See *Edlin & Haw*, *supra* note 70, at 1123 n.179.

98. See *id.* at 1123 (noting that “[e]ven schemes where the state provides the final authorization of a restriction can lack supervision if the state uses a ‘negative option’ that allows a state’s silence to signify approval”).

board, before they have the force of law.⁹⁹ When these committees are legislative, *INS v. Chadha*¹⁰⁰—which has been applied in the state context in all but one case¹⁰¹—limits the ability of the committee to “modify or veto” as supervision requires.¹⁰² 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.¹⁰³

2. *Do Licensing Rules Violate the Sherman Act?*

Liability also turns on whether a board’s conduct constitutes a violation of Sherman Act standards. In the proceedings below, the FTC found the board’s campaign against nondentist teeth whiteners in *North Carolina Dental* to be an anticompetitive restraint of trade because it eliminated a low-price alternative to teeth whitening in a dental office, with little evidence that practice by nondentists was harmful to consumers.¹⁰⁴ As in the *North Carolina Dental* case, boards often impose restraints that would run afoul of the antitrust laws if created by private cartels.¹⁰⁵ For example, the Court has found it appropriate to impose liability on private organizations promulgating rules of ethics—analogueous to the one challenged in the currently pending Teladoc case—that have significant anticompetitive effects.¹⁰⁶ Courts have also found private associations liable for creating unfair and burdensome entry requirements similar to the ones allegedly

99. See, e.g., ARIZ. REV. STAT. ANN. § 41-1052 (2013) (establishing an executive branch Regulatory Review Council to review and approve rules proposed by state agencies before they go into effect); *Legislative Regulation Review Committee*, CONN. GEN. ASSEMBLY, <https://www.cga.ct.gov/rr> [<https://perma.cc/SC7G-GKQ6>] (explaining that “[i]t is the responsibility of the Legislative Regulation Review Committee to review regulations proposed by state agencies and approve them before regulations are implemented”); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1201–02 (1999) (observing that in many states “a rules review committee within the legislature has the power to veto, suspend, or delay rules or the power to allow proposed rules to lapse absent approval, making legislative committee approval of rules a mandatory requirement in the rulemaking process.”).

100. 462 U.S. 919 (1983).

101. See Rossi, *supra* note 99, at 1202–03.

102. See *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

103. The new regime created by Georgia in response to *North Carolina Dental*, whereby the Governor has the power and duty to review all proposed occupational licensing rules, is arguably an example of active supervision. 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). Whether this solution will be viewed by the courts as “active supervision” depends on how its vague legislative mandate is ultimately interpreted and implemented.

104. See *In the Matter of the N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640, 667 (2011) (finding that the board’s public safety arguments were unpersuasive).

105. See Edlin & Haw, *supra* note 70, at 1132–34 (describing the ways in which occupational licensing can violate Sherman Act principles).

106. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 693–94 (1978) (rejecting a professional association’s argument that its ethical rule “inures to the public benefit”).

imposed by the Tennessee Council for Hearing Aid Specialists.¹⁰⁷ Similarly, by not recognizing out-of-state licenses, boards effect horizontal market allocation, which in other contexts is per se illegal.¹⁰⁸ In short, many board activities potentially implicate the Sherman Act.

There is some ambiguity, however, about whether boards will or should be subject to the same standards as purely private associations. The economic justification for professional licensing—based on the ostensibly procompetitive effects of limited entry and practice rules—is that it corrects market failures that lead to increased public health and safety.¹⁰⁹ The Court has said, outside of the licensing-board context, that such arguments are a “frontal assault” on Sherman Act policy.¹¹⁰ For example, in *National Society of Professional Engineers*, the Court considered a professional society’s ethical rule forbidding member engineers from mentioning price at the bid stage. As a procompetitive justification, the society raised the argument that price-based selection of engineering services led to low-cost, low-quality engineering that endangered the public.¹¹¹ The Court purported not to even consider this effect as possibly outweighing the obvious effect of the bidding ban on price levels. The Court quipped that, in a Sherman Act case, a defendant may not argue that “competition is [not] in the public interest.”¹¹²

The Court’s righteous indignation in *Professional Engineers* can be forgiven—the price bidding restriction was extremely anticompetitive—but the case cannot mean what it says. The rule of reason, which the Court has called “the prevailing standard of analysis” in § 1 cases under the Sherman Act,¹¹³ condemns only those restrictions for which the anticompetitive effects outweigh the procompetitive effects. As the Court has said, “the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy

107. For example, the Court found Sherman Act liability appropriate when a gas burner manufacturer was denied approval by a private standard-setting association that used a test influenced by his competitors and “not based on ‘objective standards.’” *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658 (1961). Similarly, the Court found a Sherman Act violation when a multiple-listing service comprised of competing real estate agents tried to impose a “favorable business reputation requirement” on its members that was vague, subjective, and administered by the competitors themselves. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1376, 1382, 1385–86 (5th Cir. 1980).

108. *See Edlin & Haw, supra* note 70, at 1133 (observing that “nonrecognition of out-of-state licenses subdivides the national market for services and insulates professionals in one state from competitors in another” and that such market allocation is per se illegal “when agreed to by private competitors”).

109. *See id.* at 1111–18 (describing the economics of occupational licensing).

110. *Prof’l Eng’rs*, 435 U.S. at 695.

111. *Id.* at 684.

112. *Id.* at 692.

113. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

competition.”¹¹⁴ This holding, and the rule of reason itself, implies that sometimes restricting rivalry can promote competition in a different sense. In these cases, it is perfectly acceptable to argue that competition (if taken to mean atomistic, all-against-all rivalry) is not “in the public interest.”

Perhaps *Professional Engineers* meant something narrower—that public health and safety, rather than consumer welfare measured in price, output or quality, cannot form the basis of a procompetitive argument in a Sherman Act case. This reading would also spell trouble for licensing boards; virtually all justifications for their conduct reduce to promoting health and safety. But there is reason to doubt even this narrower meaning of *Professional Engineers*. In the case itself, the Court did not use a per se standard to condemn the rule against price bidding, despite the fact that similar prohibitions achieved outside of the professional context would undoubtedly be summarily condemned. More recently, in *California Dental Association v. FTC*, the Court accepted what amounted to health and safety arguments justifying an advertising restriction promulgated by a private association of dentists.¹¹⁵ The Court credited the dental association’s argument that the restriction could increase service quality, casting serious doubt on the proposition in *Professional Engineers* that offering professional service quality as a procompetitive justification in an antitrust case is a “frontal assault on the basic policy of the Sherman Act.”¹¹⁶

Therefore, as a matter of doctrine, it seems unlikely that courts will reject every board rule that restricts output or raises price in the name of safer, higher-quality service. After all, these arguments are economic arguments about market failure and consumer welfare, categorically similar to those offered in a typical rule of reason case. Further, as a matter of legal realism, courts will be reluctant to condemn board conduct per se because to do so would be to invalidate essentially all nonimmune board regulation, which as my study reveals, is essentially all board regulation. The courts have the doctrinal room, and probably the pragmatic sensibility, to use the rule of reason to sort the pro- from the anticompetitive licensing restrictions. But many restrictions will run afoul of the Sherman Act, as the North Carolina Dental Board’s cease-and-desist campaign did,¹¹⁷ potentially exposing boards to significant liability if they cannot claim state action immunity.

114. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)) (internal quotation marks omitted).

115. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 774–75 (1999). The association’s argument amounted to a claim that without the restriction, the market for dental services would suffer from information asymmetries capable of degrading the quality of dental services provided. *Id.* at 771–73. The case relies on Akerloff’s “lemons” model. For a discussion of Akerloff’s lemons model, *Cal Dental*, and what it means for *Professional Engineer*’s “frontal assault” language, see Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 33–38 (2016).

116. *Prof’l Eng’rs*, 435 U.S. at 695.

117. In the proceedings below, the FTC used the rule of reason to evaluate the Dental Board’s activity. See *In the Matter of the N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640, 669–73 (2011) (applying rule of reason).

3. *Are Board Members Personally Liable?*

Suits brought by a government agency, such as the FTC, will probably not impose money damages on board members.¹¹⁸ But private suits under § 1 of the Sherman Act could hold individual members of the board financially liable for three times the damages claimed by plaintiffs.¹¹⁹ This fact was highlighted by amici in *North Carolina Dental* as having the probable effect of chilling board service,¹²⁰ which seems likely but is also easily addressed by statutory means. States could statutorily immunize board members as is the common practice for police officers who face potential § 1983 liability.¹²¹ Indemnification, however, merely shifts the financial liability from the board members to the state; it cannot eliminate the possibility of widespread financial liability for anticompetitive occupational restrictions.

III.

WHAT'S NEXT FOR THE COURTS: DEFINING "CONTROLLING NUMBER OF . . . ACTIVE MARKET PARTICIPANTS"

As we have seen, *North Carolina Dental* has made the vast majority of licensing boards vulnerable to antitrust suit, even under a narrow definition of "controlling number of . . . active market participants." But this narrow definition is not inevitable. The current legal crisis may prompt states to reconsider their board composition to avoid antitrust liability; doing so requires predicting how the courts will interpret *North Carolina Dental*'s language. Will courts interpret "controlling number of . . . active market participants" narrowly, as I did in coding board dominance, by looking only to whether the state statute requires that a majority of board members hold licenses issued by the board itself? Or will courts embrace a more capacious definition that could find "control" with less than a majority?¹²² Will the courts define "market participant"

118. See Complaint at 5–6, In the Matter of the N.C. Bd. of Dental Exam'rs, 152 F.T.C. 640 (2011) (omitting damages in its "notice of contemplated relief").

119. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–92 (1975) (declining to extend state action immunity to state bar association and remanding the case to allow plaintiffs, a class of consumers of legal services, to hold individual members of the bar liable for treble damages); John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 292 (2003) (noting that "any hybrid restraint that violates the antitrust laws and fails the tests for immunity leaves private parties exposed to the whole panoply of antitrust remedies," including treble damages).

120. See Brief for West Virginia et al. as Amici Curiae Supporting Petitioner at 11, N.C. State Bd. of Dental Exam'rs, 135 S. Ct. 1101 (2015) (No. 13-534) (noting that without immunity, "qualified professionals may simply refuse to serve").

121. 42 U.S.C. § 1983 (2012); see, e.g., Jonathan Day & Jeffrey W. Jacobs, *Opening the Deep Pocket—Sovereign Immunity Under Section 1983*, 31 BAYLOR L. REV. 389, 408 (1979) (observing that "voluntary assumption of employees' liability by governmental entities . . . ha[s] already been adopted in most jurisdictions, at least to the extent of assuming the burden of defending civil rights claims.").

122. See FED. TRADE COMM'N, BUREAU OF COMPETITION, FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS 8–9 (2015) [hereinafter FTC STAFF GUIDANCE], <https://www.ftc.gov/system/files/attachments/competition-policy->

as something other than a license holder?¹²³ And will every board decision need to be examined on a case-by-case basis, or can states ensure immunity *ex ante* through board composition?¹²⁴ This Section attempts to answer these questions by resorting to principles from antitrust state action doctrine, substantive antitrust law, and, where antitrust runs out of road, from other areas of law addressing similar questions.

A. “Active Market Participants” are Those Who Stand to Benefit from Relaxed Competition

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.¹²⁵ This principle runs from *Parker v. Brown*, which warned that a state may not merely authorize antitrust violations,¹²⁶ through *Midcal* and *Hallie*, which together created a shortcut for immunity for entities particularly unlikely to self-deal.¹²⁷ And it is epitomized by the holding in *North Carolina Dental* that the six dentist members of the board posed such risk of self-dealing as to require state supervision.

This interpretation—that an “active market participant” is someone especially likely to self-deal—also comports with substantive antitrust law. Under § 1 of the Sherman Act, naked agreements among competitors to restrict competition are *per se* illegal.¹²⁸ 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.¹²⁹ The principal concern in an

guidance/active_supervision_of_state_boards.pdf [https://perma.cc/WJ2F-5FL4] (defining “control” to include some situations where licensees do not constitute a numerical majority).

123. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1123 (2015) (Alito, J., dissenting) (raising the interpretive questions prompted by “active market participants”).

124. See *id.* (discussing the possibility that “active market participant” will be defined according to the “particular regulation being challenged”).

125. See Allensworth, *supra* note 74, at 1414 (describing the new antitrust federalism as imposing “additional procedures on states when they use the most competitively risky means of regulation: regulation by industry itself”).

126. 317 U.S. 341, 351 (1943) (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”).

127. See Edlin & Haw, *supra* note 70, at 1123–24 (describing the *Midcal* test and the “fast track” created by *Hallie*).

128. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (“It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable.”).

129. See 1 ADAM SMITH, *THE WEALTH OF NATIONS* ch. X, pt. II (George Bell & Sons 1908) (1776) (observing 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”).

antitrust suit against a board is that competitors will face mixed motives in regulating their profession. Board members who are currently in competition with one another will often find that their interest in protecting consumers conflicts with their profit motives to keep competitors out and prices high.¹³⁰

1. *Who Are the “Active Market Participants” on a Licensing Board?*

This focus on self-dealing suggests that “active market participants” does not mean members who participate in the market as consumers. In other legal contexts, the Court has used the phrase “market participant” to refer to purchasers,¹³¹ but in this context the interests of purchasers—in low prices and high-quality service—would mitigate rather than augment the self-dealing risks to competition posed by providers. Further, counting consumers toward board dominance would result in an absurdity, because nearly everyone consumes professional services such as medicine and dentistry—including nonprofessional board members. Counting consumers as “active market participants” would mean 100 percent dominance for boards covering especially popular professional services and would mean that states could not use board membership as a route to immunity.

Although it seems clear that “active market participants” means those with a financial interest in diminishing rivalry and does not mean consumers, there is still substantial ambiguity about how closely board members must compete to trigger *North Carolina Dental’s* holding.¹³² We know from the case itself that a dental board comprised of six dentists, one hygienist, and one consumer member is dominated and needs supervision.¹³³ But what about a “mixed” board where hygienists and dentists together make up a majority, but neither group alone does? And does that question turn on whether the challenged action pertains to dentistry, hygiene, or both? The question is crucial because, as my research reveals, many boards regulate several different professions and require a professional mix of board members.¹³⁴ The use of the singular in *North Carolina*

130. See Elhauge, *supra* note 87, at 702 (“An extensive body of literature establishes that, if freely permitted to restrain trade, those financially interested in the sale or purchase of goods or services have incentives to stifle competition, reduce output, and raise prices.”).

131. In constitutional law, for example, a state can privilege its own citizens over out-of-state interests when it acts as a “market participant” without offending dormant commerce clause principles. This “market participant” exception applies when the state is acting as a purchaser. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (finding no constitutional violation where Maryland purchased automobile hulks from its own citizens on terms more favorable than it imposed on out-of-state scrap dealers).

132. See Comment, *The Supreme Court 2014 Term: Leading Cases*, 129 HARV. L. REV. 181, 371, 375–80 (2016) (identifying the ambiguity of the “market” in which “active market participants” operate, and advocating against a narrow view).

133. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1108 (2015) (describing the Dental Board membership).

134. See, e.g., Delaware Board of Plumbing, Heating, Ventilating, A.C., & Refrigeration Examiners, DEL. CODE ANN. tit. 24, § 1803 (2016) (stipulating that of nine board members, three must be licensed plumbers and three must be licensed HVAC professionals); Maine Board of Speech,

Dental—“the *occupation* the board regulates”¹³⁵—suggests that the Court did not contemplate this board structure.

When one confronts the reality of mixed board membership, another meaning, one supported by antitrust economic theory, emerges: supervision is required when licensees of *any* occupation within that board’s jurisdiction control a decision. For many mixed boards, overlapping jurisdiction between occupations means that even different license holders have incentives to relax competition. And even for mixed boards, where the different licensees do not provide substitute services, game theory suggests that board members will act like oligopolists and cooperate to maximize rents for professionals at the expense of consumers.

First, consider the example of a board comprised of subspecialties that provide overlapping services: for example, the Georgia Composite Board of Professional Counselors, Social Workers, and Marriage and Family Therapists.¹³⁶ There are different educational, experiential, and examination requirements for each license, and there is reason to think that demand for counseling is not perfectly elastic between these three subspecialties—that is, not every consumer is indifferent to receiving counseling from a marriage therapist, a social worker, or a counselor. At the same time, because the statute allows all three to conduct “counseling,”¹³⁷ some consumers probably do substitute between the specialties, which means that the different licensees compete to some extent. A licensing restriction relaxing competition among marriage and family counselors, say, by raising an entry barrier, is likely to also benefit professional counselors and social workers by making a substitute—marriage and family counseling—less available. All three specialties therefore have an aligned interest in suppressing competition. So, for the Georgia board, the three license holders in each specialty (but not the one public member) ought to count toward the “controlling number” that triggers the supervision requirement.

Second, consider a board comprised of licensees that provide services that are not substitutes. Take, for example, the Colorado State Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors. The statute describes each licensed profession as performing distinct services.¹³⁸ It

Audiology and Hearing, ME. REV. STAT. tit. 32, § 17201 (2016) (stipulating that of seven board members, two must be Speech-language pathologists, two audiologists, and two hearing aid dealers and fitters).

135. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1106 (emphasis added).

136. *See* GA. CODE ANN. § 43-10A-4 (West 2016).

137. Marriage and Family specialists may provide individual therapy, and Social Work is defined as a profession that helps “marriages, families, [and] couples” in addition to individuals. *See id.* § 43-10A-3.

138. Architecture is the “design, construction, enlargement, or alteration of a building or group of buildings.” COLO. REV. STAT. ANN. § 12-25-302(6)(a) (West 2016). The practice of engineering is “the application of special knowledge of the mathematical and engineering sciences to . . . the utilization of the forces, energies, and materials of nature in the development, production, and functioning of

would appear that these specialties are complements, not substitutes; they are used in conjunction when constructing a building. Under a simplistic incentive analysis, providers of complementary services would not support their counterpart's self-dealing.¹³⁹ Imagine a building project with a total budget for architecture, engineering, and land surveying. If the architects succeed in raising price, then the consumer has less in her budget for the other services. This simplistic analysis would suggest that the engineers and surveyors on the board have an incentive to veto anticompetitive regulation proposed by the architects, and vice versa.

Yet there is good reason to count the board's architects, surveyors, and engineers toward professional "control," in part because economists now recognize that incentives are more complex when competitors engage in interdependent behavior.¹⁴⁰ A game theoretical analysis of this board suggests that the members will recognize that all three professions have even more to gain by approving each other's anticompetitive restrictions than by acting selfishly in any one instance. The "game" of repeated votes on anticompetitive restrictions directly benefiting just one specialty resembles the game of oligopoly. In both cases, the optimal outcome—the one that maximizes the joint returns to the group—occurs when everyone cooperates. Yet in any individual interaction, one member can maximize his returns by "cheating" and acting selfishly.¹⁴¹ Antitrust recognizes that competitors can overcome the risk of cheating most easily through an exchange of promises to cooperate. But even where such direct communication is impossible, interdependent competitors can achieve the cooperative (anticompetitive) equilibrium in repeated games. A mixed board has all the hallmarks of a successful oligopoly. It interacts repeatedly, and provides a perfect opportunity for direct communication.

There is yet another reason for counting all of a board's licensees, even from nonoverlapping specialties, as "market participants." The lack of overlap itself may be a product of cooperation, rather than an inevitable feature of professional specialization. It is well documented by labor economists that licensed professionals have a self-interest in defining the scope of their

engineering processes, apparatus, machines, equipment, facilities, structures, buildings, works, or utilities." *Id.* § 12-25-102(10)(a). Land surveying "means the application of special knowledge of principles of mathematics, methods of measurement, and law for the determination and preservation of land boundaries." *Id.* § 12-25-202(6)(a).

139. A good is complementary to another good if a price increase in one results in a decrease in demand of the other. For example, if the price of canoes skyrockets, demand for paddles will decrease because fewer people will purchase boats. A provider of paddles, therefore, would oppose a price increase in canoes, and vice versa.

140. See RICHARD A. POSNER, *ANTITRUST LAW*, 59–60 (2d ed. 2001) (discussing the use of game theory and the role of interdependent behavior in antitrust analysis).

141. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 4.1a, at 149–55 (2005) (discussing the role of cheating in cartel behavior and antitrust analysis of cartels); POSNER, *supra* note 140, at 67–68 (same).

profession to exclude all other license holders.¹⁴² Unique professional “turf” prevents competition from other specialties, leading to higher prices and higher monopoly rents for the professional.¹⁴³ Thus the fact that the Colorado State Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors promulgates rules of practice that reinforce the separateness of each profession may itself be a function of anticompetitive behavior by the board.¹⁴⁴ The members face a tension between maximizing joint returns and taking the largest slice for themselves, but this is true of any cartel.¹⁴⁵ As has been observed in a slightly different context, “[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement itself.”¹⁴⁶

2. *On the Margin: Professionals Licensed by a Different Board and Inactive Professionals*

As I have discussed, board members holding an active license in a profession regulated by the board itself should be considered “active market participants” for purposes of antitrust immunity, but what about members who hold a license in a profession regulated by a different board? When courts confront this question, they will face a difficult line-drawing exercise. Perhaps all licensees have a general affinity for anticompetitive regulation, having benefited from it in their own specialty, and so a physician on a chiropractor board,¹⁴⁷ or an engineer on an architecture board,¹⁴⁸ may go along with the self-dealing of the other members. Yet because there is no formal opportunity for actual quid pro quo, courts should not count licensees governed by other boards toward a board’s dominance.

Not counting outside professionals as “active market participants” makes sense because, in some cases, the outside professional’s self-interest is adverse

142. See Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 28 (2011).

143. See KLEINER, *supra* note 5, at 59 (discussing price effects of licensing regulations as a form of rent capture).

144. On this view, the Colorado Architecture Board has more successfully overcome its coordination problems than the Georgia Counseling Board, which has not been able to create unique turf for its licensees.

145. Even when competitors can agree that raising price together maximizes joint returns (i.e., they can agree on the size of the pie), they always have disparate interests when it comes to how to allocate those returns (they disagree about how to slice it). See POSNER, *supra* note 140, at 59–60, 66 (noting that “[a]greeing on price alone may not be enough to get [a] cartel going” and explaining that a successful cartel requires compromise among divergent interests). Yet it is no defense to a § 1 charge that the competitors had disparate interests in some aspect of the enterprise; likewise, it should be no defense in a mixed-board setting. Cf. John M. Connor, *Global Cartels Redux: The Lysine Antitrust Litigation*, in *THE ANTITRUST REVOLUTION* 336, 336–46 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014) (observing that the members of the infamous lysine cartel “squabbled frequently” and that some were “strongly inclined to cheat on the price and market-share agreements”).

146. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003).

147. See N.Y. EDUC. LAW § 6553 (McKinney 2016).

148. See MICH. COMP. LAWS § 339.2002 (2016) (providing for one seat on the architecture board to be held by a professional engineer, and vice-versa).

to the rest of the board members' profit motive. Outside board members often come from an adjacent profession,¹⁴⁹ perhaps as a way to protect their own profession from competitive encroachments. For example, it is easy to imagine that the physician on a chiropractic board will advocate against chiropractor licensing rules that put chiropractors in competition with physicians, such as orthopedists. If the outsider is successful in stopping chiropractors from enlarging their scope of practice to tread on the physicians' professional turf, that success may have anticompetitive consequences in the market for medicine, but not for chiropractic services. At least for the regulation of chiropractors, the physician's self-interest is opposed to the self-dealing tendencies of the chiropractors. And without an opportunity for the chiropractors to cooperate with the physician on their board,¹⁵⁰ there is little incentive for the physician member to "play nice" with the chiropractors.

The membership of retired professionals raises similar questions as that of outside professionals. In both cases, there may be a general affinity for professional self-dealing, but in both cases there is no possibility of an actual quid pro quo arrangement. Retired professionals have permanently given up their financial self-interest in anticompetitive regulation, and so should fall outside (albeit barely) of the Court's requirement that "*active* market participants" be supervised to enjoy immunity.¹⁵¹ To hold otherwise would invite an inquiry into how much professional experience is too much, which comes uncomfortably close to an inquiry into the subjective motivation and mental state of a board member.¹⁵² "Retirement," however, ought to be defined as the permanent relinquishment of a license. A scheme that allows board members to temporarily suspend their licenses with an easy path to reinstatement after service would be too close to currently practicing professionals.¹⁵³ Such a board member merely forestalls the personal financial benefit from self-dealing; he does not relinquish it.

149. See FLA. STAT. § 468.703 (2016) (chiropractor to serve on athletic trainer board); MINN. STAT. § 148.67 (2016) (physician to serve on physical therapy board); OHIO REV. CODE ANN. § 4763.02 (West 2016) (real estate broker to serve on real estate appraiser board); TENN. CODE ANN. § 62-1-104 (West 2016) (attorney to serve on accountancy board); TEX. OCC. CODE ANN. § 402.051 (West 2016) (otolaryngologist to serve on hearing instrument fitters advisory board).

150. I found no instances where a professional did double duty on his own professional board and that of an adjacent occupation.

151. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (emphasis added).

152. The difficulty of such an inquiry was a reason why using "capture" as a test for whether state regulation was immune from antitrust laws—a position advocated in the 1980s and never adopted by the Court—was rejected as too unwieldy. Compare John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724–26 (1986) (advocating for a capture element in the test for antitrust immunity) with Elhauge, *supra* note 87 (arguing that a capture test is hopelessly unwieldy and does not describe the case law).

153. See FED. TRADE COMM'N, BUREAU OF COMPETITION, *supra* note 122, at 7 (opining that a practitioner who has temporarily suspended his license is an active market participant).

3. *Case-by-Case or Safe Harbors?*

Defining “active market participant” as one licensed by the board itself avoids a case-by-case inquiry into whether the decision makers had an incentive to suppress competition in taking *this particular* regulatory action. A contrary rule—one that would define board dominance with reference to the particular challenged act—has several distinct disadvantages. Most importantly, it would require such fact-intensive inquiries into members’ business affairs as to make the legal status of a board virtually unpredictable. In contrast, a bright-line rule recognizing “active market participants” as license holders would allow states to be confident that properly comprised boards are immune from antitrust suit. Courts are likely to interpret *North Carolina Dental* in such a way to allow states to use board composition—and not just supervision—as a means to confer immunity; otherwise the Court’s reference to “active market participants” would have little meaning.

Similarly, defining “active market participants” with reference to the challenged restriction would be too fact sensitive because it would require an investigation into specific services provided by board members. For example, consider the North Carolina Dental Board and its decision to “do battle” with nondentist teeth whiteners. A restriction-by-restriction inquiry would ask whether the dentist members actually offered teeth whitening, or perhaps whether any of the members had future plans to do so, an inquiry that would be hopelessly speculative. Further, determining the competitive scope of a restriction for the purpose of defining “active market participant” would require market definition, a notoriously fraught endeavor.¹⁵⁴

B. “Controlling Number” and the Mathematics of Control

In addition to the question of *who* contributes to professional dominance, the *North Carolina Dental* opinion left open the question of *how many* market participants is too many. The Court curiously used “controlling number” to describe the level of practitioner dominance that triggers the supervision requirement.¹⁵⁵ The word choice is curious for two reasons. First, the precise phrase “controlling number” does not appear in any of the briefs submitted in the case;¹⁵⁶ it would seem the Court selected this phrase without guidance from

154. See, e.g., Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 440 (2010) (arguing that “that there does not exist any coherent way to choose a relevant market without first formulating one’s best assessment of market power, whereas the entire rationale for the market definition process is to enable an inference about market power”).

155. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (emphasis added).

156. See Brief for Respondent at 5, 29–34, N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015) (No. 13-534) (using terms “decisive coalition,” “majority,” “controlling majority,” and “dominated” to describe dentists’ influence over licensing board); Brief for Petitioner at 17, *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (No. 13-534) (“majority”); Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 10–11, *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (No. 13-534) (“decisive coalition”); Brief of Amicus Curiae Public Citizen, Inc., in Support of Respondent at 14,

parties or amici. Second, “controlling number” suggests “majority,” but because the Court avoided that simpler word, it implies that “controlling number” can, at least under some circumstances, mean something other than a majority.¹⁵⁷ This Section explores the possible meanings of this phrase, ultimately advocating for a meaning that is simple and formal, but that also accounts for the Court’s use of such a beguiling phrase.

1. Possible Meanings of “Control”

Although “controlling number” does not appear in any of the briefs, the notion of “control” abounds, most especially in the FTC’s briefs and its opinions below.¹⁵⁸ The FTC notion of control is capacious, and can include situations where the “active market participants” are in the minority. In guidelines issued after *North Carolina Dental*, the FTC opined that situations where the board habitually defers to the minority license-holding members would require supervision.¹⁵⁹ The FTC called for “a fact-bound inquiry that must be made on a case-by-case basis.”¹⁶⁰ As is the case for fact-intensive inquiries into “active market participant,” the cost of case-by-case determinations of “control” is high: the unpredictability of such a rule would effectively eliminate the option of using board composition to ensure immunity.

Before rejecting such an all-things-considered inquiry, it is necessary to consider its benefits, which are significant. Even minority license holders can be a powerful voice on a board. A group of decision makers with heterogeneous backgrounds and knowledge are likely to defer to the opinion of those with (or appearing to have) more information; in situations where decisions are made deliberatively, these effects can be large.¹⁶¹ The licensees on a board, as current practitioners of a specialized craft or service, will likely be seen as having special information. To the extent boards are vulnerable to “bandwagon” effects or information cascades, even a small fraction of licensees could determine

N.C. State Bd. of Dental Exam’rs, 135 S. Ct. 1101 (No. 13-534) (“majority voting power”); Brief of Amici Curiae State of West Virginia et al. in Support of Petitioner at i, *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (No. 13-534) (“majority”).

157. This issue was raised by the dissent in *North Carolina Dental*. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1123 (Alito, J., dissenting) (“What is a ‘controlling number’? Is it a majority? And if so, why does the Court eschew that term?”).

158. See *In the Matter of the N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 626 (2011) (holding that “a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine”); Brief for Respondent, *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (2015) (No. 13-534).

159. See FED. TRADE COMM’N, BUREAU OF COMPETITION, *supra* note 122, at 8–9.

160. *Id.*

161. See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 31–32 (2009) (discussing information cascades and the ways in which deliberative decision making can lead to this and other examples of “group think”).

regulatory outcomes.¹⁶² Even without the persuasion of expertise, a minority faction with united interests can yield significant influence over decisions when it is the largest faction among several.¹⁶³ A case-by-case rule would allow courts to capture such examples where the self-interest of licensees dominates board decision making, even where licensees do not dominate the board's composition. Corporate law, for example, captures the benefits of a flexible rule in determining whether a party is a "controlling shareholder."¹⁶⁴

But as other areas of law have recognized, there is value in using bright lines to define "control." The "one person, one vote" doctrine of constitutional law dictates some approximation of proportional representation in local government, but the Court has pointedly refused to use an all-things-considered standard to measure whether a particular population was heard in governmental decisions. The landmark case is *Board of Estimate of New York City v. Morris*, which rejected the notion that determining the proportionality of representation should rest on something other than a simple mathematical formula based on population.¹⁶⁵ It explained that the "one person, one vote" rule "does not attempt to inquire whether, in terms of how the legislature actually works in practice, the districts have equal power to affect a legislative outcome," reasoning that "[t]his would be a difficult and ever-changing task."¹⁶⁶

The one-person-one-vote cases provide a close analogy, and suggest that board dominance should be assessed mathematically. These cases concern regulatory decision making, as do the state action immunity cases. Regulators almost always act with mixed motives, because they operate under a complex set of imperatives. Layering on a case-by-case inquiry into how power and influence are actually exerted would expand the arguments available on either side to an almost limitless set, leaving the rule with little content at all. In the same way

162. See Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2255 (2009) (discussing the problem of deference to the few in the context of federal regulatory decision making).

163. For example, at the end of the 2010–2015 British Parliament, the Conservative Party had 302 out of a total 650 seats; they were in the minority. But because they held such a large number of seats, they could be said to "control" the government. They could form a ruling coalition by aligning with just one other party—either the Labour Party or the Liberal Democrats (they did the latter). But for the Conservatives to *not* be in the ruling faction, the other members of parliament would have had to combine the interests of at least four parties—for example, by forming an unlikely alliance among the Labour Party, the Liberal Democrats, the Democratic Unionists, and the Scottish National Party. See *Current State of the Parties*, U.K. PARLIAMENT, <http://www.parliament.uk/mps-lords-and-offices/mps/current-state-of-the-parties> [https://perma.cc/7MSJ-F75B]. The simple rule that a minority faction does not "control" a decision-making body would not recognize the Conservative Party's extreme degree of influence in forming England's 2015 government.

164. A "controlling shareholder"—a status that creates a fiduciary duty toward the other shareholders—can apply to parties holding less than 50 percent of outstanding shares. See, e.g., *Kahn v. Lynch Comm'n Sys., Inc.*, 638 A.2d 1110, 1113–15 (Del. 1994). In *Kahn*, the court cited the facts that there was a long history of the minority faction getting its way in board decisions (despite holding only five of eleven seats) and that the faction's representative "scared [the majority members] to death." See *id.*

165. See *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688 (1989).

166. *Id.* at 699.

that it is undesirable to have a constitutional inquiry turn on whether a city board of estimate acted to benefit one borough because it was “controlled” by that borough’s representatives or because it was acting in a public-regarding manner, it would be undesirable to have antitrust immunity turn on an inquiry into the persuasiveness of certain board members.¹⁶⁷

A mathematical understanding of control explains the Court’s curious addition of the word “number” to the control standard advocated by the FTC. While “controlling number” suggests something other than a majority, it also implies that, for a given board making a given decision, there is a “number” which will designate control. Alternate phrases such as “controlling faction” or “controlling interest” could have been used if the Court had in mind a fact-intensive inquiry into control.

2. *The Mathematics of “Control”*

What is the “number” that will establish control, and why didn’t the Court use “majority” in its holding? The findings of my research suggest that procedural rules such as voting and quorum rules could allow boards that are not intrinsically dominated by statute to nevertheless make decisions with a majority of licensees. The standard for “controlling number” ought to be mathematical and objective, not an all-things-considered inquiry into the intangible influence of the professionals—but it ought to consider the procedural maneuvers that may turn a minority of license holders into a decision-making majority. Essentially, “control” should be found when license holders, voting as a bloc, can determine a board’s vote without assent from nonprofessional members. Only in the simplest case (where the full board votes and every member has an equal vote) will “controlling number” be synonymous with “majority.”

If a board has a minority of license holders, but has quorum rules that allow decisions to be made by less than the full board, a decision could easily be made by a “controlling number” of licensees. Decisions so made, unless actively supervised, should be subject to antitrust liability. For example, a nursing board comprised by statute of four nurses, two physicians, and two consumer members—but allowing a quorum with a majority of the board¹⁶⁸—may appear nondominated, yet in fact could make all its decisions with a majority of

167. This all-things-considered inquiry would be too close to a capture test for antitrust immunity that was never adopted by the Court and discredited by Professor Elhauge. *See supra* note 152 and sources cited therein. *Cf.* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 49 (1991) (arguing that capture theory cannot justify changes in judicial review because of the lack of a normative baseline for how much interest group influence is too much).

168. This is a very common quorum rule. *See, e.g.*, ARK. CODE ANN. § 17-20-202(b) (2016) (“A majority of the board shall constitute a quorum and may perform and exercise all the duties and powers devolving upon it.”).

nurses.¹⁶⁹ A decision made at a meeting with four nurses and one physician attending should need supervision to enjoy immunity.

Another practice leading to dominance even on a mixed board is the use of committees. Some boards divide regulatory authority among subunits of the board: for example, the Texas Board of Nursing delegates authority over professional admission and discipline to a subcommittee.¹⁷⁰ Although license holders do not dominate the nursing board as a whole, the Eligibility and Disciplinary Committee consists of two nurses and one lay member.¹⁷¹ Decisions made by this subcommittee ought to be subject to the supervision requirement. Boards can achieve a similar effect by assigning different voting rights to different members. Some boards allow only professional members to vote on certain matters, typically competitively sensitive decisions such as admissions standards and ethical rules.¹⁷² Where this is true, only voting members should be counted toward the dominance of a particular decision.

IV.

WHAT'S NEXT FOR THE STATES: THE CASE FOR UNIFORMITY

States must act soon, as 1,515 boards are potentially vulnerable to the kinds of antitrust suits that are currently working their way through the district courts. *North Carolina Dental* leaves states with two options to confer immunity on currently dominated boards: states can either supervise board decision making or alter board composition to avoid professional dominance. This Part explains why altering professional dominance on boards may be an attractive alternative to supervision, and how states could practically achieve such a change. It also suggests that states strive for uniformity among their own boards and with other states.

169. The North Dakota Board of Physical Therapy is such an example. Because of frequent absences by nonlicensee members, 66 percent of its meetings since July 2013—and 100 percent of them since November 2015—have been dominated by licensees. See *Board Minutes*, N.D. BD. OF PHYSICAL THERAPY, <https://www.ndbpt.org/minutes.asp> [<https://perma.cc/2RAC-NLTD>]. Only one of these meetings appeared to lack a quorum, which by law is a majority of the board. See N.D. CENT. CODE § 43-26.1-03 (2016).

170. See 22 TEX. ADMIN. CODE § 211.6 (2016) (vesting nurse-dominated disciplinary committee with “authority to determine *all* matters of eligibility for licensure and discipline of [licensees]”) (emphasis added).

171. See *id.*

172. For example, the Indiana State Board of Funeral and Cemetery Service prohibits four of its nonlicensee members from voting on any matters related to licensing of funeral directors. See IND. CODE § 25-15-9-11 (2016). The Arkansas Psychology Board prohibits its lay members from voting on matters pertaining to the licensing exam. See ARK. CODE ANN. § 17-97-201 (West 2016). The South Carolina State Board of Dentistry prohibits its dental hygienist member from voting on matters related to the dentist-licensing exam; the board’s lay member may not vote on either dental or hygiene examinations. See S.C. CODE ANN. § 40-15-20 (2016).

A. Supervision

As I have argued elsewhere, providing dominated boards with adequate state supervision could be a good way to avoid antitrust liability for board members.¹⁷³ Its benefits include centralization—one umbrella supervisor could theoretically review all licensing board activity.¹⁷⁴ It also may be the best way to ensure accountability, which the Court sees as the most important feature of decisions entitled to immunity.¹⁷⁵ Supervision would promote accountability by ensuring that politically visible state actors examine, approve, and own board regulations, addressing the principal-agent problem between the state and licensing boards.¹⁷⁶

Yet supervision has some distinct disadvantages that states should consider. The biggest disadvantage to relying on supervision to immunize boards is that the Court has been unclear about what constitutes adequate supervision. The ambiguities created by the “controlling number of . . . active market participants” phrase from *North Carolina Dental* are minor compared to the vagaries of the Court’s “active supervision” jurisprudence.¹⁷⁷ Supervision is therefore a risky route to immunity, and for that reason alone states may prefer immunizing boards by altering their composition.

Even setting aside legal uncertainty, there are other reasons a state may prefer using board composition as a route to immunity. Supervisory structures must expose board activity to the discipline of electoral politics in order to comport with the Court’s new antitrust federalism and its focus on states taking the political heat for self-regulation it directs or permits. Creating such a politically accountable actor within the infrastructure of state government would require significant political capital and financial expenditures, and may lead to bureaucratic ossification.

First, creating an accountable supervisory structure will at least involve passing legislation and may require state constitutional amendment. Using the executive branch to supervise requires legislation giving the Governor the authority to review, veto, and modify board decisions before enactment, as

173. See Allensworth, *supra* note 74, at 1435–44.

174. For example, Colorado houses its licensing boards under the Department of Regulatory Affairs (DORA), which employs policy experts and economists tasked with reviewing licensing rules for efficiency. DORA is perhaps a ready-made supervisor, although it would need new statutory authority to modify or veto the rules it reviews. See COLO. REV. STAT. ANN. § 24-4-103 (West 2016) (describing DORA’s rule review process).

175. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (holding that immunity is appropriate only where states “accept political responsibility for actions they intend to undertake,” and noting that “[f]ederalism serves to assign political responsibility, not to obscure it”).

176. See Allensworth, *supra* note 74, at 1424.

177. See *id.* at 1434; Rosenstein *supra* note 89, at 334 (observing that “[d]efining the ‘active supervision’ requirement . . . has proven to be problematic”).

Georgia has recently done in the wake of *North Carolina Dental*.¹⁷⁸ And if the legislature wishes to create a special agency or division responsible for supervision—which would be reasonable given the amount of regulation a supervisor will have to review—legislation would be required to create that entity. If states choose to use a legislative committee to supervise licensing boards, states may have to amend their constitutions to allow a legislative veto; otherwise, that committee would lack the ability to “modify or veto” that supervisors must have.¹⁷⁹ Altering board membership would also require legislation, but it may require less political capital than adding a layer of regulatory bureaucracy and further delegating power to the executive.

Second, immunizing boards through supervision will be financially costly for states. The supervisor would have a significant docket if all board decisions—from rules of ethics to individual license decisions—are to be reviewed carefully for substance. The supervisor would need significant resources and staff to function.¹⁸⁰ And unlike a licensing board that can generate revenue through application and renewal fees from licensees,¹⁸¹ the supervisory entity will not be able to pay for itself.

Finally, supervision may be an unattractive alternative because it could be perceived as adding to delay and ossification in occupational regulation. An extra layer of review will may make professional regulation slower and less nimble than states prefer. Substantive supervision necessarily involves some duplication of effort and analysis, creating the risk of inefficiencies.¹⁸² In states where small government is prized, supervisory structures may be seen as adding another layer of red tape.

178. See GA. CODE ANN. § 43-1C-3(a) (West 2016) (giving the Governor the “authority and duty to actively supervise the professional licensing boards of this state,” including the right to “[r]eview . . . approve or veto any rule before it is filed”).

179. Constitutional amendment was necessary, for example, in Connecticut when it created a rules review committee within its legislature. See *Legislative Regulation Review Committee*, CONN. GEN. ASSEMBLY, <https://www.cga.ct.gov/rr> [<https://perma.cc/6LXK-W878>] (explaining that “[i]t is the responsibility of the Legislative Regulation Review Committee to review regulations proposed by state agencies and approve them before regulations are implemented”). Without the ability to bypass bicameralism and presentment requirements, the rules review committee could not meaningfully review administrative rules. See Rossi, *supra* note 99, at 1202–03 (discussing the state *Chadha* problem and Connecticut’s constitutional amendment).

180. Colorado’s Department of Regulatory Affairs, for example, has almost 600 full-time employees and a total budget of \$88.5 million. The Division of Professions and Occupations alone has 202 full-time employees and an annual budget of \$17.7 million. See DEP’T OF REGULATORY AGENCIES ORGANIZATION CHART, https://drive.google.com/file/d/0B6RhHT-_h2_eOVE2R1IEbkNMMmc/view [<https://perma.cc/64EK-3JDZ>].

181. See MORRIS M. KLEINER, W.E. UPJOHN INST. FOR EMP’T RESEARCH, GUILD-RIDDEN LABOR MARKETS: THE CURIOUS CASE OF OCCUPATIONAL LICENSING 14 (2015) (observing that licensing boards typically make rather than spend state money).

182. Several states argued as amici in *North Carolina Dental* that supervision would lead to bureaucratic inefficiencies. See Brief for West Virginia et al. as Amici Curiae Supporting Petitioner at 15, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534) (describing supervision as “inefficient,” “duplicative,” and “cumbersome”).

This is not to say that, in the final analysis, state supervision is an inferior alternative to altering board composition. Rather, I point out its shortcomings to highlight the importance of considering—and understanding—the options states have at the board level without resort to supervision.

B. *Altering Board Composition and the Value of Other Voices*

If a nondominated board does not need state supervision to enjoy antitrust immunity, then who should serve as the other board members? Although the identity of the other board members does not influence the antitrust immunity inquiry—so long as they are not “active market participants”—states should take board reformation as an opportunity to improve the substance of occupational regulation. To that end, the current paradigm, where the nonprofessional members have no particular expertise in the interests they ostensibly represent, should be abandoned.

Further, licensing boards ought to represent more than just consumer and elderly interests. It is common for a licensing-board statute to refer to a “consumer member” or a “member representing the elderly,”¹⁸³ but there is little effort to fill these slots with actual experts in consumer or elderly needs.¹⁸⁴ Rather, the fact that someone has consumed the service before, or that someone happens to be over sixty years of age, somehow qualifies members for these spots. These members have, at best, only anecdotal evidence of what consumers

183. See ARK. CODE ANN. § 17-103-201(c)(4)(A) (2016) (appointing one member who is “sixty (60) years of age or older” to “represent the elderly” on the board of social work); N.Y. EDUC. LAW § 8213(1) (McKinney 2016) (appointing three members to acupuncture board to “represent[] the consumer and community”); 5 R.I. GEN. LAWS § 5-45-1(a)(2) (2016) (appointing two members of board of nursing home administrators to represent “senior citizen groups”); TENN. CODE ANN. § 63-4-102(a) (2016) (establishing board of chiropractic examiners with two “consumer members”); WASH. REV. CODE § 18.52.040 (2016) (appointing, to board of nursing home administrators, a person who “shall be a resident of a nursing home or a family member of a resident or a person eligible for medicare.”).

184. The sole consumer member of the New York State Board for Acupuncture appears to have no past experience advocating on behalf of consumers; she describes herself as an “[e]xperienced administrator, educator and information specialist” with a “[f]ocus on instructional videoconferencing and online learning.” *Denise Graminski*, LINKEDIN, <https://www.linkedin.com/in/dmgraminski> [<https://perma.cc/U7YM-U9BS>]; see *Statutory Composition & Current Membership*, N.Y. STATE EDUC. DEP’T, <http://www.op.nysed.gov/boards/bdcomp.htm> [<https://perma.cc/8MY9-DKEB>] (scroll to “Acupuncture”). The three public members of the Texas State Board of Acupuncture Examiners include an interior designer, a retired elementary school teacher, and the president of a construction company—none of whom claim past experience advocating on behalf of consumers. See *Acupuncture Board Bios*, TEX. MED. BD., <http://www.tmb.state.tx.us/page/acupuncture-board-bios> [<https://perma.cc/HQW3-GUJ7>]. The Rhode Island Board of Examiners for Nursing Home Administrators, on the other hand, appears to have left both of its “senior citizen” seats vacant for the past three years. See *Board of Examiners for Nursing Home Administrators*, R.I. DEP’T OF STATE, <http://sos.ri.gov/govdirectory/index.php?page=DetailDeptAgency&eid=251> [<https://perma.cc/TP24-KSAM>] (scroll to “Recently Submitted Meeting Minutes”). See also *About the Board*, OR. OCCUPATIONAL THERAPY LICENSING BD., <http://www.oregon.gov/otlb/Pages/About-the-Board.aspx> [<https://perma.cc/W452-VVYL>] (describing the two public members of the occupational-therapy board as having past personal experience with occupational therapy, but citing no experience advocating for consumers).

and the elderly need. Occupational licensing involves trade-offs between service quality and service price and availability.¹⁸⁵ Professional board members may have expertise in service quality, but tend not to understand the costs—in terms of price and availability—that may be associated with a restriction aimed at improving quality. Here, someone with expertise in economics, or at least some experience advocating for consumer rights, could help identify the likely costs of a restriction.

Finding economists or experienced consumer advocates willing to serve on a licensing board is a challenge, but it is not insurmountable. First, the current compensation paid to board members, which is typically a per diem stipend,¹⁸⁶ could be raised, at least for those who need the incentive to serve. Increasing the remuneration may help attract the desired expertise, and may cost the state less than other reforms, such as creating a supervisory agency. And if the cost savings associated with more efficient occupational regulation were added to the calculation, pay increases for those with expertise may be a net money saver for states.

If increasing pay is not a viable option for augmenting the level of expertise on a licensing board, states could use some of their own staff to serve as *ex officio* members of boards. It is relatively common for a department head to serve as a member of a licensing board. For example, in Kentucky, the commissioner of public health serves *ex officio* on the State Board of Medical Licensure.¹⁸⁷ But there is typically at most one *ex officio* member on a licensing board, in part because that member is a high-ranking government official and there may not be enough of those to cover many boards. Still, states could pack their licensing boards with staff-level government workers who have the necessary policy experience or even economic expertise to represent consumers.¹⁸⁸

At best, current licensing boards represent consumer and practitioner interests, but there are other groups of stakeholders that should have seats at the table. As governmental and media reports have recently documented, licensing

185. See Edlin & Haw, *supra* note 70, at 1111–16 (discussing the trade-offs of licensing regulation).

186. See ALA. CODE § 34-11-32 (2016) (setting per diem for members of board of professional engineers and land surveyors at \$100 for time spent on board matters and necessary travel); N.M. STAT. ANN. § 10-8-4 (2016) (setting per diem for nonsalaried public officers at \$95.00 “for each board or committee meeting attended”); VT. STAT. ANN. tit. 32, § 1010(b) (2016) (setting per diem for members of professional licensing boards at \$50.00 per day “for each day devoted to official duties”).

187. See KY. REV. STAT. ANN. § 311.530 (West 2016); see also MO. REV. STAT. § 340.202 (2016) (state veterinarian serves *ex officio* on veterinary board); N.H. REV. STAT. ANN. § 310-A:120 (2016) (state geologist serves *ex officio* on board of professional geologists); WYO. STAT. ANN. § 33-39-104 (2016) (director of real estate commission serves *ex officio* on real estate appraiser board).

188. These members should have full voting privileges, unlike many *ex officio* posts that are explicitly nonvoting seats. See, e.g., ARK. CODE ANN. § 17-102-201(a)(4)(B) (West 2016) (“However, the *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.”).

restrictions impose especially heavy burdens on military families¹⁸⁹ and ex-offenders.¹⁹⁰ And some specific occupations may impose costs on a particular community—for example, African-style hair braiders have been significantly disadvantaged by cosmetology boards attempting to regulate their craft, creating a special burden on communities of African immigrants.¹⁹¹ States should strive to identify the sometimes multifarious interests implicated by a board’s regulatory activity, and bring some of those voices to the boardroom.

Adding other voices to the regulatory conversation does not mean eliminating the participation of professionals. Licensees are uniquely positioned to understand the risks of low-quality service, and to anticipate how a restriction will impact their profession.¹⁹² As Justice Breyer noted in oral argument for *North Carolina Dental*, a state may quite reasonably want a “group of brain surgeons to decide who can practice brain surgery in this State . . . [and not] want a group of bureaucrats deciding that.”¹⁹³ As long as the professional members do not exceed half of the decision-making quorum, their expertise can be used without fear of antitrust liability. Licensing board reform should focus not on eliminating all professional input into regulation, but on curtailing de facto professional self-regulation.

C. *Setting Board Voting and Quorum Rules by Statute*

As discussed above, board composition is only half of the puzzle, since quorum and voting rules can allow even a minority of professional members to make decisions on behalf of the board. States seeking a safe harbor for their unsupervised licensing boards should set procedural rules that eliminate this possibility. At present, it is common for the statute creating an occupational

189. See EXEC. OFFICE OF THE PRESIDENT, *MILITARY SKILLS FOR AMERICA’S FUTURE: LEVERAGING MILITARY SERVICE AND EXPERIENCE TO PUT VETERANS AND MILITARY SPOUSES BACK TO WORK* 20–21 (2012), https://obamawhitehouse.archives.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf [<https://perma.cc/7RXN-YDXN>] (describing First Lady Michelle Obama’s “Joining Forces” initiative).

190. See Bryant Jackson-Green, *How Occupational Licensing Blocks Path to Success for Ex-Offenders*, ILL. POL’Y (Apr. 7, 2015), <https://www.illinoispolicy.org/how-occupational-licensing-blocks-path-to-success-for-ex-offenders> [<https://perma.cc/RF7K-TG6U>] (arguing that professions barring felons create irrational barriers to entrepreneurial and employment opportunities for ex-offenders).

191. See Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG. (June 12, 2012), <http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html> [<https://perma.cc/3JGE-HZ2L>] (discussing the burdens of cosmetology licensing requirements on African hair braiders).

192. See CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM’N, BUREAU OF ECON., *THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION* ix (1990), http://www.ramblenuse.com/articles/cox_foster.pdf [<https://perma.cc/8JUJ-5CXL>] (noting that “although professions may have superior technical expertise in establishing and evaluating restrictions designed to raise quality, professionals often have a financial interest in self regulation”).

193. Transcript of Oral Argument at 31, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (No. 13-534), https://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_16h1.pdf [<https://perma.cc/E7HM-6B3P>].

licensing board to give the board the authority to create its own procedural rules.¹⁹⁴ This leaves many board decisions potentially vulnerable to antitrust suit. Only through statutorily-mandated rules of procedure can a state be sure that a nondominated board will create immune regulation.

Board procedure rules should ensure that decisions cannot be made by a majority of licensees. First, states should require that a meeting quorum depend not only on how many board members are present, but on the license status of those present.¹⁹⁵ The rules should make clear that a quorum is not obtained when licensees represent the majority of those at the meeting. Second, the rules should specify that all board members have equal votes on all areas of decision making, and that decisions carry with a simple majority.¹⁹⁶ Third, the rules should specify that license holders may not dominate any committees delegated regulatory tasks. If states enshrine these procedural rules in their statutes, states can be sure that any board decision that comports with state law is also immune from federal antitrust law.

D. *The Value of Uniformity*

With 1,790 boards operating in America, it is safe to say that professional licensing is a fractured system of regulation. Without opining on the general merits of such a decentralized system (as opposed to, say, a federal system of licensing for each profession), it is worth observing that some standardization of board composition—within a state and among the states—would have tremendous benefits.

Uniformity within a state would give that state confidence that if one board is immune, they all are immune and should not be subject to board-by-board litigation over whether supervision is required. States hoping to use board composition to avoid antitrust liability will need to reform most of their boards anyway; they should take the opportunity to reform all licensing boards along similar lines. If each board has the same proportion of practitioners—less than half, if states wish to use board composition to avoid antitrust suits—then states can expect all their boards to receive similar legal treatment by a federal antitrust

194. The South Carolina Board of Architectural Examiners, for example, is empowered to “adopt rules governing its proceedings.” S.C. CODE ANN. § 40-3-60 (2016).

195. See HAW. REV. STAT. § 468E-6 (2016) (setting quorum for speech pathology and audiology board at four members, provided that “in no instance shall a meeting of the [licensees] . . . alone be considered a quorum.”). *But see* S.C. CODE ANN. § 40-47-1225(C) (2016) (setting quorum for eight-person anesthesiology assistant licensing committee at a “majority of the members” in office, “not less than two of whom must be physician members.”).

196. Majority rules are the norm. See, e.g., MISS. CODE ANN. § 73-57-9(2) (2016) (“a majority of the required quorum is sufficient” to take action by vote); 63 PA. CONS. STAT. ANN. § 34.5(c) (West 2016) (specifying that “no action shall be taken at any meeting” without majority support); W. VA. CODE § 30-3-6 (2016) (majority vote of a quorum necessary to transact business, except for disciplinary actions). States should avoid requiring supermajorities or allowing veto power for any given board members. These rules complicate the antitrust analysis and are likely to be used to boost professional influence on decision making.

court. The identity of the remaining board members will likely be different for each board, because each profession may implicate unique interests and need a different balance of representation. However, because *North Carolina Dental* has made immunity turn on the proportion of *professionals*, variance among boards in how the remaining seats are filled will probably not introduce much legal uncertainty.

Interstate differences in board membership present a slightly different question. Typically, differences among states in their regulatory responses to problems are seen as a good thing because they encourage experimentation among states for the optimal regulatory infrastructure.¹⁹⁷ On the other hand, interstate uniformity has some distinct advantages, at least for individual states. When it comes to crafting responses to the legal crisis precipitated by *North Carolina Dental*, states may find that there is wisdom in crowds. On this view, states should collaborate on a uniform board-membership solution that could be adopted by any state hoping to avoid antitrust liability for its occupational boards. If the Court upholds one state's scheme, it could provide widespread assurance to others. Providing out-of-the-box solutions to states, model legislation has been successful in other areas, such as state Administrative Procedure Acts, and could be developed to similar success here.¹⁹⁸

One more benefit of uniformity should be identified, although it inheres more to the public than to individual states. Uniformity of licensing boards would make them easier to study and understand, giving policy analysts and economists a better picture of how the professions are regulated and the effect of those regulations. This would increase our knowledge about this powerful regulatory institution and enable crucial research into its costs and benefits. Further, it would increase the public's awareness of how the professions are regulated and inform the political process, which may in turn curb professional self-dealing. At present, the fact that no two boards are alike has contributed to each board's relative obscurity and has suppressed public outrage at what is, at present, a system of self-dealing and regulatory waste.

197. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 34-35 (1983) (describing the value of competition among diverse jurisdictions).

198. The U.S. Department of Labor recently made \$7.5 million available to states in grant money for occupational licensing reform. Some of this grant money could be used to develop board membership templates, along with substantive reforms of licensing requirements. See U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN., NOI-ETA-16-14, NOTICE OF INTENT TO FUND PROJECT ON OCCUPATIONAL LICENSING REVIEW AND PORTABILITY (2016), <https://www.doleta.gov/grants/pdf/NOI-ETA-16-14.pdf> [<https://perma.cc/6DZ5-25MJ>].

CONCLUSION

The invisibility of state boards has allowed a rapid and in many cases unjustifiable expansion of occupational licensing in the United States. The accretion of newly licensed professions, the intensification of entry requirements, and the enlargement of the scope of practice for existing professions have been conducted one board meeting at a time, in what resembles the proverbial smoke-filled rooms of traditional cartels. This Article puts those boards, their membership, and their procedures under a microscope so that we can better understand how, and by whom, almost a third of American workers are regulated. The picture is one of almost total self-regulation with little to no state governmental involvement. This is disturbing not only because a recent Supreme Court case makes this form of regulation vulnerable to federal antitrust liability, but because it defies what any reasonable citizen would expect out of governmentally-sanctioned regulation that redistributes wealth to the regulated, keeps others from earning a living, and costs consumers billions of dollars per year. If states are unable or unwilling to meaningfully supervise this self-regulation, they should reform their boards to eliminate the dominance of those who have the most to gain from restricting competition: the professionals themselves.

APPENDIX: SUMMARY OF EMPIRICAL RESULTS

State	Total Boards	Total Dominated Boards	Total Mixed Boards	Percent Dominated	Percent Dominated Excluding Mixed
Alabama	49	42	3	86%	80%
Alaska	20	18	6	90%	60%
Arizona	27	23	4	85%	70%
Arkansas	48	33	3	69%	63%
California	34	16	3	47%	38%
Colorado	25	20	2	80%	72%
Connecticut	31	26	9	84%	55%
Delaware	37	32	10	86%	59%
Florida	38	35	7	92%	74%
Georgia	32	28	2	88%	81%
Hawaii	28	21	4	75%	61%
Idaho	42	38	4	90%	81%
Illinois	37	34	6	92%	76%
Indiana	31	23	4	74%	61%
Iowa	33	29	5	88%	73%
Kansas	19	17	6	89%	58%

Kentucky	44	39	9	89%	68%
Louisiana	42	36	2	86%	81%
Maine	37	31	6	84%	68%
Maryland	34	30	4	88%	76%
Massachusetts	37	29	7	78%	59%
Michigan	35	35	1	100%	97%
Minnesota	32	25	6	78%	59%
Mississippi	32	31	4	97%	84%
Missouri	37	33	7	89%	70%
Montana	33	27	10	82%	52%
Nebraska	31	25	7	81%	58%
Nevada	40	33	7	83%	65%
New Hampshire	47	39	9	83%	64%
New Jersey	48	37	6	77%	65%
New Mexico	33	30	6	91%	73%
New York	28	24	6	86%	64%
North Carolina	45	40	5	89%	78%
North Dakota	40	33	5	83%	70%
Ohio	35	30	7	86%	66%
Oklahoma	38	32	6	84%	68%
Oregon	39	30	7	77%	59%
Pennsylvania	28	24	4	86%	71%
Rhode Island	38	32	7	84%	66%
South Carolina	42	38	5	90%	79%
South Dakota	33	31	2	94%	88%
Tennessee	36	36	6	100%	83%
Texas	49	36	10	73%	53%
Utah	48	42	5	88%	77%
Vermont	38	32	5	84%	71%
Virginia	26	21	6	81%	58%
Washington	36	30	3	83%	75%
West Virginia	33	30	4	91%	79%
Wisconsin	29	27	8	93%	66%
Wyoming	36	32	6	89%	72%
National Totals	1790	1515	276	85%	69%