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## RESPONSE

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### IF PROFESSIONS ARE JUST “CARTELS BY ANOTHER NAME,” WHAT SHOULD WE DO ABOUT IT?

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In response to Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014).

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<sup>†</sup> H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois. Professor Hyman was the principal author and project leader for a joint report prepared by the Federal Trade Commission (FTC) and the Department of Justice, which, inter alia, observed that licensure could be misused to prevent or limit competition. See generally FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, CHAPTER 2: INDUSTRY SNAPSHOT AND COMPETITION LAW: PHYSICIANS, at 25-31, in IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), available at <http://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>, archived at <http://perma.cc/58NY-WGPX> (summarizing state physician licensure requirements and their effect on market competition). The report also noted that broad interpretations of the state action doctrine would make it more difficult to address that problem. FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, CHAPTER 8: MISCELLANEOUS SUBJECTS, at 6-10, in IMPROVING HEALTH CARE: A DOSE OF COMPETITION, *supra* (“Inappropriately broad interpretations . . . can chill or limit competition in health care markets.”).

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We appreciate the helpful comments we received from Amitai Aviram, James Cooper, Bill Kovacic, Bill Sage, Danny Sokol, Paul Stancil, and Sasha Volokh.

The state action doctrine has been a significant impediment in the campaign against anticompetitive conduct by provider-dominated state licensing boards. In *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, Professors Edlin and Haw argue that state licensing boards operate as a “massive exception” to the Sherman Act’s ban on cartels,<sup>1</sup> and that the Supreme Court should use a pending case (*North Carolina State Board of Dental Examiners v. FTC*)<sup>2</sup> to “hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board’s members are appointed.”<sup>3</sup> They also propose the application of a modified rule of reason when deciding similar cases on the merits.<sup>4</sup>

We suggest three modifications to Edlin and Haw’s proposal. These modifications should help limit occupational licensing’s anticompetitive tendencies and licensing boards’ anticompetitive behavior. First, in reviewing the decisions of licensing boards, courts should presume that states were not actively supervising the boards, absent compelling evidence to the contrary. Second, defendant–licensing boards should be required to present persuasive evidence of actual harm that their proposed licensing restrictions or restraints will prevent and should be required to show that private market and non-regulatory forces (including brand names, private certification, credentialing, and liability) are insufficient to ensure that occupations maintain a requisite level of quality. Finally, we argue that legislators should take steps to roll back existing licensing regimes.

## INTRODUCTION

In *The Doctors Dilemma*, George Bernard Shaw famously observed “all professions are conspiracies against the laity.”<sup>5</sup> The intervening century has provided ample evidence of Shaw’s aphorism. Physicians have aggressively suppressed competition through overt price-fixing, attacks on salaried practice and prepaid health care, and the systematic marginalization and exclusion of competitors.<sup>6</sup> As Professors Havighurst and King observed, the

<sup>1</sup> Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1095 (2014).

<sup>2</sup> 134 S. Ct. 1491 (2014) (granting certiorari).

<sup>3</sup> Edlin & Haw, *supra* note 1, at 1100.

<sup>4</sup> See *id.* (rejecting “the idea that the potential benefits [of licensing] justify total antitrust immunity for licensing” and arguing for “a shift in the dominant interpretation of state action doctrine”).

<sup>5</sup> GEORGE BERNARD SHAW, *THE DOCTORS DILEMMA* 26 (Electronic Classics Series 2013) (1906).

<sup>6</sup> See David A. Hyman, *When and Why Lawyers Are the Problem*, 57 DEPAUL L. REV. 267, 269-72 (2008) (showing how, “[f]or much of its history, the medical profession operated as a classic cottage industry”); see also FED. TRADE COMM’N, *OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS* 3-76 (2013), available at

history of medical care in the United States is one in which “outbreaks of . . . competition were ruthlessly suppressed . . . Under the banners of ‘medical science,’ ‘quality of care,’ and ‘professional prerogative,’ the medical profession was able to repel most attacks along its borders, to force many of its antagonists into alliances, and to confine other would-be invaders to narrow enclaves.”<sup>7</sup> It is not an accident that medical ethics historically focused on the “traditional rules prohibiting doctors’ indulgence in the three A’s: adultery, alcoholism, and worst of all, advertising.”<sup>8</sup>

The legal profession has been similarly aggressive in suppressing competition. Prior to the mid-1970s, state bars routinely promulgated minimum fee schedules and held that lawyers who charged lower fees were subject to professional discipline.<sup>9</sup> Unlicensed practice of law statutes have been used to attack attempts to provide unbundled legal services and to challenge the publication of books and software providing legal information.<sup>10</sup> State bars have also attacked insurers’ attempts to use staff counsel and to implement flat fees for insurance defense representation.<sup>11</sup>

Other occupations provide no shortage of similar examples, whether it is states requiring hair braiders to obtain cosmetology licenses (even though

<http://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/hcupdate.pdf>, archived at <http://perma.cc/UNW5-QN78> (detailing myriad FTC enforcement actions against anticompetitive action in the healthcare industry).

<sup>7</sup> Clark C. Havighurst & Nancy M. P. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective* (pt. 2), 9 AM. J.L. & MED. 263, 291 (1983).

<sup>8</sup> Stephen G. Potts, *Looking for the Exit Door: Killing and Caring in Modern Medicine*, 25 HOUS. L. REV. 493, 493 (1988).

<sup>9</sup> See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 777-78 (1975) (noting that the Virginia State Bar presumed misconduct from attorneys who habitually charged prices lower than the local minimum fee schedule); see also David Giacalone, *Don’t Forget Those Minimum Fee Schedules*, F/K/A (Feb. 29, 2009, 10:17 PM), <http://blogs.law.harvard.edu/ethicalesq/2009/02/24/alf-3-dont-forget-those-minimum-fee-schedules>, archived at <http://perma.cc/QA5F-HXFK> (noting that, “[t]hrough disciplinary actions and ethics opinions, bar associations made it clear that a pattern of charging less than the minimum fee constituted misconduct” until the Supreme Court’s decision in *Goldfarb*).

<sup>10</sup> See generally David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 395 n.182 (1997) (summarizing divergent views on the unbundling of legal services); *The Brief Story of Texas v. Nolo*, NOLO (Apr. 11, 2011), <http://blog.nolo.com/blog/2011/04/11/the-brief-story-of-texas-vs-nolo>, archived at <http://perma.cc/86L4-JNUD> (recounting Nolo’s battle to keep its legal books and software accessible to the public); R. Hewitt Pate et al., *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law*, FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE (Dec. 20, 2012), <http://www.justice.gov/atr/public/comments/200604.pdf>, archived at <http://perma.cc/3PBZ-7P32> (“Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.” (internal quotation marks and footnote omitted)).

<sup>11</sup> See Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 206-10, 243-44 (1997) (reporting animosity towards both innovations from the insurance defense bar).

the requisite training has absolutely nothing to do with hair braiding),<sup>12</sup> laws prohibiting anyone other than licensed funeral directors from selling coffins,<sup>13</sup> states prohibiting anyone other than veterinarians from “floating” horse teeth,<sup>14</sup> or ethics rules prohibiting client poaching by music teachers.<sup>15</sup> There has also been dramatic “credentials creep” in fields that already require a license to practice (e.g., advanced practice nursing, audiology, occupational therapy, and physical therapy)—a phenomenon that raises entry costs as well as the prices ultimately charged to consumers.<sup>16</sup> Finally, states have aggressively expanded the number of occupations that they license, including beekeeping, interior design, locksmithing, and other trades.<sup>17</sup>

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<sup>12</sup> See Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES (June 12, 2012), [http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?\\_r=2&ref=magazine&pagewanted=all&](http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?_r=2&ref=magazine&pagewanted=all&), archived at <http://perma.cc/Y3KQ-X4Y4> (describing one would-be hair braider’s struggle against the cosmetology license requirement in Utah, where many cosmetology schools “taught little or nothing about African-style hair-braiding”).

<sup>13</sup> See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218 (5th Cir. 2013) (describing how, under a Louisiana law, “a prospective casket retailer must become a licensed funeral establishment” and “must employ a full-time funeral director”); *Louisiana Caskets: Saint Joseph Abbey, et al. v. Castille, et al. Challenging Louisiana’s Casket Cartel*, INST. FOR JUSTICE, <http://www.ij.org/saint-joseph-abbey-et-al-v-castille-et-al> (last visited Oct. 8, 2014), archived at <http://perma.cc/AWX3-JH8U> (recounting how the Fifth Circuit ultimately ruled against the Louisiana casket licensing regime).

<sup>14</sup> See generally Clark Neily, *IJ Puts “Regulatory Capture” on Trial*, INST. FOR JUSTICE (Apr. 2008), <http://www.ij.org/ij-puts-qregulatory-captureq-on-trial-2>, archived at <http://perma.cc/93QZ-62MS> (describing efforts to overturn a Minnesota law allowing only state-licensed veterinarians to “float” (or file) horse’s teeth).

<sup>15</sup> See *In the Matter of Music Teachers National Association, Inc.*, FED. TRADE COMM’N, <http://www.ftc.gov/enforcement/cases-proceedings/131-0118/music-teachers-national-association-inc-matter> (last updated Apr. 4, 2014), archived at <http://perma.cc/7J6A-E787> (discussing the Federal Trade Commission’s enforcement action against the Music Teachers National Association’s ethics provision that “restricted members from soliciting clients from rival music teachers”).

<sup>16</sup> See Burton Bollag, *Credential Creep*, CHRON. HIGHER EDUC. (June 22, 2007), <http://chronicle.com/article/Credential-Creep/25476>, available at <http://www.csun.edu/pubrels/clips/June07/06-18-07M.pdf>, archived at <http://perma.cc/3V43-CFNV> (critiquing new “Ph.D lite” doctorate programs in audiology, pharmacy, physical therapy, and occupational therapy). For specific examples of the phenomenon, see *2012-2013 Fact Sheet: Physical Therapist Education Programs*, COMM’N ON ACCREDITATION IN PHYSICAL THERAPY EDUC., at 4, [http://www.capteonline.org/uploadedFiles/CAPTEorg/About\\_CAPTE/Resources/Aggregate\\_Program\\_Data/AggregateProgramData\\_PTPrograms.pdf](http://www.capteonline.org/uploadedFiles/CAPTEorg/About_CAPTE/Resources/Aggregate_Program_Data/AggregateProgramData_PTPrograms.pdf) (last updated Mar. 27, 2014), archived at <http://perma.cc/S5R2-VMWB> (illustrating the growing number of physical therapy doctoral programs); *Audiology Programs*, ACAD. OF DOCTORS OF AUDIOLOGY, <http://www.audiologist.org/audiology-programs> (last visited Oct. 8, 2014), archived at <http://perma.cc/Z2C4-SBFC> (listing audiology doctoral programs); *Fact Sheet: The Doctor of Nursing Practice (DNP)*, AM. ASS’N OF COLLS. OF NURSING (Aug. 18, 2014), <http://www.aacn.nche.edu/media-relations/fact-sheets/dnp>, archived at <http://perma.cc/J3PG-BKSY> (calling for “moving the current level of preparation necessary for advanced nursing practice from the master’s degree to the doctorate-level by the year 2015”).

<sup>17</sup> Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & John K. Ross, *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUSTICE 10-11 tbl.1 (May 2012),

There is some good news. Antitrust law has proven to be a useful tool for attacking anticompetitive actions taken by the learned (and not-so-learned) professions.<sup>18</sup> But there is also some bad news: the state action doctrine has proven to be a substantial impediment in the campaign against these restraints.<sup>19</sup> A majority of the courts of appeals gives state licensing boards

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[https://www.ij.org/images/pdf\\_folder/economic\\_liberty/occupational\\_licensing/licensetowork.pdf](https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf), archived at <http://perma.cc/7BEN-2J6S> (listing the many lower-income occupations now subject to state licensure); Edlin & Haw, *supra* note 1, at 1096 (same).

<sup>18</sup> See, e.g., WILLIAM BLUMENTHAL, A PRIMER ON THE APPLICATION OF ANTITRUST LAW TO THE PROFESSIONS IN THE UNITED STATES 2-9 (2006), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/primer-application-antitrust-law-professions-united-states/20060929cblumenthalmaterials\\_o.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/primer-application-antitrust-law-professions-united-states/20060929cblumenthalmaterials_o.pdf), archived at <http://perma.cc/54QC-XTGQ> (explaining how antitrust law does regulate licensed professions, though with certain limitations); FED. TRADE COMM'N & U.S. DEPT OF JUSTICE, CHAPTER 2: INDUSTRY SNAPSHOT AND COMPETITION LAW: PHYSICIANS, at 33-42 (examining how antitrust law applies to the marketplace for physician services), in IMPROVING HEALTH CARE: A DOSE OF COMPETITION, *supra* note †; see also FED. TRADE COMM'N, *supra* note 6 (summarizing FTC enforcement actions against anticompetitive behavior in healthcare); FED. TRADE COMM'N, PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION ON COMPETITION AND THE POTENTIAL COSTS AND BENEFITS OF PROFESSIONAL LICENSURE BEFORE THE COMMITTEE ON SMALL BUSINESS, U.S. HOUSE OF REPRESENTATIVES 9-16 (2014), available at [http://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](http://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf), archived at <http://perma.cc/U942-XAKA> [hereinafter FTC PREPARED STATEMENT] (reviewing FTC advocacy and enforcement actions against anticompetitive licensing regimes).

<sup>19</sup> For an overview of the state action doctrine and background on the FTC's long-term plan to roll back overly expansive interpretations of the doctrine, see TODD J. ZYWICKI ET AL., FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE 5-24, 64-73 (2003), available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf), archived at <http://perma.cc/934B-ANZS>. Interestingly, the FTC's State Action Task Force was originally headed by Ted Cruz, the then-Director of the Office of Policy Planning (and currently the junior United States Senator from Texas). For additional commentary on the state action doctrine in the antitrust arena, see James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1585-1602 (2010); and D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 131-33 (2009). On the state action doctrine's use in antitrust litigation involving state licensing boards, see Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 750-54 (2012). See also Sasha Volokh, *Will the Supreme Court Hear This Important Antitrust Case?*, WASH. POST (Jan. 27, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/27/will-the-supreme-court-hear-this-important-antitrust-case>, archived at <http://perma.cc/6N4T-KBHR> (discussing *North Carolina Board of Dental Examiners v. FTC* and how “[t]here’s currently a three-way circuit split on when apparently government state regulatory boards, which are usually exempt from antitrust law, are ‘private’ enough that antitrust law applies”).

The Supreme Court has also been equivocal on the application of antitrust law to the learned professions. *Compare* *Goldfarb v. Va. State Bar*, 421 U.S. 773, 793 (1975) (“In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.”), *with* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769 (1999) (holding that more than a “quick-look analysis” was necessary before condemning the defendant’s restrictions on dentists advertising their price discounts and the quality of their services).

and similar entities considerable latitude to engage in anticompetitive conduct, even when that conduct would be clearly unlawful were it undertaken individually by the licensed providers that typically dominate these licensing boards.<sup>20</sup>

In the past decade the Carolinas (both North and South) have seen two pitched battles over these matters. The Federal Trade Commission challenged efforts by both states' dental licensing boards to restrict entry by potential competitors. In response, the licensing boards in both states raised the state action doctrine as an affirmative defense. In both cases, the state action doctrine was held not to protect the conduct in question. On October 14, 2014, the Supreme Court is scheduled to hear oral argument in an appeal of the second case, involving the North Carolina Board of Dental Examiners.<sup>21</sup>

In the first case, the South Carolina State Board of Dentistry (S.C. Board) tried to squash a program providing dental care to school children.<sup>22</sup> The program offered screenings and preventive dental care (including the application of sealants, cleanings, and topical fluoride).<sup>23</sup> After the South Carolina

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<sup>20</sup> For statistics on the degree of licensed-provider dominance of licensing boards, see Edlin & Haw, *supra* note 1, at 1103 ("Our study of the composition and powers of all occupational licensing boards in Florida and Tennessee revealed that license-holders active in the profession have a majority on 90% of boards in Florida and 93% of boards in Tennessee."). Of the eight courts of appeals that have faced the issue, three (the Second, Fifth, and Tenth Circuit Courts of Appeals) give near-complete deference to state agencies; four (the First, Seventh, Ninth, and Eleventh Circuit Courts of Appeals) give an intermediate degree of scrutiny; and only one (the Fourth Circuit Court of Appeals) gives substantial scrutiny to state agencies' anticompetitive conduct. See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 987-92 (2014) (reviewing the various appellate courts' rulings); Sasha Volokh, *The Disarray in the Appellate Courts over the Antitrust State-Action Doctrine*, WASH. POST (Jan. 29, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/29/the-disarray-in-the-appellate-courts-over-the-antitrust-state-action-doctrine>, archived at <http://perma.cc/8EMH-MCZX> (same).

<sup>21</sup> Docket, No. 13-534, N.C. State Bd. of Dental Exam'rs v. FTC, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-534.htm> (last updated Oct. 2, 2014), archived at <http://perma.cc/EL54-7LAG>.

<sup>22</sup> See *In the Matter of South Carolina State Board of Dentistry*, FED. TRADE COMM'N, <http://www.ftc.gov/enforcement/cases-proceedings/0210128/south-carolina-state-board-dentistry-matter> (last updated Sept. 11, 2007), archived at <http://perma.cc/Y8QY-39YM> (noting how the S.C. Board enacted "a rule that required a dentist to examine every child before a dental hygienist could provide preventive dental care—such as cleanings—in schools"); see also Jeffrey W. Brennan, *South Carolina State Board of Dentistry and the Role of Immunities in the Parker Doctrine*, 21 ANTITRUST L.J. 41, 41 (2007) (describing the case and the parties' accompanying legal maneuvers).

<sup>23</sup> Complaint at 1, *In re S.C. State Bd. of Dentistry*, FTC No. 9311 (Sept. 12, 2003), available at <http://www.ftc.gov/sites/default/files/documents/cases/2003/09/socodentistcomp.pdf>, archived at <http://perma.cc/U57Y-H454>.

legislature loosened restrictions on the program in 2000, a large number of students received screening and preventive services from dental hygienists.<sup>24</sup>

The S.C. Board responded to the program by implementing an emergency regulation reinstating the pre-2000 restrictions on the program.<sup>25</sup> Dentists had long fought efforts by dental hygienists to engage in independent practice,<sup>26</sup> and the S.C. Board presumably viewed the program as merely the latest front in a long-running war.<sup>27</sup> In 2001, the S.C. Board proposed to make the pre-2000 regulations permanent.<sup>28</sup> South Carolina law provided that the proposed regulation had to be reviewed by an administrative law judge (ALJ) and then submitted to the South Carolina General Assembly.<sup>29</sup> After the ALJ held that the regulation was inconsistent with the actions taken by the South Carolina legislature in 2000, the S.C. Board declined to submit the regulation to the legislature for review.<sup>30</sup> The FTC subsequently filed an administrative complaint against the S.C. Board in 2003, charging it with an unfair method of competition in violation of section 5 of the FTC Act.<sup>31</sup> The S.C. Board raised the state action defense in a motion to dismiss,<sup>32</sup> but the FTC refused to dismiss the case.<sup>33</sup> After the Fourth Circuit Court of Appeals refused to consider an interlocutory appeal,<sup>34</sup> and the Supreme Court denied certiorari,<sup>35</sup> the case was settled with a consent judgment.<sup>36</sup>

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<sup>24</sup> *Id.* at 4-5.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> See generally Morris M. Kleiner & Kyoung Won Park, *Battles Among Licensed Occupations: Analyzing Government Regulations on Labor Market Outcomes for Dentists and Hygienists* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 16560, 2010) ("As early as 1932, the issue of determining the proper tasks of hygienists relative to dentists was raised at national meetings of hygienists, with a view that hygienists should have greater autonomy.").

<sup>27</sup> Dental boards also restrict the number of hygienists who may be supervised by a single dentist, which effectively restricts the scale effect for competition by dentists and hygienists. *Id.* at 2; see also Edlin & Haw, *supra* note 1, at 1107.

<sup>28</sup> Complaint, *supra* note 23, at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 7, 9.

<sup>32</sup> Motion to Dismiss at 1, *In re* S.C. State Bd. of Dentistry, FTC No. 9311 (Oct. 21, 2003), available at <http://www.ftc.gov/sites/default/files/documents/cases/2003/10/031021scdentmotodismiss.pdf>, archived at <http://perma.cc/EM3X-3T98>.

<sup>33</sup> Order Denying Motion to Dismiss on State Action Grounds, Holding in Abeyance Motion to Dismiss on Mootness Grounds, Retaining Jurisdiction, and Referring Mootness Issues to an Administrative Law Judge at 1-2, *In re* S.C. State Bd. of Dentistry, FTC No. 9311 (July 28, 2004), available at <http://www.ftc.gov/sites/default/files/documents/cases/2004/07/040728orderdenymotodismiss.pdf>, archived at <http://perma.cc/6XYE-4PRL>.

<sup>34</sup> *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 447 (2006) (dismissing the S.C. Board's appeal for lack of jurisdiction).

<sup>35</sup> *S.C. State Bd. of Dentistry v. FTC*, 127 S. Ct. 1123, 1123 (2007) (denying certiorari).

In the second case, the North Carolina Board of Dental Examiners (N.C. Board) became concerned that non-dentists were providing teeth whitening services.<sup>37</sup> In North Carolina, teeth-whitening was available from dentists, either in-office or in take-home form; as an over-the-counter product; and from non-dentists in salons, malls, and other locations.<sup>38</sup> The version provided by dentists was more powerful and required fewer treatments, but was significantly more expensive and less convenient.<sup>39</sup> In response to complaints by dentists that non-dentists were providing lower-cost teeth-whitening services, the N.C. Board sent dozens of stern letters to non-dentists, asserting that the recipients were engaged in the unlicensed practice of dentistry, ordering them to cease and desist, and, in some of the letters, raising the prospect of criminal sanctions if they did not do so.<sup>40</sup> The N.C. Board also sent letters to mall owners and operators, urging them not to lease space to non-dentist providers of teeth whitening services.<sup>41</sup>

The FTC brought an administrative proceeding against the N.C. Board, and the N.C. Board raised the state action doctrine as a defense.<sup>42</sup> Six of the eight spots on the N.C. Board were required to be held by North Carolina licensed dentists, who were elected by their peers to serve.<sup>43</sup> Because of the N.C. Board's composition, the FTC held that active supervision by the state itself had to be shown in order for the state action doctrine to apply.<sup>44</sup> Since there was no evidence of active supervision, the FTC held that the state action doctrine did not apply.<sup>45</sup> On appeal, the Fourth Circuit upheld the FTC decision, holding *inter alia* that active supervision was required when a majority of the state licensing board was elected by members of the

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<sup>36</sup> See *In the Matter of South Carolina Board of Dentistry*, *supra* note 22 (“The FTC’s 2007 consent requires the Board to publicly support the current state public health program that allows hygienists to provide preventive dental care to schoolchildren, especially those from low-income families.”).

<sup>37</sup> N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d 359, 365 (4th Cir. 2013) (“In about 2003, non-dentists . . . started offering teeth-whitening services, often at a significantly lower price than dentists. Shortly thereafter, dentists began complaining to the Board about the non-dentists’ provision of these services.”).

<sup>38</sup> *Id.* at 364.

<sup>39</sup> *Id.* at 364-65.

<sup>40</sup> *Id.* at 365.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 364.

<sup>44</sup> Opinion of the Commission at 8-14, *In re* N.C. State Bd. of Dental Exam’rs, FTC No. 9343 (Feb. 8, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinion.pdf>, archived at <http://perma.cc/WUD4-22X2>.

<sup>45</sup> *Id.* at 14-17.



profession regulated by that board.<sup>46</sup> The N.C. Board then sought certiorari from the Supreme Court, which agreed to hear the case to resolve the circuit split described above.<sup>47</sup>

Enter Professors Edlin and Haw. In *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, Professors Edlin and Haw argue that the Supreme Court should affirm the Fourth Circuit's decision in *North Carolina Board of Dental Examiners*.<sup>48</sup> But they are troubled by the Fourth Circuit's emphasis (particularly in the concurrence) on the manner in which a majority of the Board of Dental Examiners are appointed (as noted above, six of the eight members must be licensed dentists, who are elected by their fellow dentists to serve on the Board).<sup>49</sup> Professors Edlin and Haw argue that the Supreme Court should use the opportunity provided by *North Carolina Board of Dental Examiners* to "hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board's members are appointed."<sup>50</sup> Rather than focusing on the method of appointment, they argue that the Supreme Court should base its decision on "the identity of [the N.C. Board's] members as competitors" to those they are regulating.<sup>51</sup> Because the N.C. Board is dominated by market participants, Professors Edlin and Haw argue that the N.C. Board must be actively supervised by the state of North Carolina to enjoy immunity under the state action doctrine.<sup>52</sup>

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<sup>46</sup> *N.C. State Bd. of Dental Exam'rs*, 717 F. 3d at 368 ("[W]e agree with the FTC that state agencies 'in which a decisive coalition (usually a majority) is made up of participants in the regulated market,' who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* [active supervision] prongs."). In fairness, the concurrence expressly conditions the outcome on the manner of selection for the Board, while the majority mentions the issue but does not indicate its holding is conditional on that fact. Compare *id.*, with *id.* at 376 (Keenan, J., concurring) ("[O]ur holding that the Board is a private actor for purposes of the state action doctrine turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market.").

<sup>47</sup> See *supra* note 20 and accompanying text.

<sup>48</sup> Edlin & Haw, *supra* note 1, at 1100 ("[T]he Court should make clear that . . . competitor-dominated boards that regulate their own competition and the entry of competitors will be treated as private actors and subject to antitrust review . . .").

<sup>49</sup> See *id.* at 1099-1100 & n.38 (taking the position that the Fourth Circuit "does not go far enough because the court could be seen as relying on the method of appointment to the board"). See generally *supra* note 46 and accompanying text (discussing the Fourth Circuit's emphasis on how the N.C. Board's dentist members are selected).

<sup>50</sup> *Id.* at 1100.

<sup>51</sup> *Id.* at 1099-1100.

<sup>52</sup> *Id.* See generally Cooper & Kovacic, *supra* note 19, at 1595 ("Another tweak at the margins of the state action doctrine would be to make it clear that subdivisions within the state comprised of market participants are considered private parties.").

With the state action doctrine out of the way, Professors Edlin and Haw argue that, when analyzing restrictions created by provider-dominated and unsupervised licensing boards, courts should use a modified rule-of-reason approach, which would balance licensing's procompetitive potential against its anticompetitive effects:

First, courts should accept arguments that a [licensing] restriction improves consumer access to information or raises quality of service as procompetitive justifications. . . . Second, claims of quality improvement should be specific and tied to a theory of market failure that justifies government interference. . . . Finally, courts should consider whether other regulations could restore information symmetry or raise quality of service with less cost to competition. Put another way, courts should consider whether there are less restrictive alternatives to the challenged licensing scheme.<sup>53</sup>

Going beyond the specific issues presented in *North Carolina State Board of Dental Examiners*, Professors Edlin and Haw show how licensing boards have become a dominant reality of the modern American economy.<sup>54</sup> They argue that these state licensing boards are operating as a "massive exception to the [Sherman] Act's ban on cartels."<sup>55</sup> And, like all cartels, state licensing boards predictably favor the interests of cartel members—in this case, those with a state-provided license to deliver the services in question.<sup>56</sup>

We agree with the diagnosis and with much of the treatment proposed by Professors Edlin and Haw. Indeed, one of us (Professor Hyman) signed on to an amicus brief coauthored by Professors Edlin and Haw and submitted to the Supreme Court on August 6, 2014.<sup>57</sup> We hope the Supreme Court

<sup>53</sup> Edlin & Haw, *supra* note 1, at 1148.

<sup>54</sup> *See id.* at 1102-10 ("Once limited to a few learned professions, licensing is now required for over 800 occupations.").

<sup>55</sup> *Id.* at 1095.

<sup>56</sup> Two commentators (one a former FTC chairman, and the other a member of the FTC's state action task force) aptly describe the unfortunate situation that results when members of the regulated profession become the regulators:

Much anticompetitive conduct is not the result of legislation, but rather emanates from regulatory boards made up of decision makers who wear their regulatory hat at the board's monthly meetings, but earn a living in the very profession that they have been charged to regulate the other 353 days of the year. . . . There simply is no principled difference between wholly private actors and those clothed in state authority, via their title (e.g., 'real estate commissioner,' or member of the 'board of dentistry' or 'board of optometry'), for a few days each year.

Cooper & Kovacic, *supra* note 19, at 1595-97.

<sup>57</sup> Brief of Antitrust Scholars as *Amici Curiae* in Support of Respondent at 3a, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014), available at <http://www.americanbar.org/>

will adopt their framework—or, failing that, at least uphold the decision of the Fourth Circuit.<sup>58</sup>

That said, we believe Professors Edlin and Haw do not go quite far enough. The empirical evidence they canvass and the logical implications of their analysis indicate that a more aggressive set of remedies is required to fully address the problem they describe. Accordingly, we propose three modifications to Professors Edlin and Haw’s proposals:

- (1) When assessing whether states are actively supervising licensing boards, courts should be exceedingly skeptical about the actual efficacy of such supervision in reining in licensing boards’ anticompetitive tendencies.
- (2) When conducting the rule-of-reason analysis recommended by Professors Edlin and Haw, courts should rule for the licensing board only if the board can demonstrate an actual *as applied* justification for the conduct in question.<sup>59</sup> More concretely, the licensing board should have to present persuasive evidence—not *speculation*—showing that a proposed regulation will protect against *demonstrable* harms—meaning actual harm to consumers, and not just complaints from competitors or generalized claims about the problem of market failure. And by “persuasive evidence,” we do not mean an off-hand reference to informational asymmetries and rhetoric about the need to protect vulnerable consumers from unscrupulous and unqualified purveyors of snake oil—even if the off-hand reference is accompanied by the obligatory citation to Akerlof.<sup>60</sup> In like fashion, the court must be persuaded

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content/dam/aba/publications/supreme\_court\_preview/BriefsV4/13-534\_resp\_amcu\_as.authcheckdam.pdf, archived at <http://perma.cc/4LMG-CU3Y>.

<sup>58</sup> If the Supreme Court decides the issue in *North Carolina State Board of Dental Examiners* based solely on the method of selection or appointment to the Board, states sympathetic to licensing boards can readily circumvent the ruling to promote anticompetitive ends. See Edlin & Haw, *supra* note 1, at 1154-56 (noting how states could easily circumvent a ruling based on method of appointment by actively supervising licensing boards, changing licensing boards’ compositions, or directly regulating professions).

<sup>59</sup> Our approach is similar to the FTC’s suggested guidelines for deciding whether to create a licensing regime in the first instance, and for evaluating the cost and benefits of the resulting regulations. See FTC PREPARED STATEMENT, *supra* note 18, at 8-9 (proposing a framework for analysis that asks whether “the specific licensing conditions or restrictions adopted address the issues that gave rise to the decision to require licensure” and whether “they in fact reduce a risk of consumer harm from poor-quality services”).

<sup>60</sup> See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 488 (1970) (arguing that “government intervention may increase the welfare of all parties” when markets provide “incentives for sellers to market poor quality merchandise”). As it happens, Akerlof notes the prevalence and importance of non-regulatory mechanisms, like the use of guarantees or certification, that can independently address the problem of quality uncertainty. *Id.* at 499-500.

that the remedy will primarily address the specific proven harm and that it will actually enhance overall consumer welfare.

In assessing these issues, courts should uphold the challenged restraint only after taking full account of the utility and efficacy of non-regulatory structures and forces that commonly protect consumers: brand names, private certification, credentialing, and liability, for example. And, given the history of professional licensing abuses, courts should impose an exceedingly heavy burden of proof on licensing boards attempting to justify overtly anticompetitive conduct, no matter how well-intentioned and plausible the arguments offered in support.

(3) State legislators should “just say no” to new proposals for occupational licensing, and they should sunset or roll back existing licensing regimes.

### I. JUDGES SHOULD BE MORE SKEPTICAL ABOUT ACTIVE SUPERVISION

Professors Edlin and Haw argue that

[i]f the Court requires occupational boards to show supervision in order to enjoy immunity from antitrust suits, then the most straightforward way for states to insulate boards from antitrust scrutiny is to actively supervise them. Supervision, at least in theory, will complete the link between a board’s anticompetitive restrictions and the accountable, elected body that demanded them.<sup>61</sup>

Elsewhere, they assert that “[s]upervision by disinterested state agents should be a minimum requirement for a state board to receive antitrust immunity.”<sup>62</sup>

Although active supervision may restrain some state licensing boards from engaging in some anticompetitive conduct, we are skeptical that it will actually do all that much to address the problems cataloged by Professors Edlin and Haw. Where are these disinterested state agents to be found? When “dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments,”<sup>63</sup> even Diogenes might have a hard time finding a single disinterested state agent who is ready, willing, and able to supervise even one state licensing board, let alone supervise the multiplicity of boards that most states now have. Given the

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<sup>61</sup> Edlin & Haw, *supra* note 1, at 1154-55.

<sup>62</sup> *Id.* at 1143.

<sup>63</sup> Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

ability of state licensing boards to “paper the file” in advance of any antitrust challenge, courts will not go far wrong in presuming that there was not active supervision, at least until clearly proven otherwise.<sup>64</sup>

## II. CONDUCTING THE RULE-OF-REASON ANALYSIS: REQUIRING AN *AS APPLIED* EMPIRICAL JUSTIFICATION

For many commentators, the benefits of licensing (and the inadequacies of a world without licensing) are so self-evident that even the most overt anticompetitive conduct is treated as unproblematic. If you asked an imaginary “completely honest legislator” to actually describe and quantify those benefits, the response would probably be something like the following:

We don't have any evidence of benefit, so we just keep saying there are benefits. We've always licensed occupations, so why shouldn't we keep doing it? And why not extend it to new fields? The state gets licensing fees and we get campaign contributions. I'm not seeing the problem here.<sup>65</sup>

But it is one thing to assert there are net benefits from licensing, and entirely another to prove it. As Professors Edlin and Haw's canvass of the empirical literature makes clear, the evidence of quantifiable benefit (let alone net benefit, after taking account of the anticompetitive ends to which licensing is routinely deployed) is elusive.<sup>66</sup> Those inclined to give the benefit of the doubt to a licensing board should start by explaining why

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<sup>64</sup> Stated differently, we propose the effective use of a “quick-look” test, with a strong presumption that there was not active supervision:

If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful, and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.

*Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

<sup>65</sup> Our “completely honest legislator” is imaginary. The Second City Network has supplied “completely honest” videos for three kinds of professionals: ob-gyns, therapists, and veterinarians. See The Second City Network, *Completely Honest Guy - Completely Honest OBGYN*, YOUTUBE (Oct. 30, 2011), <https://www.youtube.com/watch?v=xG6K5hbPJKs>, archived at <http://perma.cc/UX6Y-U2UR>; The Second City Network, *Complete Honest Therapist*, YOUTUBE (Dec. 31, 2010), <https://www.youtube.com/watch?v=QD-4aNxuCws>, archived at <http://perma.cc/FC3X-PF2T>; The Second City Network, *Completely Honest Veterinarian*, YOUTUBE (Dec. 4, 2010), <https://www.youtube.com/watch?v=YugT3uDpinA>, archived at <http://perma.cc/5MMR-AY82>. In each video, “representatives” of the three professions explain that they have structured their operations to serve their own interests, rather than those of their clients.

<sup>66</sup> See Edlin & Haw, *supra* note 1, at 1111-18 (“[A] licensing restriction can only be justified where it leads to better quality professional services—and for many restrictions, proof of that enhanced quality is lacking.”).

these boards respond so aggressively to complaints from their members about unlicensed competitors, absent any evidence of actual consumer harm. Was it really a coincidence that the cease-and-desist letters in *North Carolina State Board of Dental Examiners* were prompted by complaints from dentists unhappy about the provision of teeth-whitening services by someone other than themselves? And is it a surprise that these complaints focused on competitors providing teeth-whitening services at lower prices than those offered by dentists, and not on consumer harm?<sup>67</sup> Similarly, the record in *In re South Carolina State Board of Dentistry* is devoid of complaints from the parents of the poor and working-class children in South Carolina who (*quelle horreur!*) received free dental care from hygienists.<sup>68</sup> There is simply no reason to believe that most licensing boards are in the business of maximizing consumer welfare.

In conducting the rule-of-reason analysis, it is also important to recognize that markets use numerous strategies to help protect consumers, such as reputation, intermediaries, private certification, and warranties. Every day, consumers pump gasoline into their cars' gas tanks and feed their children cereal from boxes. They don't worry that tainted fuel might damage their engine or that poison in the food might harm their children. A firm's reputation has value, which creates a financial incentive for firms to protect consumers.

Why are consumers willing to use the Internet to buy things from people they have never met before and with whom they may never deal again? The ability to leave unfavorable feedback (on eBay, Yelp, and Angie's List) gives consumers huge leverage at the point of purchase. The risk of unfavorable feedback motivates higher service quality. These reputational intermediaries make it possible for small businesses and professionals to flourish, even in competition with nationally recognizable brand-name firms. And, when markets are not up to the task, private litigation (which has its own costs and benefits) is always available.

Consider the interaction of licensure and market forces in two licensed professions: barbers (hair stylists) and physicians. Let's start with the easy case: barbers. What strategies do consumers use to gather information about who they will allow to cut their hair? Reputation and brand names are important. Consumers ask friends and search online. Some rely on low-cost

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<sup>67</sup> See Opinion of the Commission at 4, *In re N.C. State Bd. of Dental Exam'rs*, FTC No. 9343 (Dec. 7, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf>, archived at <http://perma.cc/ZC8W-BSVF> ("Many of these complaints noted that these non-dentist providers offered low prices . . . ; only on rare occasion did they indicate possible consumer harm . . .").

<sup>68</sup> See *supra* notes 22-36 and accompanying text.

brand-name providers (e.g., BoRics, Hair Cuttery, and Great Clips) who advertise heavily, standardize services, and insist that individual licensees meet their demanding standards.

Barbers and hair stylists are regulated by the state—but what role does state licensing play in the market for haircuts? Has any reader ever checked with their state’s licensing authorities before choosing a barber or hair stylist? In California, over a seven-year period, the State Board of Barbering and Cosmetology (CA Board) received a total of about 21,500 complaints and referred about 1,100 cases for investigation or to the Attorney General.<sup>69</sup> Of these, only about 670 cases were for things that a consumer would be most likely to worry about: fraud, health and safety, incompetence or negligence, product quality, general misconduct (e.g., personal, unprofessional, or sexual), and criminal charges and convictions.<sup>70</sup> That amounts to less than 100 cases per year, in a state with a population of more than 38 million people,<sup>71</sup> where more than 200,000 individuals have active licenses from the CA State Board.<sup>72</sup> The benefits the state derives from licensure are more clear-cut: the CA State Board has loaned the state general fund a total of \$30 million in the past decade and less than a third has been repaid.<sup>73</sup>

What about licensing for physicians? Edlin and Haw are likely thinking about physicians and other health care providers when they observe that “[f]or some professions, licensing provides such an obvious public benefit that barriers to entry and regulation of practice are accepted as necessary evils.”<sup>74</sup> The adverse consequences from treatment by a bad physician are

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<sup>69</sup> See *Enforcement Statistical Overview*, CAL. STATE BD. OF BARBERING & COSMETOLOGY, [http://www.barbercosmo.ca.gov/enforcement/enf\\_stats.shtml](http://www.barbercosmo.ca.gov/enforcement/enf_stats.shtml) (last updated Oct. 2013), *archived at* <http://perma.cc/gLYP-NSVA> (listing complaints received, cases referred for investigation, and cases referred to the Attorney General since 2006). We omit data from fiscal year 2013–2014 from our calculations because only three months of data from that period are currently available.

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

<sup>71</sup> *California QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated July 8, 2014), *archived at* <http://perma.cc/LB5S-DCUC>.

<sup>72</sup> See CAL. STATE BD. OF BARBERING & COSMETOLOGY, SECTION 4: LICENSING PROGRAM, at 2, in *SUNSET REVIEW REPORT 2012*, *available at* [http://www.barbercosmo.ca.gov/forms\\_pubs/sunset\\_report.pdf](http://www.barbercosmo.ca.gov/forms_pubs/sunset_report.pdf), *archived at* <http://perma.cc/X2VE-KDMZ> (showing that the CA Board renews more than 200,000 licenses annually).

<sup>73</sup> See CAL. STATE BD. OF BARBERING & COSMETOLOGY, SECTION 3: FISCAL AND STAFF, at 1, in *SUNSET REVIEW REPORT 2012*, *supra* note 72 (noting that the CA Board’s “outstanding loan balance of \$21 million”).

<sup>74</sup> Edlin & Haw, *supra* note 1, at 1107. Two former FTC officials espouse a similar attitude toward physician licensing:

No one seriously disputes the need for some form of professional regulation in the presence of large information asymmetries and serious spillover effects. In most cases it is difficult, if not impossible, for a consumer to judge the quality of her physician or

obviously greater than those from a haircut from a bad barber, but those higher stakes simultaneously create pressure for markets to develop compensating strategies and institutions.<sup>75</sup> When courts conduct the rule-of-reason analysis, it would be a serious mistake to think that, but for the proffered regulation, the market for health care would operate as a savage war of all against all, red in tooth and claw, populated solely by charlatans and snake oil vendors.<sup>76</sup>

Consumers who want to know about a physician's specialty training can rely on private specialty boards.<sup>77</sup> Board certification also provides assurance for Americans seeking health care abroad (i.e., "medical tourists").<sup>78</sup> Whether motivated by liability, reputation, or both, hospitals, health maintenance organizations (HMOs), and physician group practices aggressively review the credentials of physicians with whom they contract, and are willing to limit physicians' privileges or exclude them entirely.<sup>79</sup> Insurers also routinely disseminate information on the quality of care provided by physicians with whom they contract.<sup>80</sup>

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attorney, and these practitioners are unlikely to internalize the full costs of their mistakes. Some level of state credentialing and regulation makes sense.

Cooper & Kovacic, *supra* note 19, at 1566.

<sup>75</sup> See, e.g., Shirley Svorny, *Medical Licensing: An Obstacle to Affordable, Quality Care*, CATO POL'Y ANALYSIS, Sept. 17, 2008, at 1, 8-11, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa-621.pdf>, archived at <http://perma.cc/L4Y6-BJPS> (identifying medical malpractice liability, malpractice insurers, private credentialing, and brand names as nonlicensing mechanisms to guarantee physician quality).

<sup>76</sup> See Edlin & Haw, *supra* note 1, at 1156 ("We do not propose an end to licensing or a return to a Dickensian world of charlatan healers and self-trained dentists.").

<sup>77</sup> The American Board of Medical Specialties has twenty-four member boards. See *About ABMS Member Boards*, AM. BD. OF MED. SPECIALTIES, [http://www.abms.org/About\\_ABMS/member\\_boards.aspx](http://www.abms.org/About_ABMS/member_boards.aspx) (last visited Oct. 8, 2014), archived at <http://perma.cc/J47R-QFCN> (listing the various boards).

<sup>78</sup> See, e.g., *Thailand Medical, Cosmetic, Dental Surgery*, PATIENTS BEYOND BORDERS, <http://www.patientsbeyondborders.com/thailand> (last updated Aug. 19, 2014), archived at <http://perma.cc/XA9U-E3LG> (noting the availability of "[m]ore than 900 full-time and consulting physicians representing every imaginable specialty and subspecialty practice [in Thailand]"—of which "nearly 300 are US board certified").

<sup>79</sup> See Svorny, *supra* note 75, at 9 ("Hospitals, managed-care organizations, and other providers not only check the background of medical professionals to avoid liability for negligence but also to meet standards set by accrediting organizations and insurers.").

<sup>80</sup> See generally *id.* at 10 ("Managed care organizations, preferred provider organizations, and other health plans are accredited by the National Committee for Quality Assurance [NCQA]. The NCQA requires these organizations to credential clinicians as well.").



Medical malpractice insurers also keep an eye on physicians. They offer premium discounts to physicians who adopt risk-reducing strategies.<sup>81</sup> Experience-rated premiums (i.e., premiums with substantial surcharges for a history of valid claims or other high-risk behavior) create a financial incentive for risky physicians to either clean up their acts or retire.<sup>82</sup> Some insurance companies and underwriters specialize in managing the risks associated with the small minority of physicians with serious claims records or other high-risk attributes.<sup>83</sup> A physician who is unable to obtain medical malpractice insurance will lose his hospital privileges and will likely be excluded from insurers' physician networks, even though he still has a valid medical license.<sup>84</sup> The cold reality is that medical malpractice insurers have identified more problematic physicians and have done more to make those physicians practice safely than all the state licensing boards combined.<sup>85</sup>

Finally, where is the evidence that medical licensing boards actually do much to ensure quality and public safety? These boards rarely discipline physicians.<sup>86</sup> When they do, the impetus is not usually low quality care. Instead, most of medical licensing boards' disciplinary docket involves personal drug abuse, prescription drug diversion, or criminal conduct.<sup>87</sup> And

<sup>81</sup> Shirley Svorny, *Could Mandatory Caps on Medical Malpractice Damages Harm Consumers?*, CATO POLICY ANALYSIS, Oct. 20, 2011, at 1, 9, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa685.pdf>, archived at <http://perma.cc/4LU3-ELPF>.

<sup>82</sup> For a discussion of these "experience rating" premiums and how they "penalize physicians who exhibit 'negligence-prone behavior,'" see Svorny, *supra* note 75, at 9.

<sup>83</sup> See Svorny, *supra* note 81, at 2 (describing these "surplus-line carriers").

<sup>84</sup> See Svorny, *supra* note 75, at 9 (noting how insurers consider "failed board examinations, lack of specialty board certifications, lack of hospital privileges, and frequent malpractice claims").

<sup>85</sup> See generally Svorny, *supra* note 81, at 13-14 (advocating that mandatory medical malpractice insurance would be a far better alternative to government licensing of medical professionals).

<sup>86</sup> See Sidney M. Wolfe, *Ranking of State Medical Boards' Serious Disciplinary Actions, 2009-2011*, HEALTH LETTER (Pub. Citizen, Washington, D.C.), June 2012, at 1, 1-3, available at [http://www.citizen.org/documents/HL\\_201206.pdf](http://www.citizen.org/documents/HL_201206.pdf), archived at <http://perma.cc/8TS9-SR76> (finding that even the "best" states bring serious disciplinary actions against at most 6.8 of every thousand physicians annually, while the "worst" states bring such actions against just over one per thousand).

<sup>87</sup> See Steven W. Clay & Robert R. Conatser, *Characteristics of Physicians Disciplined by the State Medical Board of Ohio*, 103 J. AM. OSTEOPATHIC ASS'N 81, 83 (2003) (noting drug use, inappropriate prescriptions, and other petty crimes at the top of a list of "the most common individual offenses"); Svorny, *supra* note 75, at 8 ("[T]he bulk of disciplinary actions involve inappropriate prescription of controlled substances, drug and alcohol abuse, mental illness, sexual improprieties, and other issues."). But see Darren Grant & Kelly C. Alfred, *Sanctions and Recidivism: An Evaluation of Physician Discipline by State Medical Boards*, 32 J. HEALTH POL. POL'Y & L. 867, 875 tbl.2 (2007) (listing the most common reasons for physician sanctions, and including incompetence and negligence among the top reasons for sanctions, alongside criminal convictions and substance abuse). Those inclined to review individual cases can look at abbreviated summaries of disciplinary sanctions imposed by the state of Illinois, which are publicly available at *Disciplinary Reports*, ILL. DEP'T OF FIN. & PROF'L REGULATION, <http://www.idfpr.com/News/Disciplines/DiscReports.asp> (last visited Oct. 8, 2014), archived at <http://perma.cc/N688-9X53>.

physicians disciplined for drug abuse are routinely allowed to continue practicing medicine, as long as they are participating in a recovery program.<sup>88</sup> If anything, licensing may give consumers a false sense of security.

In assessing the merits of occupational licensing, the relevant question is whether consumers are made better or worse off, all things considered. No system (whether it is state licensing boards, other regulatory alternatives, or an unregulated market) is perfect; to believe otherwise is to indulge in the nirvana fallacy.<sup>89</sup> That said, private markets have developed a range of responses and institutions that should be taken into account when conducting the rule-of-reason analysis—and those private market strategies seem to routinely outperform licensing boards.<sup>90</sup> Further, they do so without favoring the interests of incumbent providers, as licensing boards always seem to end up doing.

Accordingly, in cases involving a state licensing board, judges should be extremely skeptical of claims that the challenged conduct actually provides a net benefit to consumers. Judges should insist on actual empirical evidence that, *as applied*, the challenged conduct offers consumers a net benefit, taking into account the probable anticompetitive consequences of the proposed restraint. To do so, judges should (1) evaluate whether there is evidence of actual harm, (2) assess whether the regulatory intervention actually addresses the identified harm and does so in the least restrictive fashion, and (3) analyze whether there is likely to be net consumer benefit, all things considered (including, but not limited to, the impact of information, brand names, private credentialing, certification, liability, and other private market forces). Absent exceedingly persuasive evidence of each of these elements, the licensing board should lose. “Regulation last” is a sensible strategy, both here and elsewhere.<sup>91</sup>

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<sup>88</sup> See Svorny, *supra* note 75, at 8 (“Researchers have found a high rate of repeat offenders among physicians sanctioned by state medical boards, suggesting that licensing does not deal with offenders in an effective way.”).

<sup>89</sup> See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (“The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements.”); see also RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 32 (1995) (“First-best solutions are rarely, if ever, possible; thus the beginning of wisdom is to seek rules that minimize the level of imperfections, not to pretend that these do not exist. . . . Perfection is obtainable in the world of mathematics, not in the world of human institutions.”).

<sup>90</sup> See, e.g., *supra* note 75 and accompanying text.

<sup>91</sup> Professors Edlin and Haw also encourage courts to “consider whether other regulations could restore information symmetry or raise quality of service with less cost to competition.”

### III. “JUST SAY NO” TO MORE LICENSING—AND ROLL BACK OR SUNSET EXISTING LICENSING

Professors Edlin and Haw suggest that the ballot box could remedy the problems they catalog: voters might “vote out officials approving unjustifiable regulations.”<sup>92</sup> It would be nice if that actually happened more often, but we are skeptical. There is a reason why we have so many licensing boards, and why they misbehave as often as they do. Rational ignorance means that few voters are aware of the existence and role of state licensing boards, let alone the degree to which those boards promote the interests of incumbent professionals.<sup>93</sup> For obvious reasons, providers have a far greater interest in the existence and behavior of licensing boards than ordinary consumers.<sup>94</sup>

If we want to make progress on these issues, we have to destabilize the equilibrium that allows for the seemingly endless expansion of occupational licensing. The solution to this problem does not lie with the courts but with the legislature. First, legislatures should stop adding new licensing boards. Second, legislatures should roll back the existing licensing infrastructure, either by affirmatively eliminating existing licensing boards or by sunseting them and forcing the affected providers to periodically persuade a majority of the legislature that licensure is deserved.

The issue has attracted some prominence in recent months. Greg Abbott, the Texas Attorney General who is currently running to be Texas’s governor, has called for the de-licensing of eight occupations, along with other reforms targeted at existing licensing regimes (e.g., eliminating grandfathering, the abolition of criminal penalties, routine reciprocity, and a mandatory opt-out

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Edlin & Haw, *supra* note 1, at 1148. In our view, judges should only consider “other regulations” after they have assessed whether market and non-regulatory forces are sufficient on their own to redress the problem. In conducting that analysis, courts should not give deference to self-serving statements to the contrary made by the licensing board or by members of the licensed occupation.

<sup>92</sup> Edlin & Haw, *supra* note 1, at 1155.

<sup>93</sup> See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 1 (2013) (“Much evidence suggests there is widespread political ignorance about politics in America.”).

<sup>94</sup> See Brief of *Amici Curiae* Scholars of Public Choice Economics in Support of Respondent, at 22, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) available at [http://www.ij.org/images/pdf\\_folder/amicus\\_briefs/nc-teeth-whitening-amicus.pdf](http://www.ij.org/images/pdf_folder/amicus_briefs/nc-teeth-whitening-amicus.pdf), archived at <http://perma.cc/ZT6S-GPE8> (“While dentists have much to gain from capturing the teeth-whitening market, consumers have relatively little incentive to organize in opposition.”); Cooper & Kovacic, *supra* note 19, at 1560 (“It has long been recognized that because of industry’s superior efficiency in political organization relative to consumers, consumer interests are often subservient to industry interests in the regulatory process.”); Edlin & Haw, *supra* note 1, at 1139-40 (“Individual consumers lack the incentive to participate in the process of licensing regulation; rarely would it be rational for a consumer to take the time and effort to try to change a licensing rule in hopes of getting a cheaper haircut.”).

provision).<sup>95</sup> Representative Paul Ryan's recent antipoverty plan similarly identifies excessive occupational licensing as an impediment to upward mobility that hurts low-income families.<sup>96</sup> Professors Glaeser and Sunstein wrote a piece just months ago in *The Wall Street Journal* calling on states and localities to eliminate and streamline "burdensome requirements, including occupational licensing."<sup>97</sup>

Unfortunately, we are not aware of a groundswell of enthusiasm to roll back the tide of occupational licensing.<sup>98</sup> We are not holding our breath while we wait. But if we wish to make progress in the war on occupational licensing, we need to open a new front.

## CONCLUSION

Professors Edlin and Haw are right to call attention to the adverse consequences that result from overly broad interpretations of the state action doctrine, particularly when those overly broad interpretations are applied to provider-dominated state licensing boards. Antitrust has historically focused on private restraints on competition, but publicly imposed limitations can pose greater peril, since they are likely to be both more effective and more durable. As former FTC chairman Timothy Muris aptly observed,

[a]ttempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.

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<sup>95</sup> See *Occupational Licensing*, ABBOTT FOR GOVERNOR, at 6-8, <http://www.gregabbott.com/wp-content/uploads/2014/08/Occupational-Licensing.pdf> (last visited Oct. 8, 2014), archived at <http://perma.cc/5UDU-XAGW> (naming "Interior Designer," "Salvage Vehicle Dealer," "Dog Trainer," "Coach," "Auctioneer," "Barber," "Cosmetolog[ist]," and "Towing/Booting Operator" as job titles that should no longer be subject to state licensing).

<sup>96</sup> See MAJORITY STAFF OF H.R. BUDGET COMM., 113TH CONG., EXPANDING OPPORTUNITY IN AMERICA: A DISCUSSION DRAFT FROM THE HOUSE BUDGET COMMITTEE 66 (2014) (Rep. Paul Ryan, Chairman), available at [http://budget.house.gov/uploadedfiles/expanding\\_opportunity\\_in\\_america.pdf](http://budget.house.gov/uploadedfiles/expanding_opportunity_in_america.pdf), archived at <http://perma.cc/P6JV-DRQE> ("Eliminating irrational or unnecessary licensing requirements . . . would open up new opportunities for low-income families and reduce costs for consumers.").

<sup>97</sup> Edward Glaeser & Cass Sunstein, *How to Deregulate Cities and States*, WALL ST. J. (Aug. 24, 2014, 6:31 PM), <http://online.wsj.com/articles/edward-glaeser-and-cass-sunstein-how-to-deregulate-cities-and-states-1408919500>, archived at <http://perma.cc/XzZ4-G8AL>.

<sup>98</sup> Indeed, attempts in 2011 (Florida) and 2012 (Michigan) to dismantle licensing for a range of occupations went absolutely nowhere. See Edlin & Haw, *supra* note 1, at 1098 & n.32. Even the far more modest changes proposed by Massachusetts provoked no change. See *id.* at 1098-99.

The same is true of antitrust enforcement. If you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take. Let me restate the point in the form of a competition policy theorem: as a competition system achieves success in attacking private restraints, it increases the efforts that firms will devote to obtaining public restraints.<sup>99</sup>

Given these dynamics, what is to be done? The proposal made by Professors Edlin and Haw is useful and important. But we believe more will be required to truly address the problem and maximize consumer welfare. Accordingly, our three proposed modifications to Professors Edlin and Haw's proposal should help to limit the anticompetitive tendencies of occupational licensing and the anticompetitive behavior of provider-dominated licensing boards.

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Preferred Citation: David A. Hyman & Shirley Svorny, Response, *If Professions Really Are Just "Cartels by Another Name," What Should We Do About It?*, 163 U. PA. L. REV. ONLINE 101 (2014), <http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-101.pdf>.

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<sup>99</sup> Timothy J. Muris, FTC Chairman, State Intervention/State Action - A U.S. Perspective, Remarks Before the Fordham Annual Conference on International Antitrust Law & Policy 2 (Oct. 24, 2003), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf), archived at <http://perma.cc/4X9J-PE6T>. Muris goes on to observe that rational firms are likely to prefer public governmental restraints, since public restraints are not only more effective and efficient, but also include a built-in cartel enforcement mechanism. *Id.*; see also Edlin & Haw, *supra* note 1, at 1133 (making the same point). For further corroboration of Muris's view, see Cooper & Kovacic, *supra* note 19, at 1560-61 (quoting Muris and Ulf Böge, President of the German Cartel Office and Chair of the Steering Committee of the International Competition Network).