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Correcting Crooked Licensing Boards with a Revolving-Door Statute

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CORRECTING CROOKED LICENSING BOARDS WITH A REVOLVING-DOOR STATUTE

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ABSTRACT

Contrary to conventional wisdom, occupational licensing restrictions do not serve a primary purpose of protecting consumers. They instead wage war on the market economy. This reality is unsurprising when one considers the makeup of a typical licensing board, which consists primarily of active market participants. These industry incumbents scheme to keep potential competitors out. Entrance exams for florists and onerous educational requirements for interior designers—absurd as they seem—become the rule rather than the exception. Despite their propensity for anticompetitive conduct, licensing boards elude review under the Sherman Act, the nation's chief law regulating anticompetitive conduct. Licensing boards need not defend their self-interested conduct thanks to a line of Supreme Court cases that establish relatively sweeping immunity.

Rather than rework an entire body of case law, this Note recommends a statutory solution to confront crooked licensing boards. States should look to the federal revolving-door statute for inspiration. Though the revolving-door statute addresses a slightly different subject in imposing lobbying bans on former executive branch officials, similar concerns of corruption predominate among licensing

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boards. Accordingly, states should craft their own revolving-door statutes and bar active market participants from occupying a majority of any licensing board's membership.

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INTRODUCTION

People generally despise crooks. Among the worst crooks are those who concoct schemes to maximize their profits at the public's expense.[1] Congress sought to curtail these backdoor dealings with the Sherman Antitrust Act (Sherman Act), which declares that industry leaders may not steamroll consumers with anticompetitive economic practices.[2] To deter such behavior, the Sherman Act imposes severe penalties on crooks who dare to rig the market in their favor.[3] Notwithstanding the statutory command against economic exploitation, one class of potential crooks—occupational licensing boards—largely evades Sherman Act scrutiny.[4]

Vested with authority from the state, occupational licensing boards differ from the private-sector power brokers who typically orchestrate anticompetitive plots.[5] But this public–private distinction is largely

1. *See, e.g.*, Ben Popken, *You're Getting Skinned on Chicken Prices, Suit Says*, NBC NEWS, https://www.nbcnews.com/business/consumer/you-re-getting-skinned-chicken-prices-suit-says-n721821 [https://perma.cc/4R2W-R7D6] (Feb. 17, 2017, 3:37 PM) (detailing a class action lawsuit alleging that America's largest four chicken producers conspired to "rig the chicken market" and put family farms out of business, allegedly causing American families of four to spend $330 more per year on chicken as a result of the price-fixing conspiracy).

2. *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7). The Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. In addition, the Act provides that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine . . . or by imprisonment." *Id. See also* Coryanne Hicks, *The Sherman Antitrust Act Is the First in a Line of Federal Laws Protecting Consumers from Unfair Prices*, BUS. INSIDER, https://www.businessinsider.com/personal-finance/sherman-antitrust-act [https://perma.cc/F6RY-M8XP] (Aug. 2, 2022, 2:09 PM).

3. *See* 15 U.S.C. § 2. Maximum penalties under the Sherman Act include a ten-year prison sentence, a $1 million fine for individuals, and a $100 million fine for corporations. *Id.*

4. Legal scholars Edlin and Haw have observed that "[t]he Sherman Act has had one principal success: cartels and their smoke-filled rooms, where competitors agree to waste economic resources for their own industry's benefit, are unambiguously and uncontroversially illegal in the United States—unless that industry is a profession and that cartel is a state licensing board." Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1095 (2014) (footnote omitted). Edlin and Haw aptly note that "licensing boards have become a massive exception to the Act's ban on cartels." *Id.*

5. *See* Morris M. Kleiner, *Occupational Licensing*, J. ECON. PERSPS., Fall 2000, at 189, 191 ("Occupational licensing is defined as a process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency."); *e.g.*, Popken, *supra* note 1 (detailing an alleged private-sector anticompetitive plot).

superficial because active market participants, those currently working in the regulated industry, typically occupy most of the licensing boards' available seats.[6] As regulators, many active market participants gather to limit competition and erect barriers to entry, just as any aspiring private-sector monopolist would.[7] This behavior is unsurprising considering that active market participants possess strong incentives to exclude would-be competitors for the sake of protecting their own economic interests.[8] Examples abound of licensing boards engaging in anticompetitive conduct:[9] Florists in Louisiana must obtain a license from the state's horticulture commission to make floral arrangements.[10] Although occupational licensing requirements are generally grounded in protecting health and safety, nothing suggests that receiving a pedestrian bouquet threatens a consumer's welfare.[11] Even more perplexing than the floristry license are the requirements that one must satisfy to obtain such credentials.[12] Despite no apparent compelling public safety justification for floristry licenses, a Louisiana district court concluded that the state "ha[d] rational and legitimate reasons" for the regulatory scheme and, therefore, it passed

6. Kleiner, *supra* note 5; Edlin & Haw, *supra* note 4, at 1103.

7. *See* Neil Katsuyama, Note, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISC. L.J. 565, 571 (2010).

8. *See id.*; Edlin & Haw, *supra* note 4, at 1111.

9. *See, e.g.*, Opinion, *You Shouldn't Need a License to Be a Florist*, BLOOMBERG (Dec. 23, 2022, 9:00 AM), https://www.bloomberg.com/opinion/articles/2022-12-23/occupational-licensing-is-a-burden-on-workers-and-the-economy [https://perma.cc/76ES-TWGJ] [hereinafter *Florist Licensing*]; *Arizona Drops Investigation into Man Who Gave Free Haircuts to the Homeless*, INST. FOR JUST., https://ij.org/illegal-give-kid-haircut-arizona/ [https://perma.cc/ALP3-PN4S] (Feb. 22, 2017) [hereinafter *Arizona Investigation*]. After cosmetology student Juan Carlos Montesdeoca hosted an event to offer free haircuts to the local homeless population, the Arizona State Board of Cosmetology launched an investigation upon discovering that he had cut hair without a license. *Arizona Investigation*, *supra.* At the time, one who practiced unlicensed cosmetology in Arizona could face up to six months in jail, regardless of whether the offered services were free, meaning that parents who cut their kids' hair could theoretically face punishment under the regulatory scheme. *Id.*

10. LA. STAT. ANN. § 3:3808(B)(1) (2022); *Florist Licensing*, *supra* note 9.

11. Shoshana Weissmann & C. Jarrett Dieterle, Opinion, *Louisiana Is the Only State that Requires Occupational Licenses for Florists. It's Absurd.*, USA TODAY (Mar. 28, 2018, 7:00 AM), https://www.usatoday.com/story/opinion/2018/03/28/louisiana-only-state-requires-occupational-licenses-florists-its-absurd-column/459619002/ [https://perma.cc/U685-HRD6].

12. *Id.* (explaining that Louisiana used to require a "complicated, subjective practical exam" and "required applicants to arrange four bouquets in four hours" before a committee of licensed florists, a scheme under which passage rates did not meet 50%).

constitutional muster.[13] This decision stripped one unlicensed Louisiana florist of her livelihood.[14]

Because occupational licensing boards, like the Louisiana Horticulture Commission, often evade the Sherman Act in pursuit of anticompetitive conduct, reforms are needed to improve their accountability. This Note addresses whether and how occupational licensing boards should be subjected to greater antitrust scrutiny. Part I examines the development of occupational licensing boards and the historical progression of antitrust jurisprudence in this context. Part II analyzes the current state of antitrust jurisprudence and its inability to reign in licensing boards' problematic actions. Part III proposes a solution to address licensing boards' conduct that draws on structures underlying revolving-door and anti-lobbying statutes.

I. BACKGROUND

Nearly 25% of American laborers need a license to work.[15] Once reserved for a select group of professionals, occupational licensing requirements now apply across industries irrespective of the worker's requisite degree of proficiency.[16] It is often relatively lower-skilled workers who must confront onerous licensing requirements.[17] As a consequence of the maze of regulations, aspiring workers find

13. Meadows v. Odom, 360 F. Supp. 2d 811, 823–24 (M.D. La. 2005). The court applied rational basis review to uphold the licensing scheme, relying in part on testimony from a *licensed florist* who opined that licensed florists protect consumers from injury by checking for exposed picks, broken wires, and flowers with infections. *Id.* at 824.

14. *See id.* at 825; Weissmann & Dieterle, *supra* note 11 (explaining how unlicensed florist Sandy Meadows, the named plaintiff in *Meadows*, failed Louisiana's practical exam five times before being fired from the floral department of the grocery store where she worked).

15. NAT'L CONF. OF STATE LEGISLATURES, THE STATE OF OCCUPATIONAL LICENSING: RESEARCH, STATE POLICIES AND TRENDS 2, 3 fig.1 (2017), https://licensing.csg.org/wp-content/uploads/2019/04/State_Occupational_Licensing.pdf [https://perma.cc/K92F-BY69].

16. *Id.* at 2–3; MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 1 (2006) (pointing out that "doctors, lawyers, fortune tellers, and frog farmers are now licensed occupations in either all or some U.S. states").

17. *See, e.g.*, NAT'L CONF. OF STATE LEGISLATURES, *supra* note 15, at 3. Michigan requires licensed security guards to complete three years of education and training, a time period equivalent to the typical American law school curriculum. *See id.* Cosmetologists in Iowa, Nebraska, and South Dakota must complete sixteen months of education before obtaining a license. *Id.*

themselves unable to gain entry into or maintain their preferred profession.[18] Even when they *do* obtain a license, workers could encounter difficulties when moving to a different state, where requirements will almost certainly differ.[19] Together, the consequences of restrictive licensing regulations—such as barriers to market entry and limits on market mobility—help enrich industry incumbents.[20] With fewer potential competitors, industry incumbents charge higher prices for their services, meaning that consumers suffer economic harm as a direct consequence of anticompetitive licensing regulation.[21] This dynamic, characterized by a handful of licensed professionals whose interests supersede the interests of everyone else, raises a pertinent question: How did we get here?

A. The Development of and Rationale Behind Occupational Licensing Boards

Because state legislatures cannot immerse themselves in the regulatory weeds of every industry, they often create occupational licensing boards and designate those boards as the entities responsible for determining how their profession will operate.[22] Legislatures then appoint members to the boards and empower them with regulatory

18. *See* Edlin & Haw, *supra* note 4, at 1105–06 (providing examples of various individuals being excluded from their preferred professions, including a Minnesotan horse "teeth-floater," Louisianian Benedictine monks' selling "simple pine coffins to bury their departed," and a Texas eyebrow threader).

19. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 15, at 3. *But see* Anne Ryman, *Universal Licensing: Here's What You Need to Know About Arizona's Law for Out-of-State Work Licenses*, AZCENTRAL., https://www.azcentral.com/in-depth/news/local/arizona/2021/12/27/universal-licensing-what-you-need-know/8810038002/ [https://perma.cc/J98Q-UBA2] (Dec. 27, 2021, 10:14 AM) (explaining how Arizona bucked the trend in 2019 by becoming the first state to adopt universal licensing recognition, making it easier for professionals licensed in other states to obtain an Arizona license).

20. Kleiner, *supra* note 5, at 192. Licensing boards can "restrict supply and raise the wages of the licensed practitioner"; nevertheless, "[t]here is presumed to be a once-and-for-all income gain that accrues to the current members of the occupation who are grandparented in[] because they do not have to meet the newly established standard." *Id.*

21. *See* Edlin & Haw, *supra* note 4, at 1102 (explaining that occupational licensing increases consumer prices by 15%); Paul Boyce, *Occupational Licensing — an Unnecessary Evil*, MISES INST. (May 4, 2019), https://mises.org/wire/occupational-licensing-unnecessary-evil [https://perma.cc/U9F5-WAS6].

22. *See* Christopher James Marth, Note, *Qualified (Immunity) for Licensing Board Service?*, 84 U. CHI. L. REV. 1473, 1473 (2017); Jeffrey P. Gray, *In Defense of Occupational Licensing: A Legal Practitioner's Perspective*, 43 CAMPBELL L. REV. 423, 425–26 (2021).

authority.[23] Industry incumbents, commonly referred to as active market participants, often dominate these boards' ranks.[24] These arrangements appear to make perfect sense, especially when considering that active market participants possess more expertise about their industry than a layperson does.[25] This line of thought tracks the rationale behind creating occupational licensing boards in the first place—namely, to protect consumer safety by establishing and enforcing industry standards.[26] Basic economic theory lends support to the consumer protection justification.[27] The lack of a licensing regime creates problems of "asymmetric information," where workers know more than consumers regarding their fitness to provide the requested services.[28] In effect, absent licensing requirements, consumers must roll the dice and hope that their selected service provider is qualified or else bear the consequences of their miscalculation.[29]

To quell concerns related to consumer safety and service quality, licensing boards impose an array of educational and training requirements that prospective practitioners must satisfy before obtaining legal permission to work in an industry.[30] In theory, these entry-level thresholds ensure practitioner competency and increase

23. *See* Kleiner, *supra* note 5; Edlin & Haw, *supra* note 4, at 1103.

24. Kleiner, *supra* note 5; Marth, *supra* note 22.

25. Roger D. Blair & Christine Piette Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 IOWA L. REV. 1943, 1946 (2015).

26. Gray, *supra* note 22, at 447–48. Licensing boards aim "to ensure persons engaging in the particular occupation or profession possess the minimum knowledge and skills to perform the functions required; to ensure continuing competence; and to take appropriate disciplinary action when a standard is violated." *Id.* at 448.

27. *See* Blair & Durrance, *supra* note 25, at 1945.

28. *Id.*; David Skarbek, *Occupational Licensing and Asymmetric Information: Post-Hurricane Evidence from Florida*, 28 CATO J. 73, 74–75 (2008). Despite information asymmetries, "[t]here are many market mechanisms in place that mitigate the problems associated with asymmetric information," such as a brand's reputation and third-party rating agencies like the Better Business Bureau. Skarbek, *supra.*

29. *See* Gray, *supra* note 22, at 449–50.

30. *See* KLEINER, *supra* note 16, at 8 (describing the conditions for securing occupational licenses, which often include "residency requirements, letters from current practitioners regarding good moral character, citizenship, general education, occupation-specific training levels, and scores on specific tests.").

service quality.[31] But licensing boards—composed primarily of active market participants—sit behind most "quality-based" regulations.[32] Thus, a closer examination of many licensing regulations suggests that their purpose is to restrict competition rather than to control quality.[33] Ordinarily, this kind of conduct—such as requiring interior designers to incur nearly $1,500 in fees as well as brandish six years of education and experience just to obtain a license[34]—would implicate antitrust concerns, but licensing boards repeatedly dodge scrutiny in the judicial sphere.[35]

B. Judicial Immunity for Licensing Boards?

Even the harshest critics accept the states' power to create occupational licensing boards.[36] More than a century ago, the Supreme Court declared that states may erect barriers to occupational entry in *Dent v. West Virginia*.[37] Two principles led the Court to uphold the statute requiring all "practitioner[s] of medicine in [the state] to obtain a certificate from the state board of health" showing they had graduated from "a reputable medical college."[38] First, enacting licensing regulations embodies a valid exercise of the state's power to protect the general welfare of its citizens.[39] Second, to preserve

31. Gray, *supra* note 22, at 448. *But see* Blair & Durrance, *supra* note 25 ("After all, licensing of physicians should protect us from quackery. But licensing physicians also curtails supply, which increases fees and reduces the quantity of physician services consumed. As a result, . . . some consumers will go without professional services. There can be long-term consequences from not visiting the doctor or the dentist." (footnote omitted)).

32. *See* Edlin & Haw, *supra* note 4, at 1103; Kleiner, *supra* note 5.

33. *See* Kleiner, *supra* note 5, at 192; KLEINER, *supra* note 16, at 8 (explaining that licensing boards often raise the required passing score for an entrance exam "when there is perceived to be an oversupply in the occupation").

34. LISA KNEPPER, DARWYYN DEYO, KYLE SWEETLAND, JASON TIEZZI & ALEC MENA, INST. FOR JUST., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 41 (3d ed. 2022), https://ij.org/wp-content/uploads/2022/09/LTW3-11-22-2022.pdf [https://perma.cc/NC54-MQ95]

35. Edlin & Haw, *supra* note 4, at 1099.

36. *See* Gray, *supra* note 22, at 429 (explaining that states' police powers allow them to limit who can work in a given profession and that such right has been "thoroughly documented" in "journals and case law").

37. Dent v. West Virginia, 129 U.S. 114, 122–23 (1889).

38. *Id.* at 115.

39. *Id.* at 122.

federalism, courts should show deference when states exercise this power.[40] Interestingly, Congress passed the Sherman Act just one year after *Dent* was decided, although there is no evidence to suggest that the two events were connected.[41] Despite the Sherman Act's general command against anticompetitive economic practices,[42] in the decades following *Dent*, courts used federalism to justify occupational licensing boards' actions in lieu of relying on the principles articulated in the landmark 1890 law.[43]

When assessing allegations that a licensing board acted in an anticompetitive manner, courts reiterate that entities may avoid antitrust scrutiny when their actions embody an exercise of state sovereignty.[44] This bedrock principle of antitrust jurisprudence emanates from *Parker v. Brown*, a 1943 Supreme Court case that introduced the concept of *Parker* immunity.[45] In *Parker*, a raisin producer invoked § 1 of the Sherman Act to challenge a California law that empowered a commission to fix agricultural commodity prices in ways explicitly designed to limit industry competition.[46] The Court rejected the plaintiff's claim, concluding that federal antitrust laws do not apply to state actions of this nature given the importance of federalism and the absence of references to states in the Sherman Act's legislative history.[47] Although this outcome rested on the distinction between state and private actors, *Parker*, which dealt with a law that

40. *See id.*

41. *Dent* was decided in 1889 and the Sherman Act was passed in 1890. *See id.* at 114; Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7). *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 8–10 (Random House, Inc. 1965) (describing that the Sherman Act came into existence in response to transformations in the American economy, where large manufacturing firms "swallowed up" smaller ones and eliminated competition in their industries).

42. *See* 15 U.S.C. § 1.

43. *See* Edlin & Haw, *supra* note 4, at 1093 ("The Sherman Act's great accomplishment has been to make cartels per se illegal and relatively scarce—unless the cartel is managed by a professional licensing board. Most jurisdictions consider such boards, as state creations, exempt from antitrust scrutiny by the state action doctrine . . . ."); *e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 520 (2015).

44. *E.g.*, *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 503–04.

45. Parker v. Brown, 317 U.S. 341, 351–52 (1943). *Parker* immunity applies "[w]hen the state empowers a group of competitors to regulate their own industry." Marth, *supra* note 22, at 1477.

46. *Parker*, 317 U.S. at 343, 346, 348–49.

47. *Id.* at 350–51.

expressly dictated the commission's actions, did not address the much more common scenario where the state imbues the agencies it creates with considerable discretion.[48]

In recognizing *Parker*'s insufficient guidance, the Supreme Court formulated a two-pronged test to differentiate between state and private actors in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*.[49] Under this framework, a private actor would retain *Parker* immunity against antitrust claims only if its challenged action was "clearly articulated and affirmatively expressed as state policy" and "'actively supervised' by the [s]tate itself."[50] In *Midcal*, the Court held that the challenged conduct failed the active supervision prong, thereby stripping the actor of state-action immunity.[51] Once again, however, key questions regarding state-action immunity's application in the occupational licensing context were left unresolved because *Midcal* did not answer whether its two-pronged test applied to state-empowered licensing boards.[52] A subsequent case, *Town of Hallie v. City of Eau Claire*, suggested that the active supervision requirement likely would not apply to state agencies.[53] More than seven decades after its broad pronouncement in *Parker*, the Supreme Court finally resolved this confusion and clarified the obligations licensing boards must meet to survive antitrust scrutiny.[54]

48. Edlin & Haw, *supra* note 4, at 1119–20. In *Parker*, the Court's failure to elaborate on its distinction between state and private actors "created serious problems for lower courts trying to apply *Parker* because states rarely regulate economic activity directly through a legislative act. Rather, states delegate rulemaking and rate-setting to agencies, councils, or boards dominated by private citizens." *Id.*

49. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104–05 (1980). *Midcal* involved a California law that required "all wine producers, wholesalers, and rectifiers [to] file fair trade contracts or price schedules with the [s]tate." *Id.* at 99. "If a wine producer ha[d] not set prices through a fair trade contract, wholesalers must post a resale price schedule for that procedure's brands." *Id.* Further, the law required all "state-licensed wine merchant[s]" to sell their wine at the price established in the price schedule or the fair trade contract. *Id.*

50. *Id.*at 105 (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)).

51. *Id.* at 103, 105–06.

52. *See* Marth, *supra* note 22, at 1481.

53. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n.10 (1985) ("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."); Edlin & Haw, *supra* note 4, at 1124.

54. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 515 (2015).

II. ANALYSIS

In many respects, occupational licensing boards cannot be classified as purely public or purely private entities; instead, they fall somewhere in between.[55] Licensing boards often exhibit both public and private attributes: they purport to pursue public aims, such as protecting consumer safety, but are simultaneously composed of "private actors with private aims."[56] As a consequence of this murky middle ground, federal courts disagreed—and a circuit split emerged—as to whether courts should treat licensing boards as public or private actors for purposes of antitrust scrutiny.[57] How courts answer this question poses major ramifications for licensing boards' accountability. Specifically, to enjoy state-action immunity, licensing boards that are considered public entities need only show that their challenged conduct pursued a "clearly articulated state policy" per *Parker*—a low bar to meet—whereas those considered private must satisfy the *Parker* prong and demonstrate active state supervision per *Midcal*.[58]

A. The Primer: North Carolina State Board of Dental Examiners v. FTC

In response to this circuit split, the Supreme Court granted certiorari in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* to determine whether a licensing board's actions need only satisfy the clear articulation prong to escape an antitrust challenge.[59] At issue was the conduct of the North Carolina State

55. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 939–40 (2014).

56. Marth, *supra* note 22, at 1481.

57. *See* Volokh, *supra* note 55, at 987–89. Some circuits, like the Second, Fifth and Tenth Circuits, applied a deferential test, designating a licensing board as public so long as the state classified it as public. *See id.* at 987–88. Meanwhile, other circuits, like the First, Seventh, Ninth, and Eleventh Circuits, implemented a more involved, factored test that analyzed whether the licensing board was sufficiently similar in structure and function to a public entity to warrant that designation. *Id.* at 988–89.

58. Marth, *supra* note 22, at 1481. Compared to the clear articulation prong, *Midcal's* active supervision requirement "can have real bite," meaning that its addition to the immunity analysis could subject licensing boards to greater scrutiny. *See* Edlin & Haw, *supra* note 4, at 1120.

59. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 499.

Board of Dental Examiners, a state entity created to oversee dentistry practices and issue licenses for practitioners.[60] Importantly, North Carolina law defined "practicing dentistry" to include teeth-whitening services.[61] Pursuant to this unambiguous statutory authority, the board sent cease-and-desist letters to non-dentists who offered teeth-whitening to customers.[62] This type of behavior is not unusual for a regulatory body, such as a licensing board, but the board's underlying structure invited concerns regarding its true motives for pestering non-dentist teeth-whiteners.[63] North Carolina state law provided that licensed dentists must comprise six of the board's eight members.[64] This structure—one where industry incumbents dominate the ranks—raised concerns that the board would regulate in ways that promote its members' private interests.[65]

Wary of these self-dealing risks, the Court declared that licensing boards with a controlling number of active market participants, like the North Carolina State Board of Dental Examiners, must demonstrate active state supervision to retain antitrust immunity.[66] Active supervision requires the state to affirmatively endorse the licensing board's anticompetitive actions for immunity to apply.[67] The requirement, in the Court's view, alleviates self-dealing concerns.[68] Forcing states to review proposed regulations ensures that licensing boards do not abandon state policy objectives in pursuit of private interests.[69] Despite these pronouncements, the Court in *North Carolina State Board of Dental Examiners* made clear that active supervision

60. *Id.*; *see* N.C. GEN. STAT. §§ 90-22, -29(a) (2022).

61. *See* § 90-29(b)(2).

62. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 500–01.

63. *See id.* at 501 (explaining the letters "had the intended result" that "[n]ondentists ceased offering teeth whitening services in North Carolina"); *id.* at 505 ("Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants . . . .").

64. § 90-22(b); *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 499–500. The statute additionally provided that licensed dentists in the state would elect their colleagues to occupy the board's six available seats for licensed dentists. § 90-22(b). A licensed dental hygienist and a North Carolina resident (who is not licensed to practice dentistry or dental hygiene) occupy the remaining two seats on the board. *Id.*

65. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 510.

66. *Id.* at 510, 511–12.

67. *Id.* at 507.

68. *See id.*

69. *See id.*

entails only a fact-specific inquiry and does not require states to micromanage licensing boards' conduct.[70] Therefore, claims that the active supervision requirement substantially enhances licensing board accountability seem naïve at best and dubious at worst.[71] Further compounding doubts regarding the active supervision test's stringency, *North Carolina State Board of Dental Examiners* did not even apply the requirement to the facts of the case.[72] The board conceded that the state exercised little to no supervision over its actions, let alone so-called active supervision.[73] Between the Court's mixed message concerning active supervision and its inability to apply the requirement to the facts, *North Carolina State Board of Dental Examiners* failed to establish a bright-line rule to govern licensing boards' anticompetitive conduct.[74]

B. Federalism Concerns Provide an Insufficient Basis for Broad Immunity

Federalism, or the division of power between the federal and state governments, limits the outer bounds of antitrust liability under the Sherman Act.[75] Antitrust law pits federal interests in a free-market economy against state preferences for protectionist regulation.[76] These very tensions drew the Court's attention in *North Carolina State Board of Dental Examiners*.[77] Some degree of federalism—usually manifested in the form of state-action immunity—remains essential to

70. *Id.* at 515.

71. *See* Edlin & Haw, *supra* note 4, at 1143. Given disparities in knowledge regarding the regulated industry, it remains unlikely that state-level bureaucrats will possess the skills necessary—namely, a solid understanding of how the profession works—to gauge whether a licensing board is promulgating an anticompetitive regulation. *See id.* As a consequence, "[s]upervision by disinterested state agents should be a *minimum* requirement for a state board to receive antitrust immunity." *Id.* (emphasis added).

72. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 515.

73. *Id.* at 515.

74. *See id.* at 514–15.

75. Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 13 (William W. Buzbee ed., 2009); Edlin & Haw, *supra* note 4, at 1131, 1136.

76. Edlin & Haw, *supra* note 4, at 1138.

77. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 504–05 ("[T]he Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism . . . .").

insulate states from a barrage of antitrust lawsuits.[78] That is, because nearly all regulations implicate the economy in some way, an immunity-less environment would subject an overly broad range of state actions to potential Sherman Act challenges.[79]

Proponents of sweeping immunity argue that a strong reverence for federalism in the antitrust context advances states' historical rights to protect public safety through regulation.[80] After all, when occupational licensing boards impose entry requirements and competency standards, they do so to promote the public good, at least in the eyes of their most ardent defenders.[81] As one final underlay to the federalism argument for preserving robust state-action immunity, one need look no further than the Sherman Act itself, which expresses no desire to reign in state conduct.[82] Taken together, principles derived from federalism, the Constitution, and the Sherman Act's language build a powerful case in favor of insulating state-empowered licensing boards from serious antitrust scrutiny.[83]

Under this federalism framework, the active state supervision requirement, as applied to licensing boards, begins to make sense. The requirement seems to promote federalism interests in ensuring that states affirm a licensing board's actions as consistent with the public

78. *See* Katsuyama, *supra* note 7, at 567 ("The Sherman Act, however, was primarily designed for private commercial activity and courts have been reluctant to apply it to state actions. After all, every regulation restrains trade, and applying the Sherman Act to all economic legislation would lead to endless litigation against states.").

79. *Id.*

80. *See* Gray, *supra* note 22, at 429.

81. *See id.*; Amy Elik & Natalie Manley, Opinion, *The Case for Responsible Professional Licensing*, GOVERNING (July 7, 2022), https://www.governing.com/now/the-case-for-responsible-professional-licensing [https://perma.cc/3LMQ-W82Z]. Proponents of current licensing restrictions express concerns that reform will "jeopardize the public and disadvantage hardworking professionals, especially those who have served the public well for decades and whose qualifications will be effectively nullified if passed into law." Elik & Manley, *supra*.

82. Parker v. Brown, 317 U.S. 341, 351 (1943). The Sherman Act offers "no hint that it was intended to restrain state action or official action directed by a state. . . . That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." *Id. See generally* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

83. *See* Gray, *supra* note 22, at 432 (arguing that licensing regulations "are nothing more than the sovereign state exercising its constitutionally protected police powers to provide for the general safety and welfare of its citizens as determined by those citizens' elected representatives").

interest and declared state policy.[84] In carrying out its supervisory role, the state acts pursuant to its police powers, a realm the federal government ordinarily may not disturb.[85] Because the state maintains final say over the licensing board's actions *in theory*, what looks like private conduct—namely, active market participants promulgating regulations designed to stomp out competition—somehow magically transforms into public conduct that warrants antitrust immunity.[86] Put another way, the fact that the state supervises a licensing board's conduct means nothing when that supervision is cursory; the conduct remains private in nature despite the illusion of government involvement.

1. The Active Supervision Requirement Lacks Much Force in Reality

In *North Carolina State Board of Dental Examiners*, the Supreme Court emphasized that active supervision does not require states to oversee a licensing board's every action.[87] Instead, active supervision simply demands that states "review the substance of the anticompetitive decision" and retain veto power to nullify rulings that contravene state policy.[88] A close reading of this language reveals that active supervision merely obliges states to sign off on anticompetitive conduct and do nothing more, even when faced with conduct that undermines the Sherman Act.[89] In other words, had the North Carolina legislature reviewed and concurred with the board's actions to punish unlicensed teeth-whiteners, the Sherman Act would not have applied because of its carveout for actively supervised state actions.[90] Such a

84. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 507 (2015).

85. Gray, *supra* note 22, at 429; *see N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 519–20.

86. *See* Edlin & Haw, *supra* note 4, at 1137.

87. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 515.

88. *Id.* Further, active supervision demands that "the [s]tate's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Id.* (quoting Patrick v. Burget, 486 U.S. 94, 100–01 (1988)).

89. *See* Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design*, 70 AM. U. L. REV. 75, 99 (2020).

90. *Id.*; *see also N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 514 ("[T]here is no evidence here of any decision by the [s]tate to initiate or concur with the Board's actions against the nondentists.").

low and bureaucrat-laden standard renders the Sherman Act suggestive, despite the Act's resolute language in favor of a competitive national economy.[91] States could rather easily create a "review" system that satisfies the active supervision requirement and casts a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[92] Rather than advancing federalism interests, the active supervision requirement allows licensing boards to evade antitrust challenges so long as the state institutes a system that, in all likelihood, will follow cursory review procedures and exercise extreme deference.[93]

2. Active Supervision Does Not Render States Politically Accountable for Anticompetitive Licensing Board Conduct

Active supervision serves as a prerequisite to antitrust immunity because the requirement supposedly ensures that states bear ultimate political responsibility for licensing boards' actions.[94] In theory, because the state enjoys veto power over licensing board conduct,[95] voters can attribute objectionable actions to *elected* state officials rather than *appointed* board members, a group they cannot hold accountable at the ballot box.[96] With this avenue for electoral

91. *See* 15 U.S.C. §§ 1, 2; *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 502 ("Federal antitrust law is a central safeguard for the Nation's free market structures. . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.").

92. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 (1980).

93. *See* Edlin & Haw, *supra* note 4, at 1143; Meese, *supra* note 89. *But see* Marth, *supra* note 22, at 1474 ("[T]he concern of surreptitious, cartel-like behavior by licensing boards is potentially mitigated by the political accountability of requiring a state official to approve the board's actions.").

94. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 495. "Thus, where a [s]tate delegates control over a market to a nonsovereign actor, the Sherman Act confers immunity only if the [s]tate accepts political accountability for the anticompetitive conduct it permits and controls." *Id.* "Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the [s]tate to regulate their own profession, result from procedures that suffice to make it the [s]tate's own." *Id.*

95. *Id.* at 515.

96. *See* Edlin & Haw, *supra* note 4, at 1139. State-action antitrust immunity "is defensible only when a state could be held accountable for an anticompetitive restriction. . . . Unless the decisions of private actors are properly supervised by political actors subject to election, the support justifying immunity is lacking." *Id.* (footnote omitted).

accountability, federalism concerns demand sweeping immunity because the state—having assumed ultimate responsibility through its supervisory scheme—would otherwise face constant antitrust challenges.[97] But this entire argument rests on a faulty assumption that voters know enough about a licensing board's day-to-day actions to punish elected state officials for endorsing anticompetitive practices.

The requirement that licensing boards generally must hold meetings open to the public hardly makes their actions visible.[98] Most licensing board actions go unnoticed and unchallenged because consumers lack incentives to contest regulations when the potential payoff remains low.[99] No rational consumer would go through the trouble of challenging a licensing regulation when a victory would, at most, yield slightly reduced prices for a good or service they purchase sparingly.[100] Even assuming consumers did possess sufficient incentives to challenge licensing regulations, it remains unlikely that they would recognize those anticompetitive practices ripe for challenge given their lack of industry-specific expertise.[101] Because consumers generally lack the incentives and baseline industry knowledge to confront protectionist conduct, licensing boards—and the state as the conduct's "supervisor"—will seldom face political pushback for even the most egregious regulations.[102] Active supervision thus serves as little more than a feel-good requirement that enables deliberate anticompetitive behavior.[103]

97. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 503 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, . . . federal antitrust law would impose an impermissible burden on the [s]tates' power to regulate.").

98. *See, e.g.*, GA. CODE ANN. § 50-14-1(b)–(c) (2022).

99. Edlin & Haw, *supra* note 4, at 1140.

100. *See id.*

101. *See id.*

102. *See* ROGER G. NOLL, REFORMING REGULATION 40–43, 46 (1971), *as reprinted in* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 79 (8th ed. 2019).

103. *See* Meese, *supra* note 89.

C. Constitutional Avenues for Judicial Relief Similarly Lack Promise

To compound the active supervision requirement's shortcomings, alternative legal frameworks prove equally ineffective in reigning in licensing boards' conduct.[104] Constitutional challenges, which are analyzed under rational basis review, likewise offer plaintiffs a slim path to victory.[105] Regulations will almost always survive judicial review under the rational basis test, even if they produce anticompetitive results and lack a strong evidentiary basis for taking effect.[106] As a case in point, in *Powers v. Harris*, the Tenth Circuit upheld the constitutionality of an Oklahoma law which stipulated that only licensed funeral directors may sell caskets.[107] The court reached this conclusion despite evidence suggesting that the requirements for obtaining a funeral director's license bore no rational relation to the skills necessary to sell caskets.[108] Constitutional law in the occupational licensing context places consumer welfare on the backburner and offers scant protection against regulations that undermine economic competition.[109] Between constitutional law doctrines and the active supervision requirement, judicial remedies for exploitative licensing board conduct remain elusive, and the national

104. *See* Katsuyama, *supra* note 7, at 567 (arguing that "constitutional and antitrust law arguments have had limited success in overturning licensing regulations").

105. Edlin & Haw, *supra* note 4, at 1134; Jack Brown, *A Blind Eye: How the Rational Basis Test Incentivizes Regulatory Capture in Occupational Licensing*, 17 J.L. ECON. & POL'Y 135, 137 (2022) ("Because rational basis review is so deferential to the government, it leaves courts unable to serve as effective checks against politically connected interest groups that have captured governmental bodies and then use them to stop their potential competitors from operating in the marketplace.").

106. Brown, *supra* note 105; *see, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955). Despite describing an Oklahoma law as "exact[ing] a needless, wasteful requirement," the Court stated that it "is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Williamson*, 348 U.S. at 487. Further, the Court does not use "the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id.* at 488.

107. Powers v. Harris, 379 F.3d 1208, 1211, 1222 (10th Cir. 2004).

108. *Id.* at 1215–16.

109. *See* Edlin & Haw, *supra* note 4, at 1135–36 (arguing that the Tenth Circuit's interpretation of the law at issue in *Powers* "eviscerates constitutional law's ability to safeguard robust competition and its benefits to consumer welfare").

policy in favor of robust economic competition demands a solution that improves accountability.

III. PROPOSAL

Antitrust legal frameworks remain ill-equipped to reign in occupational licensing boards. This jurisprudential shortfall proves harmful to the masses.[110] For example, rogue boards in more than thirty states can deny licenses to individuals who were arrested for a crime but not convicted.[111] Additionally, nearly every state scrambled in early 2020 to revise existing licensing regimes so that medical professionals could work across state lines.[112] Such measures became necessary to address hospitals' COVID-19-induced patient spikes.[113] Pervasive barriers to entry like these emerge from a legal environment that refuses to hold licensing boards accountable. Rather than attempt to upend decades of deferential case law, holding licensing boards accountable demands a solution that addresses the root of the problem. The root that must be ripped up, as this Section explains, is the active

110. *See* JOSH T. SMITH, VIDALIA FREEMAN & JACOB M. CALDWELL, HOW DOES OCCUPATIONAL LICENSING AFFECT U.S. CONSUMERS AND WORKERS? 2 (2018), https://www.thecgo.org/wp-content/uploads/2020/10/how-does-occupational-licensing-afect-US-consumers-and-workers.pdf [https://perma.cc/8MHY-S5LQ] (explaining that "licensing can have large negative effects on the total number of jobs" and that "[t]hree economists estimated that licensing in the United States results in 2.8 million fewer jobs and costs consumers $203 billion annually." (internal quotation marks omitted)); *see also* Eric Boehm, *Texas Roofer Arrested in Florida for Helping Hurricane Victims*, REASON (Oct. 12, 2022, 2:40 PM), https://reason.com/2022/10/12/texas-roofer-arrested-in-florida-for-helping-hurricane-victims/ [https://perma.cc/JK5W-B3NV]. Though not directly involving an occupational licensing board, Terence Duque's story illustrates the consequences of hardline licensure requirements. After Hurricane Ian devastated Florida, Duque, a licensed roofer in Texas, traveled to the Sunshine State to assist homeowners in need. Boehm, *supra*. But Duque's generosity was met with a quick rebuke. *See id.* After receiving a tip from a state investigator, local police arrested Duque for conducting business without a Florida license, a crime that could result in a five-year prison sentence. *Id.*

111. NICK SIBILLA, INST. FOR JUST., BARRED FROM WORKING: A NATIONWIDE STUDY OF OCCUPATIONAL LICENSING BARRIERS FOR EX-OFFENDERS 1 (2020), https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf [https://perma.cc/G4NN-HSJX]. Barriers to entry levied against ex-offenders prove especially consequential because "[e]arning an honest living is one of the best ways to prevent re-offending." *Id.*

112. Shoshana Weissmann, *LP #2: Occupational Licensing Reform Is Having a Moment*, LIBERTARIAN-PROGRESSIVE PAPERS (Oct. 28, 2021), https://lppapers.substack.com/p/lp-2-occupational-licensing-reform [https://perma.cc/B9SB-RVHV].

113. *See id.*

market participant's widespread authority over the typical licensing board.

A. A Heightened Judicial Standard?

To subvert the rent-seeking behavior that plagues many licensing boards, one potential solution would impose heightened scrutiny in circumstances where board regulations face judicial review.[114] Legal scholars Aaron Edlin and Rebecca Haw suggest that courts should replace the clear articulation and active supervision test with a "modified rule of reason" when reviewing licensing board conduct.[115] The modified rule-of-reason analysis would implement a strict scrutiny test specially adapted to the antitrust context.[116] The test would require a licensing board to offer a "legitimate reason for the licensing regulation" and demonstrate that "less restrictive alternatives" do not exist to survive a Sherman Act challenge.[117] Without doubt, a strict scrutiny test would tremendously improve licensing boards' accountability *in court*. After all, defendants rarely prevail when strict scrutiny applies in constitutional law cases, and licensing boards would likely face similar prospects if subjected to its requirements.[118] But to be effective in curtailing anticompetitive licensing board conduct, a heightened judicial standard must correspond with an influx of cases that allow its requirements to be applied. A heightened judicial standard as a solution presupposes that many plaintiffs will bring cases to put the standard's components to work, which will in turn lead to improvements in licensing boards'

114. *See* Edlin & Haw, *supra* note 4, at 1148.

115. *Id.* at 1100 (explaining that this "proposal involves a shift in the dominant interpretation of state action doctrine, [but] it does not require any change in Supreme Court precedent").

116. *See id.* at 1148. Edlin and Haw note that their proposed test "resembles the constitutional standard applied to equal protection or due process claims." *Id.*

117. *Id.* In describing their proposed rule of reason, Edlin and Haw point to three prongs that the standard entails: "[I]dentifying a legitimate reason for the licensing restriction, analyzing the fit between the restriction and the problem, and inquiring into less restrictive alternatives . . . ." *Id.* For the final prong, courts would determine "whether there is an alternative less destructive to competition that achieves the same benefits." *Id.*

118. *See id.* at 1148–50 (explaining why various licensing regulations would fail particular prongs of the modified rule-of-reason analysis).

accountability. This presupposition will likely fail to materialize, however, because individual consumers lack incentives to challenge licensing regulations in the first place.[119] Thus, although Edlin and Haw's modified rule of reason would admirably improve licensing boards' accountability in the judicial sphere, it alone provides an insufficient remedy because lawsuits that could apply the new, tougher standard will prove especially scarce.[120]

B. Addressing the Root of the Problem with a Revolving-Door Statute

Anticompetitive licensing regulations do not emerge coincidentally. Instead, they often arise and wreak havoc on American consumers precisely because active market participants dominate licensing boards' ranks.[121] For this reason, the problems related to anticompetitive licensing regulation derive from the membership structure of the boards themselves rather than the judicial standards they must satisfy. The Supreme Court in *North Carolina State Board of Dental Examiners* even recognized the membership structure as the problem's true source when it crafted a test for liability based on membership structure—specifically, liability hinged on whether the licensing board possessed a "controlling number" of active market participants.[122] As a consequence, any proposal to mitigate anticompetitive licensing regulations must confront their root cause—board membership—to deliver meaningful results.

119. *Id.* at 1140. Because the effects of anticompetitive licensing regulations spread among all who consume the good or service, no individual consumer will possess sufficient financial motivations to initiate a lawsuit against a licensing board for its conduct or participate in the rulemaking process. *See supra* notes 99–103 and accompanying text.

120. It is true that individuals seeking entry into professions would be far more likely to mount antitrust challenges than ordinary consumers. Edlin and Haw, *supra* note 4, at 1140. Aggrieved would-be professionals, such as the non-dentists in *North Carolina State Board of Dental Examiners*, possess stronger incentives than the average consumer to file suits under the Sherman Act given its provision of treble damages to prevailing parties. *See* Sherry R. Feinsmith, *Treble Damage Actions for Violation of Section 7 of the Clayton Act: The View After* Gottesman v. General Motors, 1 LOY. U. CHI. L.J. 298, 299 (1970). Even then, lawsuits from these individuals would not be common enough to reign in all licensing boards in all sectors of the economy.

121. *See* Marth, *supra* note 22; Kleiner, *supra* note 5; Edlin & Haw, *supra* note 4, at 1157.

122. N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 511–12 (2015).

1. A Brief Overview of Revolving-Door Statutes

Revolving-door statutes provide a useful analog when imagining how one could confront active market participants in the licensing board context. The "revolving door" refers to a phenomenon where government officials rotate employment between the public and private sectors.[123] As it spins, the revolving door invites concerns of "regulatory capture" where industry leaders turned government regulators bend over backwards to cater to their former colleagues and vice versa.[124] To combat the revolving door's undesirable consequences, Congress implemented a "cooling-off period," or a time frame during which former government officials, upon entering the private sector, may not engage in lobbying activities relevant to their earlier public sector work.[125] The federal revolving-door statute, 18 U.S.C. § 207, forbids "senior officials of the United States executive and legislative branch from representing parties other than the United States before their former employer agencies for a period of one to two years depending on the scope of their former employment."[126] Simple intuition underlies the reasoning behind cooling-off periods. These periods primarily exist to diminish the former official's influence over and rapport with ex-colleagues who may still work for the government agency.[127] This way, former bureaucrats cannot exploit their connections to manipulate government decision-making and succeed in their private sector employment.[128]

Despite its efforts to root out corrupt lawmaking, 18 U.S.C. § 207 only addresses one side of the revolving door.[129] The statute deals exclusively with public officials transitioning to the private sector but

123. Cecilia Wang, *Stop That Revolving Door: Analysis of the Appropriate Application of the "Cooling-Off" Period Beyond Senior Government Employees*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 297, 299 (2017).

124. Hadar Y. Jabotinsky, *Revolving Doors - We Got It Backwards*, 89 U. CIN. L. REV. 432, 432–33 (2021).

125. *Id.* at 433.

126. Wang, *supra* note 123; 18 U.S.C. § 207.

127. Jabotinsky, *supra* note 124, at 433.

128. Tyler Swafford, Note, *Public Corruption*, 58 AM. CRIM. L. REV. 1321, 1350 (2021).

129. *See* 18 U.S.C. § 207; Jabotinsky, *supra* note 124, at 433 (noting the demand for a similar statutory bar "for people joining the public sector after working in the private sector").

provides no coverage for the reverse scenario where industry leaders leave their posts to become government regulators.[130] With similar tendencies towards corruption predominating in the private-to-public-sector employment pipeline, one should ask why no statute exists to cover this flip side of the revolving door.[131] It is easy to envision scenarios where former private executives enter government employ with blinding pro-industry biases and regulate in ways that reflect those predispositions, as often seen in the occupational licensing context.[132] Although no federal *statute* addresses this problem, presidents have signed executive orders tailored to address this other side of the revolving door.[133] Both President Obama and President Trump issued executive orders that forbade appointees from engaging in matters relevant to their former private-sector employment for two years following their initial appointment.[134] These executive orders recognize what federal statutes do not: those who transition from private to public-sector employment possess the same incentives to pursue corrupt ends as those who leave government for industry.[135]

2. An Application to Occupational Licensing Boards

This discussion concerning revolving-door statutes and executive orders raises two issues: (1) how their principles relate to occupational licensing boards, and (2) how their principles can be applied to abate anticompetitive licensing regulations. For the first issue, similar

130. *Id.*; *see* 18 U.S.C. § 207.

131. *See* NOLL, *supra* note 102. The process by which members of regulatory agencies are chosen "reinforce[s] a pro-industry bias." *Id.* Generally, "appointees to commissions must have the tacit approval of the regulated industries" because the regulated industries pay closer attention to the appointment process than laypersons and are more likely to challenge agency actions. *See id.*

132. *See* Blair & Durrance, *supra* note 25 (describing the problem that occurs "when the self-regulatory board of interested parties . . . use[s] its position to behave in the interest of its members while professing to be acting in the public interest").

133. *E.g.*, Exec. Order No. 13,490, 3 C.F.R. 193, 194 (2010); Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

134. Exec. Order No. 13,490, 3 C.F.R. 193, 194 (2010); Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017). President Trump issued an executive order that contained identical language to that of President Obama's on the revolving door issue. *Compare* Exec. Order No. 13,770, 82 Fed. Reg. 9,333 (Jan. 28, 2017), *with* Exec. Order No. 13,490, 3 C.F.R. 193, 194 (2010).

135. *See* Jabotinsky, *supra* note 124, at 433 & n.6.

concerns emerge when active market participants control licensing boards as when former industry leaders pass through the revolving door to become government regulators. Both situations invite concerns that perverse incentives will lead these actors to behave corruptly and anticompetitively.[136] Just as a former oil company executive may relax fossil fuel regulations after appointment to a position at the Environmental Protection Agency, a current dentist appointed to a dentistry licensing board may act to restrict prospective industry competition.[137]

Notwithstanding these similarities, self-dealing concerns remain even stronger for licensing boards because their members largely still work in the industry they regulate, hence the term "*active* market participants."[138] Whereas those appointed to federal executive branch positions must leave their private sector gigs, active market participants on state licensing boards may continue to work in both government and non-government positions.[139] Consequently, active market participants on licensing boards are not limited to biases that stem from working in the industry *previously*—as in the case of executive branch appointees—but possess additional biases based on their *current* membership in the industry they regulate.[140] Because incentives for rent-seeking behavior prove especially powerful among active market participants, a revolving-door statute becomes necessary to fend off temptations to regulate unfairly.

Active market participants invite the same concerns, if not to a greater degree, that justify revolving-door statutes in the executive

136. *See id.* ("The revolving door phenomenon . . . . gives rise to concern of regulatory capture, which happens when the regulators respond, via regulations, to the wishes of strong interest groups . . . ." (footnote omitted)); *e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 510 (2015) (emphasizing "the risk that active market participants will pursue private interests in restraining trade").

137. *See, e.g.*, *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 500–01. After receiving complaints from practicing dentists that non-dentists were offering teeth-whitening services at lower prices, the North Carolina State Board of Dental Examiners—run almost entirely by dentists—launched an investigation into the matter and pledged to challenge the non-dentists. *Id.*

138. *See* Marth, *supra* note 22 (emphasis added); Kleiner, *supra* note 5; Edlin & Haw, *supra* note 4, at 1157.

139. *See* Edlin & Haw, *supra* note 4, at 1103.

140. *See* Blair & Durrance, *supra* note 25 (describing that regulatory boards are "composed of people with a vested economic interested in the board's decisions regarding competitive restraints").

branch official context. This reality raises an important question: How could a revolving-door scheme work to regulate licensing board membership? Because the Sherman Act establishes a *federal* interest in market competition,[141] one would expect the *federal* government to intervene and pass a revolving-door statute that applies to state licensing boards. Constitutional considerations render that solution untenable, however, because the federal government may not "require the [s]tates to govern according to [its] instructions."[142] In imposing any membership restrictions on state licensing boards, such as limiting the number of active market participants who may occupy available seats, the federal government would likely run afoul of this constitutional limitation on its powers.[143] Therefore, the states themselves—as opposed to the federal government—must step in to address the perverse incentives that cloud active market participants' judgment.[144]

To that end, states should implement their own revolving-door statutes to revise the membership structures that are common to licensing boards. A revolving-door statute in this context would need to take on a modified form, however. Unlike the federal revolving-door statute and the executive orders, it could not impose a blanket

141. Edlin & Haw, *supra* note 4, at 1138 (explaining that the Sherman Act pits a federal interest in free markets against state interests in economic protectionism); s*ee* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

142. New York v. United States, 505 U.S. 144, 162 (1992). This principle is now known as the anti-commandeering principle. JAY B. SYKES, CONG. RSCH. SERV., LSB10133, THE SUPREME COURT BETS AGAINST COMMANDEERING: *MURPHY V. NCAA*, SPORTS GAMBLING, AND FEDERALISM 2 (2018).

143. Under the anti-commandeering principle, Congress may encourage, but not compel, state regulation to ensure a state's residents "retain the ultimate decision as to whether or not the [s]tate will comply." *New York*, 505 U.S. at 168. With a revolving-door statute, the federal government would be forcing states to adjust membership composition rather than simply encouraging them to do so.

144. States are fully capable of implementing licensing reforms, and many have already done so. Arizona recently passed a law that allows those "without a bachelor's degree to start and finish their training as a teacher while in college." *Arizona Educators Can Now Teach at Public Schools Before Earning College Degree*, FOX 10 PHOENIX, https://www.fox10phoenix.com/news/arizona-educators-can-now-teach-at-public-schools-before-earning-college-degree [https://perma.cc/USP7-J6JR] (July 10, 2022, 9:22 PM). The law also loosens requirements for teachers to renew their licenses. *Id.* Arizona's reform proves especially necessary in a time of major labor shortages within the education sector. *See* Erica Pandey, *America's Teacher Shortage Will Outlast the Pandemic*, AXIOS (Nov. 15, 2021), https://www.axios.com/2021/11/15/teacher-labor-shortage-outlast-pandemic [https://perma.cc/SZ3Q-5ZBZ].

cooling-off period applicable to all regulators.[145] A generally applicable cooling-off period as applied to licensing boards would prove problematic because it would prevent active market participants from serving in regulatory positions.[146] Although active market participants do pose major self-dealing risks, licensing boards must possess some level of expertise regarding the sector they regulate, and industry incumbents undoubtedly know the ins and outs of their professions.[147] Thus, to balance these competing concerns—active market participants' anticompetitive tendencies versus the need for knowledgeable regulators—states should implement a specialized blanket ban that prohibits active market participants from occupying a majority of any licensing board's membership.[148] This remedy would avoid turning over licensing boards to clueless government bureaucrats and prevent industry incumbents from wielding unchecked power to stomp out competition.

CONCLUSION

Occupational licensing boards substantially affect the American economy; one study estimated that licensure reduces the share of workers in licensed occupations by 17% to 27%.[149] Despite their far-reaching impacts and appetite for anticompetitive conduct, licensing boards largely evade judicial scrutiny under the cloak of state-action immunity. Insulated from any meaningful accountability, licensing

145. *See* 18 U.S.C. § 207; Exec. Order No. 13,490, 3 C.F.R. 193, 194 (2010); Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

146. A cooling-off period, by its very nature, precludes *active* market participants from working as regulators. *See* Jabotinsky, *supra* note 124, at 433. Cooling-off periods require government officials to take time off from handling matters related to their former private sector employment, a requirement *active* market participants cannot satisfy given their continued employment in the regulated sector. *See id.*

147. *See* Blair & Durrance, *supra* note 25; Michael P. Vandenbergh, Jonathan M. Gilligan & Haley Feuerman, *The New Revolving Door*, 70 CASE W. RSRV. L. REV. 1121, 1127 (2020).

148. This proposed scheme would mirror the language used in *North Carolina State Board of Dental Examiners*, where the Court created a standard for state-action immunity based on whether the licensing board subjected to suit has a "controlling number of decisionmakers" who are active market participants. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 511–12 (2015).

149. Peter Q. Blair & Bobby W. Chung, *How Much of Barrier to Entry Is Occupational Licensing?* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25262, 2018).

boards under the control of active market participants erect barriers to entry and needless regulations, all to the detriment of consumers and aspiring professionals. This dynamic, where industry incumbents regulate their prospective competitors, unsurprisingly gives rise to absurd requirements, such as licenses for florists.[150] To eradicate this corrupt, rent-seeking behavior, states should draw on federal revolving-door statutes and declare that licensing boards may not brandish membership structures where active market participants constitute a majority. This way, consumers will no longer suffer from the harms that result when crooks run rampant on licensing boards.

150. *See supra* notes 9–14 and accompanying text. Licensing requirements for florists appear even more absurd in today's age of online reviews. Studies show that consumers place more value in online reviews and pricing than in whether the service provider is licensed. Lauri Scherer, *Consumers Value Reviews and Prices More Than They Do Licenses*, NBER DIG., Apr. 2020, at 6, 6, https://www.nber.org/sites/default/files/2020-03/apr20.pdf [https://perma.cc/T4GC-BYWY].