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## The Legal Monopoly

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# THE LEGAL MONOPOLY

Renee Newman Knake\*

*Abstract:* Lawyers enjoy an exclusive monopoly over their craft, one unlike any other profession or industry. They bar all others from offering legal representation. In most jurisdictions, lawyer-judges draft, enact, and enforce their own professional conduct rules as well as preside over any legal challenge to the rules' validity. Lawyer regulation purports to protect the public and preserve professionalism, but it also reduces competition, constrains information, and maintains artificially high prices. Consequently, much of the American public goes without help when a lawyer is needed.

Federal antitrust law typically steps in to remedy this sort of pervasive market control, promoting competition and free markets for the public good. The legal profession, however, largely avoids antitrust scrutiny because the courts fall into a special exception known as the "state action doctrine," permitting anticompetitive actions by governmental bodies to engage in what otherwise would be illegal, anticompetitive activity. But a key presumption justifying this exception—that the regulators are not themselves members of the regulated profession or industry—is not true for most lawyer regulation. Accordingly, this Article proposes applying federal antitrust law to scrutinize the legal monopoly, and suggests that doing so may increase access to affordable legal services while preserving professionalism and client protection.

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## INTRODUCTION

As much as 80% of the American public goes without a lawyer to resolve legal problems, primarily due to lack of information and cost.<sup>1</sup> This problem, first acknowledged in the 1930s,<sup>2</sup> continues nearly a century later, notwithstanding extensive efforts like expanded legal aid and pro bono services.<sup>3</sup> To understand why, consider the market for legal services.

High barriers to entry, information asymmetries, and anticompetitive restrictions are hallmarks of the legal profession. Only lawyers, regulated exclusively by lawyer-judges in most jurisdictions, may provide legal representation. The profession justifies this level of self-regulation as necessary to preserve independence and ensure that the judicial branch remains a separate check on the executive and legislative branches of government. At the same time, this regulation prices legal representation beyond what many individuals can afford, consequently making access to

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1. See *infra* note 195.

2. See Stephen Love, Karl Llewellyn, Osmond Fraenkel & Malcolm Sharp, *Economic Security and the Young Lawyer: Four Views*, 32 ILL. L. REV. 662, 663 (1938); Lloyd K. Garrison, et al., *Report of the Special Committee on the Economic Condition of the Bar*, 63 A.B.A. REP. 390, 391 (1938) (“[P]eople in the low income groups frequently go without legal assistance because they cannot afford to pay for it, or because they think they cannot afford to pay for it, or because they distrust lawyers or do not know any lawyers, or do not know when they need advice . . .”).

3. See generally REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014) [hereinafter SANDEFUR, ACCESSING JUSTICE], [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2478040](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478040) [<https://perma.cc/P5LD-NU26>].

justice out of reach.<sup>4</sup> It also limits available information so severely that much of the American public does not realize when a life problem has a legal solution.<sup>5</sup>

Federal antitrust law typically breaks up business relationships like this, where members of an industry or profession act in concert to suppress competition. Why does the legal profession enjoy such control over the market for its services? The answer lies in the unique role that lawyer-judges play simultaneously as a regulatory arm of the state and also as members of the regulated profession.

When the state creates the monopoly or cartel, regulatory constraints typically are immune from antitrust review under what is known as the “state-action doctrine.”<sup>6</sup> This exemption from antitrust liability is based upon principles of federalism, state sovereignty, and judicial economy.<sup>7</sup> It is justified, at least in part, by the belief that publicly accountable officials will not be influenced by the same financial motivation or other self-interest as private actors.<sup>8</sup> Moreover, state regulatory officials usually represent a diverse range of backgrounds and experiences. This is not the case, however, for legal assistance.

In most jurisdictions, the highest courts—made up of judges who usually are also lawyers—adopt and enforce rules governing who may practice law and how law may be practiced. Even where these lawyer-judge regulators are presumed nonpartisan by virtue of a committee-based appointment process or subject to some measure of public accountability through elections, the fact remains that they are members of the profession subject to the regulations they enact and enforce.

Consequently, lawyer-judge regulators are vulnerable to capture, both perceived and actual, because as industry members, they may consciously or unconsciously advance the commercial or special concerns of their own profession. Although the judiciary is presumed to act in the public’s interest, its members are nonetheless part of the legal profession. This vulnerability ought to remove lawyer regulation from aspects of the state

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4. *Id.*

5. *Id.*

6. See *infra* notes 38–45 and accompanying text.

7. See S. Paul Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 703–05 (1973).

8. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985) (“We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.”); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 27 (1983) (“[R]egulation often is procured by and designed for the benefit of those the regulation purports to control.”).

action doctrine. Even if individual lawyers or judges may act to advance consumer interests over the profession's interests, capture risks remain.

When members of a profession enact and enforce anticompetitive regulations as an arm of the state—whether as legislators, the judiciary, or the executive—dual allegiances exist. As Justice Kennedy cautioned in the 2015 decision *North Carolina Board of Dental Examiners v. FTC*,<sup>9</sup> such an arrangement risks that “established ethical standards” will “blend with private anticompetitive motives in a way difficult for even market participants to discern.”<sup>10</sup> Accordingly, in this sort of circumstance, limiting antitrust immunity is “most essential.”<sup>11</sup>

Interestingly, courts do not protect competition only via antitrust law. In several instances, the U.S. Supreme Court used the First Amendment to limit anticompetitive regulations when state action immunity would otherwise protect the regulation from federal antitrust review.<sup>12</sup> Economic constraints long thought well outside the purview of free speech doctrine have increasingly been struck down on First Amendment grounds, beginning in the late 1970s with advertising by pharmacists, optometrists, lawyers, and beyond.<sup>13</sup> Thus, the commercial speech doctrine became an alternative vehicle for striking down anticompetitive state regulation.

The practice of treating competition as commercial speech, however, is imprecise, failing at times to fully account for the economic and informational consequences of anticompetitive regulations. Some scholars argue that this causes undesirable distortion in First Amendment jurisprudence and threatens to return the country to a *Lochner*-like era.<sup>14</sup> Moreover, the manipulation of free speech principles to reach anticompetitive state action does not fully account for the potential complications of capture on a pragmatic level where, as in the case of the legal profession, the public official administering (and reviewing the

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9. 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015).

10. *Id.* at 1111, 1116–17 (holding that the state dental board violated antitrust law by issuing cease-and-desist letters to providers of teeth whitening services).

11. *Id.* at 1111.

12. *See, e.g., Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that a blanket ban on advertising violated the First Amendment).

13. *See infra* notes 96–101 and accompanying text.

14. *See, e.g., Robert Post & Amanda Shanor, Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 165–66 (2015) (critiquing the D.C. Circuit's recent decision striking a licensing requirement for tour guides on First Amendment grounds and observing that “[u]ntil very recently, it was well accepted that purely economic regulations are subject to rational basis review. This was the point of consigning *Lochner v. New York* to the *anti-canon*. Since the New Deal, black-letter constitutional law has authorized the Nation to regulate the complexities of modern economic life in ways designed to modify the unobstructed operation of the private market” (citations omitted)).

constitutionality of) the constraint is also a member of the very industry prospering from it.

This Article is the first to identify these interrelated problems of substituting the First Amendment to address anticompetitive actions by a self-regulated state entity, and to propose expanded federal antitrust review as a solution. This proposal engages important debates within three areas of legal scholarship—federal antitrust law, First Amendment jurisprudence, and legal ethics. These debates frame the Article’s organization.

Part I of this Article describes the origin of the legal monopoly, explaining how lawyer-judges regulate legal ethics and the practice of law. Part I also explores the unique concerns presented when the state official responsible for suppressing competition is a member of the regulated group, looking in particular at the exceptional situation of courts as regulators of the legal profession, though this analysis potentially bears on other professions and industries as well. Here, this Article addresses an oversight in the commentary on federal antitrust law and state regulation of the professions and applies capture theory to critique the conflicts of interest at play when the sovereign regulator is a member of the targeted group. Part I also examines the evolution of the First Amendment’s commercial speech doctrine as a tool to address competition constraints at the state level that would otherwise be unreachable under the state action doctrine. This Article cautions against reliance upon free speech doctrine rather than federal antitrust law for striking down anticompetitive regulations. Such reliance distorts First Amendment jurisprudence and arbitrarily permits review of some, but not all, anticompetitive state action.

Part II offers an overview of the interaction between federal antitrust law and state anticompetitive regulation. Here, this Article discusses relevant decisions since the U.S. Supreme Court first articulated the state action doctrine over seventy years ago in *Parker v. Brown*.<sup>15</sup> This discussion includes the Court’s most recent guidance from *North Carolina Board of Dental Examiners*, where the Court held that a state agency comprised almost entirely of members of a profession—dentists—could not prohibit outsiders from offering teeth-whitening services, though the dentists argued this constituted the unlawful practice of dentistry. In the months following the Court’s decision, at least three different antitrust challenges were filed in federal district courts by legal

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15. 371 U.S. 341 (1943).

services providers against state bar authorities, an indication that the questions posed and addressed by this Article are likely to recur.<sup>16</sup>

Part III proposes limiting antitrust immunity for challenges against anticompetitive lawyer-judge-made regulations. Here, this Article reflects upon the goals of federal competition law in the context of the public's interest in legal services. This Article proposes that anticompetitive regulations only should be protected by the "state action doctrine" when the regulation either (1) cures a market problem to the public's benefit or (2) preserves an essential element of professional practice. Striking anticompetitive professional conduct rules that do not fall into one of these categories promises to expand access to legal services for large segments of the American public.

## I. THE LEGAL MONOPOLY

The legal profession is unique in its degree of self-regulation. Lawyer-judge regulators craft and enforce the rules for their own profession without the elements of public accountability and due process ascribed to government actors, most notably public elections of disinterested external individuals and independent judicial review. Capture theory provides justification for reconsidering how the state action doctrine should be applied (or, at least, how competition values should be weighed) in the context of self-regulation.

### A. *How Lawyer-Judges Regulate Legal Ethics and the Practice of Law*

Consider the implications of the lawyer-driven regulatory regime. Most states draw from model ethics rules and policies promulgated by lawyers elected by their peers to the American Bar Association ("ABA") House of Delegates. These lawyers likely have direct financial interest in the rules that they draft. The drafting and enactment of the model rules and policies are not subject to external review. The highest court in each state then bases its body of regulations upon the ABA's model rules and policies.<sup>17</sup> This process typically occurs behind closed doors, without

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16. *See infra* note 183.

17. It should be noted that in a few states, some regulation of lawyers occurs via the legislature—this would more clearly fall under the umbrella of state action protection and, assuming the legislature is not made up entirely of lawyers, is not the subject of my focus here. For example, the states of Alaska, California, Maryland, Massachusetts, Michigan, Mississippi, Virginia, and Wyoming all have legal authority promulgated by a combination of judicial and legislative powers. NAT'L CONF. OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR,

public hearings or open meetings, at most with a period for public notice and comment.<sup>18</sup> While one might argue that in states where the members of the highest courts are elected<sup>19</sup> some public accountability is in place, the fact remains that at all levels of regulation, from drafting to enactment to enforcement to adjudication, lawyers (or lawyer-judges) hold exclusive control.<sup>20</sup>

Despite all of these concerns, federal courts and the Federal Trade Commission (“FTC”) apply the state action doctrine to the state supreme courts when acting legislatively because, “[a]s a coordinate branch of the sovereign exercising a constitutionally prescribed legislative authority, the state supreme court is entitled to deference in its regulatory choices.”<sup>21</sup> This deference is grounded in the courts’ “traditions of independence and principled decision-making that distinguish them from regulatory

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COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1 (2014); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1, at 51 (1986) (“Modern lawyer codes plainly are adopted by courts and legislatures for the purpose of authoritatively measuring a lawyer’s liability to professional discipline.”).

18. Regarding the closed process for lawyer regulation, see Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 351–54 (1975) (describing the example of Virginia law, where the Virginia Supreme Court is empowered “to control and regulate the practice of law” including the authority to “promulgate a code of ethics to govern attorney conduct” and observing that this sort of “regulation provides no public hearing on minimum fee schedules and no maximum rate setting”). Regarding the attorney discipline process, see Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO J. LEGAL ETHICS 1, 19–20 (2007) (“The extent to which the disciplinary process is private varies from state to state. Only Florida, New Hampshire, Oregon, and West Virginia treat all or most complaints about lawyers as a matter of public record. In most other states, the complaint becomes a public record once there has been a finding of probable cause. In a minority of the jurisdictions, the public cannot attend disciplinary hearings even after probable cause is found; information about complaints does not become publicly available until there has been a finding of wrongdoing and a public sanction is imposed.” (internal citations omitted)).

19. Thirty-eight states hold judicial elections at the supreme court level, where the remaining states utilize a system of appointment usually by an advisory committee. *See* Joe Palazzolo, *Judges Step up Electioneering as Outside Money Pours in to Races*, WALL ST. J. (Oct. 13, 2014), <http://online.wsj.com/articles/judges-step-up-electioneering-as-outside-money-pours-into-races-1413149643> [<https://perma.cc/477X-W7L5>].

20. At its extreme, when a rule is challenged, plaintiffs are forced to argue their case before the very officials who enacted the rule. *See, e.g.,* Grievance Adm’r v. Fieger, 719 N.W.2d 123 (Mich. 2006) (lawyer challenging constitutionality of professional conduct rules promulgated by the Michigan Supreme Court). While beyond the scope of this Article, it is for this reason challengers to lawyer conduct rules should have the ability to bring their case in federal court where, at least, they will not be forced to argue the validity of rules before the judges who adopt and enforce them. *See* WOLFRAM, *supra* note 17, § 2.2.1, at 23 (“One uncomfortable consequence is that the same body that promulgates comprehensive sets of rules regulating the conduct of lawyers must also sit as the body that determines their validity if later attacked.” (citation omitted)).

21. William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 637 n.113.

agencies.”<sup>22</sup> Although independence and principled decision-making are values “largely limited to the decisions of concrete cases, they are closely related to the court’s authority over the practice of law,”<sup>23</sup> so the argument goes.

Some scholars maintain that courts should “presum[e] . . . as ‘private’ any organization [even a government body] in which a decisive coalition (usually a majority) is made up of participants in the regulated market,”<sup>24</sup> but this is not how the judiciary or other lawyer-regulators have been treated in antitrust jurisprudence, perhaps because, in essence, judges are being asked to apply the antitrust law to themselves. Instead, state supreme courts, comprised of lawyer-judges who apply antitrust law to regulations adopted and enforced by members of their own profession, are treated as a sovereign.<sup>25</sup> Indeed, courts jump entirely over this threshold inquiry, skipping ahead to decide whether the challenged regulatory action is that of the state without examining the composition of the state actor. Moreover, when lawyer-judges delegate regulatory power to a bar authority or licensing committee, courts still view the regulator as a governmental unit even when it is made up of a majority of market participants.<sup>26</sup>

Consequently, lawyer regulation enjoys insulation from competition that, in some instances, may not only compromise consumer interests, but also may undermine constitutionally protected rights. Numerous regulations on the practice of law have suppressed competition. For example:

Minimum fee schedules have kept fees high, unauthorized practice rules and bar admission standards have limited entry,

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22. *Id.*

23. *Id.*

24. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 227, at 226 (4th ed. 2013); *see also* *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 191–92 (2010) (courts “seek the central substance of the situation and therefore . . . ‘are moved by the identity of the persons who act, rather than the label of their hats.’” (citing *United States v. Sealy Inc.*, 388 U.S. 350, 353 (1967))). “The determination that [an actor’s] activities constitute state action is not a purely formalistic inquiry.” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

25. Applying the *Parker* doctrine articulated in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court observed “a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially is exempt from Sherman Act liability as state action.” *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (citations omitted).

26. *Id.* (observing that “[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization,” yet still finding that a bar regulation banning advertising was protected from antitrust challenge under the state action doctrine).

restrictions on advertising and solicitation have reduced competition and the development of new markets for legal services, and limitations on nonlawyer ownership of law firms has reduced capital flow into legal services markets.<sup>27</sup>

Bar regulators justify any “resulting losses in economic efficiency . . . on the ground that the restrictive rules prevent more harmful effects on clients and society.”<sup>28</sup> Yet, it is unclear whether these harmful effects even exist<sup>29</sup> and, in any event, “[e]conomists . . . tend to believe that market efficiency is a net benefit to clients and society and probably to lawyers as a group.”<sup>30</sup>

In drafting, adopting, and enforcing the rules applicable to their own profession, as well as reviewing their validity when subject to a legal challenge, it is not an overstatement to suggest that members of the judiciary may suffer from regulatory capture. The public-private distinction commonly used by the courts to define the contours of the state action exemption does not fully encompass the range of concerns presented by anticompetitive regulation in the context of a sovereign regulating an occupation of which it is also a member, as in the legal profession.<sup>31</sup> This binary public-private dichotomy fails to account for the range of influences at play, including financial or other self-interest, rent-seeking, conflicts, accountability to and pressure from members of one’s own group, and ethical blind spots such as cognitive bias or groupthink.<sup>32</sup> While it may be uncomfortable to contemplate that a particular judge would regulate or review lawyer regulation in a self-interested or self-dealing way, this may occur without the judge being fully conscious of it.<sup>33</sup> Lawyer-judge self-regulation is also susceptible to conflicts of interest and pressure from the local professional community.

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27. WOLFRAM, *supra* note 17, § 2.4.1, at 39.

28. *Id.*

29. See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587, 2605–06 (2014).

30. WOLFRAM, *supra* note 17, § 2.4, at 39; see also Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 *STAN. L. REV.* 1689 (2008) [hereinafter Hadfield, *Legal Barriers to Innovation*]; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 3–5 (1981).

31. See generally Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) (discussing the breakdown between public/private rights).

32. See generally MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* (2011).

33. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1504 (1998) (discussing “suggestive evidence that self-serving bias does affect lawyers and judges”); *Hoover v. Ronwin*, 466 U.S. 558, 587–88 (1984)

How might we better refine state action immunity to deal with these concerns? While some flexibility<sup>34</sup> could be helpful to courts evaluating the application of federal antitrust law to the legal profession, modern doctrine does not adequately accommodate for this. The theory of regulatory capture offers a response.

### B. *Antitrust and Regulatory Capture*

Capture theory would suggest that when the state's economic choices are proscribed by a regulatory body that has overtaken the state's political system, this process (and perhaps also the choices made within the process) is both inefficient and illegitimate.<sup>35</sup> Occupational regulation has been long critiqued as an unjustified economic constraint, going back as far as Adam Smith's *Wealth of Nations* in the late 1700s.<sup>36</sup> Economic literature over the ages has built upon Smith's assessment, including the theory of regulatory capture, which suggests that occupations or other economic alliances endeavor to enrich themselves through the state's power to control competition and price.<sup>37</sup>

Professor John Shepard Wiley set forth his "capture theory of antitrust federalism" in a mid-1980s Harvard Law Review article to explain what he described as the U.S. Supreme Court's "unpredictable but unmistakable willingness to subject state regulatory policies to supervening federal antitrust policy" in the wake of *Parker v. Brown*.<sup>38</sup> In *Parker*, the U.S. Supreme Court set forth a special exemption from federal antitrust law for the states when they enact anticompetitive regulations.<sup>39</sup>

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(Stevens, J., dissenting) (observing that while it may "seem[ ] highly improbable that members of the profession entrusted by the State Supreme Court with a public obligation to administer an examination system that will measure applicants' competence would betray that trust, and secretly subvert that system to serve their private ends[;] [n]evertheless, the probability that respondent will not prevail at trial is no justification for dismissing the complaint").

34. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 699 (1978) (Blackmun, J., concurring) ("In my view the decision in *Goldfarb* . . . properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation." (citations omitted)).

35. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

36. For example, Adam Smith argued that the only purpose of mandated apprenticeships in the late 1700s was to suppress competition, with self-regulated professions acting in "conspiracy against the public" and endeavoring to maintain artificially high prices. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS ch. X, pt. II (George Bell & Sons 1908) (1976).

37. See generally Stigler, *supra* note 35.

38. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714 (1986) [hereinafter Wiley, *Capture Theory*].

39. *Id.*

According to Wiley, this “doctrinal shift has paralleled a theoretical shift in our conceptions of the nature of regulation itself,” due at least in part to “a New Deal confidence in market regulation” that “*Parker* reflected.”<sup>40</sup> In the decades following *Parker*, “however, regulation came to be regarded as economically inefficient and as the product not of broad political consensus but of the capture of lawmaking bodies by producer groups seeking benefit at the expense of others.”<sup>41</sup> “This changed attitude toward regulation” was reflected in a series of decisions by “courts to use the very state action doctrine that arose from a desire to defer to state sovereignty as a means to intrude increasingly on that sovereignty.”<sup>42</sup>

Recognizing the fear of regulatory capture underlying the Court’s decisions led Wiley to formulate his preferred test for assessing the competitive effects of state regulation. His theory is grounded in two goals: first, “distributive justice for consumers”; and second, “economic efficiency.”<sup>43</sup> He contends that one goal of federal antitrust preemption is to “assure justice for consumers” because “the Sherman Act entitles consumers to distributive justice: ultimate or household consumers deserve the surplus they gain from transacting in competitive markets. When producers appropriate consumer surplus by replacing competition with cooperation, the Act outlaws their effort.”<sup>44</sup>

Wiley’s conceptualization of distributive justice for consumers is relevant to this Article’s project. His assessment of whether anticompetitive state action should endure contemplates a two-step inquiry: first, where “a state policy restrains market rivalry,” one must ask “if the policy is primarily a producer initiative”; and second, if so, the policy is void if it “hurts consumers by impairing competition without solving some serious market problem in a way beneficial to them.”<sup>45</sup> In the end, he would “preempt anticompetitive state policies that producers have captured to the detriment of consumers.”<sup>46</sup>

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40. *Id.*

41. *Id.* at 715.

42. *Id.*

43. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327, 1335 (1988) [hereinafter Wiley, *Capture Theory: Reply to Professors Page and Spitzer*]; see also Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 HANDBOOK OF LAW AND ECONOMICS 1073 (2007) (“Yet the role of economics in shaping antitrust law has evolved greatly, especially over the past few decades. The growing influence of economics on antitrust law can be traced in part to the Chicago School, which, starting in the 1950s, launched a powerful attack on many antitrust rules and case outcomes that seemed to lack solid economic underpinnings.”).

44. Wiley, *Capture Theory: Reply to Professors Page and Spitzer*, *supra* note 43, at 1335–36.

45. *Id.* at 1336.

46. *Id.* at 1341.

Scholars have critiqued capture theory on a number of grounds, though none hold particular weight here in the context of self-regulation. Some scholars argue that “[b]ecause regulatory politics are extremely complex, frequently combining winning coalitions from many different groups, it is difficult to know when, if ever, the regulatory process has been captured.”<sup>47</sup> In other words, it is difficult to find “direct proof” of regulatory capture because “legislative histories, such as committee reports and floor debates, are rarely maintained. Still less common are records of municipal and administrative deliberation.”<sup>48</sup> While this complexity of coalitions may be true for most regulation moving through a legislative or administrative rule-making process, this description does not accurately characterize the process for regulating lawyers—no proof is needed to demonstrate that lawyer regulation, in most jurisdictions, is handled almost exclusively by lawyers.

Another critique questions whether “regulation generated by producer capture is less legitimate than other anticompetitive, inefficient regulation.”<sup>49</sup> Reliance upon capture theory is at times discredited as also threatening economic efficiency and the political process. In reviewing antitrust challenges, courts face “a difficult dilemma: how to respect the political process in the states without frustrating Congress’ purpose in enacting the Sherman Act.”<sup>50</sup> To achieve this balance, courts “focus on preventing the delegation to private parties of the power to restrain competition” and “[a]s long as a state retained effective control over the regulation of its economy, the federal judiciary would honor that state’s political decision to restrain market forces.”<sup>51</sup> Thus, according to critics, applying capture theory “as the touchstone for preempting state law” would “overturn[] those results. And that is a role the courts should not permit antitrust laws to play.”<sup>52</sup>

This Article conceives of “capture” more narrowly, and as such is not vulnerable in the same way to these criticisms. For example, among self-regulated professions, no special effort such as lobbying or other external

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47. Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1305 (1988).

48. Page, *supra* note 21, at 647; *id.* at 625 (arguing that “judicial intervention is justified when regulation that conflicts with antitrust exploits an independent defect in the process of representation. The function of intervention, then, is to resubmit the issue to the state political process for fuller consideration”).

49. Spitzer, *supra* note 47, at 1302–03.

50. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 518 (1987).

51. *Id.* at 518–19.

52. *Id.* at 519.

pressure is necessary to capture the state regulator *ex ante*, an effect labeled by some as “pre-capture.”<sup>53</sup> Likewise, no effort is needed to determine whether the industry influences its regulatory body; the body is the industry.

Lawyer regulation by its very design operates from a baseline of capture. The result, inevitably, is a risk that regulation will maximize economic rents for the profession at the public’s and/or consumer’s expense. This rent-seeking is evident in an array of professional conduct rules governing who may practice law (e.g., licensing requirements and geographic restrictions)<sup>54</sup> and how law may be practiced (e.g., bans on multi-disciplinary practices and outside ownership and investment in law firms, and limitations on advertising, solicitation, and referrals).<sup>55</sup>

Nevertheless, might there be good reasons for allowing this inherently captured regulatory structure to persevere?

### C. *Capture of Lawyer-Judge Regulators*

The capture of lawyer-judge regulators plays out in unique ways in the context of the legal profession. On the one hand, lawyers play a special role in democratic government which, arguably, demands insulation from regulation by other political branches. On the other hand, the self-regulation necessary for preserving independence can also be vulnerable to dual allegiances.

#### 1. *The Special Role of Lawyers in a Democracy*

Without question, lawyers hold a unique place in society, which may necessitate some protection for the profession from competitive market pressures. As scholars observe: “The role of an attorney in navigating and, when necessary, challenging the law is a critical component of American

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53. Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 486 n.137 (1993) (citing Stigler, *supra* note 35).

54. The legal profession’s conduct is, in effect, cartel-like “in restricting entry and negotiating agreements with competing groups.” Rhode, *supra* note 30, at 4 n.7; *see also* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI L. REV. 6, 11 (1976) (“Licensing, imposed ostensibly to protect the public, almost always impedes only those who desire to enter the occupation or ‘profession;’ those already in practice remain entrenched without a demonstration of fitness or probity.”).

55. *See, e.g.*, Geoffrey Hazard, Russell Pearce & Jeffrey Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1093 (1983); Rhode, *supra* note 30, at 1; Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

democratic government.”<sup>56</sup> For example, litigating in the courts “may well be the sole practicable avenue open to a minority to petition for redress of grievances”<sup>57</sup> and lawyers are critical to this process. Lawyers protect individuals from the excesses of the sovereign<sup>58</sup> and “play an indispensable part in . . . nonviolent means of dispute resolution.”<sup>59</sup> Lawyers embody the law. As one scholar explains, they act as:

[A]gents who communicate the rules through advice to private clients and governments and enable them to organize their businesses and structure their transactions and comply with regulations and tax laws and constitutional limitations; and who can negotiate and if necessary litigate with the state and other private parties when their claims of rights are impaired or disputed.<sup>60</sup>

It is commonly accepted that “[o]ur legal system is premised on the assumption that law is intended to be known or knowable, that law is in its nature public information.”<sup>61</sup> This means that “[t]he ‘rule of law’ as we understand it requires promulgation. . . . And one fundamental, well-

56. Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 642–43 (2011) (citing David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 259 (1996) (“[B]ecause lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law, lawyers often should be among the first . . . to counsel others that it is acceptable to violate or nullify it.”)); Geoffrey R. Stone, *A Lawyer’s Responsibility: Protecting Civil Liberties in Wartime*, 22 WASH. U. J.L. & POL’Y 47 (2006) (“It is the legal profession that is most fundamentally responsible for helping the nation strike the right balance [between national security and civil liberties] and for defending our freedoms.”).

57. *NAACP v. Button*, 371 U.S. 415, 429–30 (1963) (citations omitted); see also *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 223 (1967) (reinforcing that the First Amendment protections established in *Button* extend beyond “political matters of acute social moment” and that “[g]reat secular causes, with small ones, are guarded” (citations and punctuation omitted)); Daniel Markovits, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 171–211 (2008); *id.* at 185 (“One might say, then, that what democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail.”).

58. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 348 (6th ed. 1876) (observing that lawyers are “the most powerful existing security against the excesses of democracy” given “the authority . . . intrusted [sic] to members of the legal profession, and the influence which these individuals exercise in the government”).

59. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 19 (3d ed. 2004).

60. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQ. L. 441, 448 (2010) (“Legal regulations and procedures are complicated and rapidly changing; so that sophisticated, experienced agents who know their way around the rule-systems and the courts are generally essential to effective representation within and operation of the system.”).

61. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547 (1995).

understood aspect of the lawyer's role is to be the conduit for that promulgation."<sup>62</sup>

In short, lawyers effectively are the law: "In a complex legal environment much law cannot be known and acted upon, cannot function as law, without lawyers to make it accessible to those for whom it is relevant."<sup>63</sup> Given the special nature of the work that lawyers do as it relates to the functioning of the legal system and the foundations of American government, it is not surprising that the state might find it more efficient to allow the profession to determine its own regulatory standards rather than look to external sources. Moreover, external regulation<sup>64</sup> could fundamentally compromise the very role that lawyers are meant to fulfill in the system of democratic checks and balances.<sup>65</sup> For these reasons, some argue that the best balance to be struck is one in which lawyers self-regulate given the intractable relationship with lawyers to law and the necessity that lawyers not be controlled by other branches of the government, even in the face of regulatory capture.<sup>66</sup>

## 2. *Self-Regulation and Dual Allegiances*

Even so, when members of a profession self-regulate, "those who have the most to gain from reduced consumer welfare in the form of higher prices are tasked with protecting consumer welfare in the form of health

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62. *Id.*

63. *Id.* at 1548. For a competing view on the value of a lawyer's role in selecting information for a client, see Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 613–14 (1989) ("Our conclusions cast doubt on the social value of lawyers' role in selecting information for their clients, thereby challenging one of the fundamental premises of the legal system.").

64. External regulation would include state or federal legislative regulations or other control by authority from outside the legal profession. For further discussion of the distinction between internal and external regulation of lawyers, see Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005).

65. See, e.g., James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97 (2006) (the consequence of legislative control "over lawyer practice may come to erode the ability of lawyers to serve as a bulwark against the aggrandizement of government power vis à vis the individual").

66. See Page, *supra* note 21, at 637 n.113 ("Despite this danger[ ] [of regulatory capture][,] the extension of the state action exemption to policies of the state supreme court is necessary. As a coordinate branch of the sovereign exercising a constitutionally prescribed legislative authority, the state supreme court is entitled to deference in its regulatory choices. Courts have traditions of independence and principled decisionmaking that distinguish them from regulatory agencies. While those traditions are largely limited to the decisions of concrete cases, they are closely related to the court's authority over the practice of law.").

and safety—the fox guards the henhouse.”<sup>67</sup> Thus, as other commentators have observed, we are left to rely upon “an unsupervised group of competitors appointed to regulate their own profession . . . to neglect their selfish interests in favor of the state’s.”<sup>68</sup> For the judiciary, this is problematic on multiple levels in that the judiciary not only regulates itself but also members of the legal profession, of which it also is a part.<sup>69</sup>

Competition is not the only value at stake; self-regulation by the judiciary also undermines judicial independence.<sup>70</sup> Beyond regulating themselves, “[t]he multiple institutional, political, and personal connections between the judiciary and the lawyers they are ostensibly regulating, as well as the natural inaccessibility of judges to the public, virtually guarantees lawyers a stranglehold over every aspect of lawyer regulation.”<sup>71</sup> As such, “[i]n this context, the bar is not only working in its occupational interests, but is also leveraging its close and unique relationship with its regulators, state judiciaries.”<sup>72</sup>

#### D. *Antitrust and the Legal Profession: Goldfarb v. Virginia State Bar*

For the most part, courts have treated lawyer regulation as protected state action, without inquiring too deeply into concerns of capture or other conflicts inherent in this sort of regulatory structure. This is not to say that

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67. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1140 (2014).

68. *Id.* at 1143.

69. *See, e.g.*, Page, *supra* note 21, at 637 n.113 (“It is naive to think that state supreme courts, even those whose members are appointed, are fully insulated from interest-group pressures. Indeed, the kinds of considerations developed in section III of this article, suggest that there is a danger that state courts will enact rules in the interest of the legal profession against the broader consumer interest. The court is composed of lawyers; it is small in number; and it is in daily contact with the regulated group.”).

70. *See* Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL’Y REV. 123, 147–48 (2011) (observing that judicial codes undermine judicial independence because they “allow behaviors that may create opportunities and appearances of judicial bias and partiality” and they “allow the interpretation of ambiguous provisions to be conditioned by bar norms, which include private interests and private orientations, rather than by independent judicial norms, which ideally are oriented exclusively toward state and public interests”).

71. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1239 (2003) (arguing that “[l]egislatures, while typically criticized for their accessibility to organized special interests, would fare better with lawyer regulation than judiciaries” for avoiding the conflicts of interest and other concerns associated with regulatory capture).

72. Remus, *supra* note 70, at 147 (arguing that “[b]ar influence over attorney conduct regulation” not only “raises the specter of regulatory capture” but also presents “an even more worrisome concern—that the bar will not only capture but more explicitly control and co-opt power from its regulator, which is itself a branch of government”).

courts blindly endorse all anticompetitive lawyer regulation; for example, the U.S. Supreme Court has struck down a minimum fee schedule as well as a rule banning all lawyer advertising.<sup>73</sup> In striking these constraints on competition, the Court's primary focus was the public's access to legal services. Interestingly, however, the Court reached this conclusion by applying different bodies of law. While antitrust law was used to scrutinize the fee schedule, the Court turned to the First Amendment for acting on the advertising ban. This turn to constitutional law is not without consequence, as explained below, but first some history about the application of antitrust law to the professions is necessary.

For nearly a century, all professions were considered exempt from federal antitrust law. The U.S. Supreme Court addressed the Sherman Act's application to the legal profession for the first time in *Goldfarb v. Virginia State Bar*<sup>74</sup> where it not only brought the professions under antitrust review but also found the fee schedule at issue in violation of federal law.<sup>75</sup> While not explicit on the face of the opinion, Wiley's capture theory helps explain and justify the Court's decision.<sup>76</sup>

The Fairfax County Bar Association ("FCBA") argued in *Goldfarb* that federal antitrust law was "never intended to include the learned professions."<sup>77</sup> The Bar took the position that "competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community."<sup>78</sup> The Court declined to extend a blanket Sherman Act exemption for the legal profession,<sup>79</sup> instead examining the specific anticompetitive behavior at issue and applying *Parker's* state action doctrine.<sup>80</sup>

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73. See Easterbrook, *supra* note 8, at 27 ("The 'ethical' requirement that lawyers charge minimum fees, at issue in *Goldfarb*, was seen as a simple cartel; . . . the ban on attorneys' advertising in *Bates* appeared as a way to jack up prices by denying clients information about the identity of low-priced attorneys. Justices convinced that state regulation was in the interest of the firms at the expense of consumers were reluctant to give antitrust blessings to the results."); Janet F. Bently et al., *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164 (1974).

74. 421 U.S. 773 (1975).

75. *Id.* at 791–92.

76. See Wiley, *Capture Theory*, *supra* note 38, at 727 ("The *Goldfarb* Court echoed the capture notion that regulation serves industry ends, for instance, when it referred to the attorney minimum fee schedule at issue as 'essentially a private anticompetitive activity'—even though state law enforced the schedule." (citation omitted)).

77. *Goldfarb*, 412 U.S. at 786.

78. *Id.* (citation omitted).

79. *Id.* at 787.

80. *Id.* at 788.

*Goldfarb* involved a challenge by a husband and wife purchasing a home.<sup>81</sup> They could not find an attorney to assist with their title examination who would accept a fee lower than the minimum fee schedule published by the FCBA.<sup>82</sup> They contacted thirty-six attorneys; nineteen replied but refused to offer their services.<sup>83</sup> The schedule was not enforced by the FCBA, but the Virginia State Bar, an administrative agency of the Virginia Supreme Court, had officially condoned fee schedules and opined that they could not be ignored.<sup>84</sup> Indeed, one opinion went so far as to provide “that ‘evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local bar Association raises a presumption that such lawyer is guilty of misconduct.’”<sup>85</sup> Yet, according to the lower court, “although the fee schedule and enforcement mechanism substantially restrained competition among lawyers, publication of the schedule by the County Bar was outside the scope” of federal review.<sup>86</sup>

The U.S. Supreme Court disagreed and, Justice Burger, writing for a unanimous Court, observed: “The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether [the Act] includes professions.”<sup>87</sup> Moreover, he explained: “In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.”<sup>88</sup> As such, the Court had no trouble finding that attorneys are not, simply by virtue of being a learned profession, removed from the Sherman Act’s reach.<sup>89</sup> Consequently, the Virginia State Bar along with the FCBA found themselves liable for a

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81. *Id.* at 775.

82. *Id.* at 776.

83. *Id.*

84. *Id.* at 776–77.

85. *Id.* at 777–78.

86. *Id.* at 775.

87. *Id.* at 787 (citations omitted).

88. *Id.* at 788.

89. *Id.* at 790 (“The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia [sic] through its Supreme Court Rules required the anticompetitive activities of either respondent.”); *id.* at 791 (“It is not enough that . . . anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.”).

\$200,000 settlement, reached after the case was remanded to the district court and paid from an assessment levied upon the bar members.<sup>90</sup>

At the same time, however, the Court acknowledged that professional regulatory bodies might warrant special treatment under federal antitrust law:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.<sup>91</sup>

Strikingly, the opinion contains no mention that the justices themselves and the judges reviewing the matter in the courts below, as well as the regulators setting the challenged price schedule and issuing legal opinions about it, were all members of the regulated profession. The only distinction between lawyers and other professions mentioned by the Court went to lawyer exceptionalism, offering additional support for upholding future economic constraints:

The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’ 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.<sup>92</sup>

*Goldfarb* opened the door to federal antitrust review for state regulation of the professions, but in later cases the U.S. Supreme Court declined to extend the reasoning for limiting antitrust immunity to challenges against the state supreme court itself rather than an entity like the Virginia State Bar. Significantly—and the significance of this point cannot be overstated—the Court continued to review anticompetitive professional regulations even when mandated directly by the state supreme court. But rather than applying federal antitrust law, the Court turned to the First Amendment. However, in doing so, the Court made a fateful choice,

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90. WOLFRAM, *supra* note 17, § 2.4, at 40 n.29.

91. *Goldfarb*, 421 U.S. at 788 n.17.

92. *Id.* at 792–93 (citations omitted).

inserting the sort of economic analysis typically reserved for antitrust matters into the scope of the First Amendment.

*E. Commercial Speech Doctrine and the Legal Profession: Bates v. State Bar of Arizona*

Justifications for free competition often mirror justifications for free speech,<sup>93</sup> particularly when the Court focuses upon the public's interest in information.<sup>94</sup> Thus, on occasion, litigants (and the courts) have turned to the First Amendment when they cannot achieve the desired result for maximizing competition via antitrust doctrine. The U.S. Supreme Court has used economic competition (and, implicitly, concerns about producer capture<sup>95</sup>) as a basis to strike down numerous regulations banning truthful information from reaching the consumer market, starting in the mid-1970s with abortion procedures,<sup>96</sup> prescription drugs,<sup>97</sup> and legal services,<sup>98</sup>

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93. Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 48 (1985) ("In deciding whether to grant constitutional protection to particular types of professional promotion, the Supreme Court has not relied on traditional first amendment analysis. Rather, the Court in evolving its commercial speech doctrine has looked to many of the same interests protected by antitrust and consumer protection law.").

94. For example, in rejecting independence and professionalism as a justification for a ban on advertising, the *Virginia Pharmacy* Court was especially concerned in that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 769 (1976); see also 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1337 (2009) (noting that keeping citizens in ignorance "is as threatening to core democratic values as the suppression of any speaker").

95. See, e.g., Wiley, *Capture Theory*, supra note 38, at 756–57 (noting that in *Central Hudson Gas & Electrical Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the "electric utilities that successfully challenged this anticompetitive state restraint could have argued plausibly that it was the product of producer capture, but the decision's first amendment framework caused the Court to review the advertising limitation without considering capture or any other antitrust state action issue").

96. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

97. *Va. State Bd. of Pharm.*, 425 U.S. at 764–65.

98. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (holding that categorical ban on direct-mail solicitation targeting potential clients with specific legal claims violates First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding that categorical ban on lawyer advertising violates the First Amendment).

followed more recently by an array of other kinds of information ranging from utility promotions,<sup>99</sup> to commercial handbills,<sup>100</sup> to liquor prices.<sup>101</sup>

As one scholar explained in writing about commercial speech and deceptive advertising, the Court's initial motivation for "extending first amendment protection to some forms of advertising occasionally implied that the risk of successful persuasion—even if that persuasion might be irrational, or might have socially harmful consequences—could not be a constitutional basis for restricting advertising."<sup>102</sup> In later cases, "[h]owever, the Court subsequently (without discussing its earlier statements) adopted what is apparently a more flexible standard, stating that even nondeceptive advertising could be prohibited whenever the prohibition would serve a 'substantial' state interest, as long as the prohibition was no broader than necessary to serve that interest."<sup>103</sup> This expansion of the commercial speech doctrine to a "more flexible standard" coincides with the Court's use of the First Amendment to review the competitive impact of professional conduct regulations which otherwise would be unreachable under the state action doctrine.

Lawyers and the clients who need them rely heavily upon the speech of lawyers—courtroom advocacy, written briefs and opinions, intimate advice, counseling, and more. Lawyers' speech has been described as "not only central to what the legal system is all about, and not only the product of the law as we know it, but basically the only thing that lawyers and the legal system have."<sup>104</sup> Nearly every rule of professional conduct governing the practice of law touches upon what a lawyer may, or may not, say. Lawyers cannot reveal client confidences.<sup>105</sup> They must be circumspect in disclosures to the media during a pending trial.<sup>106</sup> Lawyers walk a fine line in counseling a client about good faith challenges to existing laws.<sup>107</sup> For many years lawyers could not advertise, and, in most jurisdictions, lawyers remain rather constrained in their ability to advertise

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99. *See Cent. Hudson*, 447 U.S. at 563.

100. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424–25 (1993).

101. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

102. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 667 n.28 (1985) (citing *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96–97 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

103. *Id.* (citing *Cent. Hudson*, 447 U.S. at 566 and *Bates*, 433 U.S. at 384).

104. Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 688 (1996) ("As lawyers, speech is our stock in trade.").

105. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2014).

106. *See id.* r. 3.6.

107. *See id.* r. 1.2.

and solicit clients.<sup>108</sup> They must heed restrictions on their ability to criticize the judiciary.<sup>109</sup> Indeed, when attorneys take their oath, they sacrifice certain free speech rights enjoyed by the public.

Despite these numerous limitations on lawyers' speech, the First Amendment has also been used to protect attorney advice and advocacy as political speech, particularly when access to legal representation is at stake.<sup>110</sup> In the context of challenges to restrictions viewed as anti-competitive, however, the Court has applied the commercial speech rubric rather than political speech analysis.

In *Bates v. Arizona State Bar*,<sup>111</sup> the U.S. Supreme Court struck down a universal ban on lawyer advertising and, in so doing, recognized "the right of the public as consumers and citizens to know about the activities of the legal profession."<sup>112</sup> Notably, the Court relied upon commercial speech doctrine, rather than antitrust law, to reach what essentially was a conclusion about free competition, not free speech. The Court quickly dismissed the antitrust claims based upon the state action doctrine.

A close review of the majority's opinion suggests that the result was driven largely by competition values rather than free speech interests. Two recently licensed attorneys, Bates and O'Steen, published a simple newspaper advertisement describing routine legal services at set fees, such as uncontested divorces, wills, and name changes.<sup>113</sup> The Arizona State Bar banned all such advertising on the grounds that this helped maintain a professional image for lawyers, and protected the public from unnecessary litigation or misleading communications.<sup>114</sup> The Court

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108. *See id.* r. 7.1–7.3.

109. *See id.* r. 3.5.

110. *See NAACP v. Button*, 371 U.S. 415, 428, 439 (1963) (holding that the First Amendment protects the "right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights" and observing that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); *Bhd of R.R. Trainmen v. Va. State Bar*, 337 U.S. 1, 8 (1964) (extending the holding of *Button* to legal advice and representation beyond the civil rights context); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221–22 (1967) (holding "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives . . . the right to hire attorneys . . . to assist . . . in the assertion of . . . legal rights"); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (observing that "meaningful access to the courts is a fundamental right within the protection of the First Amendment"); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001); Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 642–43 (2011).

111. 433 U.S. 350 (1977).

112. *Id.* at 358 (quoting *In re Bates*, 555 P.2d 640, 648 (Ariz. 1976) (Holohan, J., dissenting)).

113. *Id.* at 353–55.

114. *Id.* at 368, 372.

rejected the Bar's professionalism concerns and instead elevated the public's need for information. The Court suggested that the lack of advertising "reflect[ed] the profession's failure to reach out and serve the community."<sup>115</sup> The Court described its First Amendment analysis in language of competition and economic freedom:

Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.<sup>116</sup>

Thus the commercial speech analysis in *Bates* (and its progeny<sup>117</sup>) turns on similar factors as would an antitrust analysis, allowing the Court to achieve a pro-competitive result even where the state action doctrine otherwise exempts the economic restriction from scrutiny.<sup>118</sup> Despite the First Amendment's application in *Bates*, this constitutional argument has had less traction when concerned with economic constraints on who may practice law, as opposed to how law may be practiced. For example, lower courts have refused to find a First Amendment right to have an unlicensed

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115. *Id.* at 370.

116. *Id.* at 376–77 (internal quotation marks omitted).

117. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (applying First Amendment commercial speech protection to lawyer advertising); *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651–52 (1985) (holding that disciplinary rules could mandate disclosure regarding payment of costs in advertisement, but that First Amendment protected attorney so long as advertisement was truthful and nondeceptive); *Peel v. Att'y Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 100 (1990) (applying First Amendment commercial speech protection to lawyer advertising).

118. See, e.g., Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265, 286–87 (2000) ("The seminal commercial speech cases—*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* and *Bates*—turned on an analysis of the impact on consumers of banning advertising, just as would an antitrust analysis of an advertising ban. Indeed, commentators noted the identity of antitrust and first amendment analysis. Under either antitrust law or the first amendment, a restraint based on protection of the economic interests of any group, including professionals, would not stand.").

layperson represent an individual in court<sup>119</sup> or a right to have non-lawyers practice in partnership with lawyers.<sup>120</sup>

The outcome of *Bates* raises the question of whether the First Amendment should be used to reach anticompetitive activity that state action immunity would otherwise protect. If the answer is yes, that the Court will examine the competitive constraint as it did in *Bates*, then why not simply use antitrust law? One concern might be the sanctioning; public officials and regulatory volunteers might be less willing to engage in government service if they repeatedly face the threat of treble damages and attorney's fees as antitrust remedies.<sup>121</sup> States could, of course, opt to indemnify and/or defend against Sherman Act violations, an observation made by the Court in *North Carolina State Board of Dental Examiners v. FTC*.<sup>122</sup> Another concern is that professions are special, needing protection from competition in order to function as society and democracy

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119. See *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 478 (N.D. Tex. 1975) (citations omitted) ("The Plaintiffs have also attempted to couch their right to have unlicensed laymen represent them in Court in terms of the first amendment. Their argument is that the first amendment guarantees the freedom of association and right to petition their government for redress of grievances. An alliance between a defendant, or plaintiff for that matter, and an unlicensed layman for the purpose of litigation in Court is an association which has as its end the redress of grievances. Hence, the argument goes, the first amendment guarantees the right of the Plaintiffs to have unlicensed attorneys in Court. . . . What this Court is holding is that the Constitution of the United States, in particular the First and Sixth Amendments, does not grant to the Plaintiffs the right to have an unlicensed layman represent them in Court proceedings.").

120. See *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring) ("A State may forbid one without a license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought."); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992).

121. Indeed, Justice Scalia raised this concern in the context of the legal profession during oral argument in *North Carolina State Board of Dental Examiners*. Transcript of Oral Argument at 28–29, *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015) (No. 13-504); see also Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 5 (2005) (citing William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985)) (noting the problems associated with treble damages in other antitrust contexts such as predatory pricing). See generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

122. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. \_\_\_, 135 S. Ct. 1101, 1115 (2015) (citation omitted).

require.<sup>123</sup> If the answer is no, that in *Bates* the Court got it wrong<sup>124</sup> and that the First Amendment should not be used to undo competitive restraints where the state action doctrine would prevent the reach of federal antitrust law, then much of what has been established as protected commercial speech would be threatened.

*F. The Consequences of Substituting Commercial Speech Doctrine for Competition Law: Distortion and Arbitrary Review*

The concerns highlighted by capture theory continue to resurface via challenges on constitutional and competition grounds,<sup>125</sup> and capture theory reveals a critical disparity where cases involving the same competition concerns that motivated the *Bates* Court go unaddressed because a free speech issue is not involved. A divided opinion from the U.S. Supreme Court in *Hoover v. Ronwin*<sup>126</sup> applying the state action

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123. See discussion *supra* section I.C.1. *But see* *Hoover v. Ronwin*, 466 U.S. 558, 598–99 (1984) (Stevens, J., dissenting) (“In any event, there is true irony in the Court’s reliance on these concerns. In essence, the Court is suggesting that a special protective shield should be provided to lawyers because they—unlike bakers, engineers, or members of any other craft—may not have sufficient confidence in the ability of our legal system to identify and reject unmeritorious claims to be willing to assume the ordinary risks of litigation associated with the performance of civic responsibilities. I do not share the Court’s fear that the administration of bar examinations by court-appointed lawyers cannot survive the scrutiny associated with rather ordinary litigation that persons in most other walks of life are expected to endure. . . . The Court also no doubt believes that lawyers—or at least those leaders of the bar who are asked to serve as bar examiners—will always be faithful to their fiduciary responsibilities. Though I would agree that the presumption is indeed a strong one, nothing in the sweeping language of the Sherman Act justifies carving out rules for lawyers inapplicable to any other profession. In *Goldfarb* we specifically rejected such parochialism. Indeed, the argument that it is unwise or unnecessary to require the petitioners to comply with the Sherman Act is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.” (citation and internal punctuation omitted)).

124. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 778 (1993) (O’Connor, J., dissenting) (“I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. . . . In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker’s membership in a learned profession and therefore damaging to the profession and society at large.”).

125. See, e.g., Second Amended Complaint for Declaratory Judgment and Injunctive Relief at ¶ 35, *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep’ts, App. Div. of the Sup. Ct. of N.Y.*, 118 F. Supp. 3d 554 (S.D.N.Y. 2013) (No. 1:11-CV-3387-LAK) (“*Jacoby & Meyers* wishes to expand its operations, hire additional attorneys and staff, acquire new technology, and improve its physical offices and infrastructure to increase its ability to serve its existing clients and to attract and retain new clients and qualified attorneys. Notably, *Jacoby & Meyers*’ business plans principally concern expansion within communities in which working-class, blue-collar and immigrant families reside.”).

126. 466 U.S. 558 (1984); see also *Edlin & Haw*, *supra* note 67, at 1141 (arguing that *Hass v. Or. State Bar*, 883 F.2d 1453 (9th Cir. 1989), was wrongly decided because the court “analogize[d] licensing boards to municipalities because boards are ‘public,’ citing open meetings, public-minded

doctrine to admission to practice requirements is one example of this disparity. Justice Stevens, joined by Justices Blackmun and White, offered in his dissent a lengthy discussion about the concerns of capture associated with regulation that is enacted, enforced, and reviewed by members of the regulated profession.

In *Hoover v. Ronwin*, Edward Ronwin failed the Arizona bar examination and then argued that Arizona Supreme Court's Committee on Examinations and Admissions was "artificially reducing the numbers of competing attorneys in the State of Arizona" by setting the grading scale in accordance with the number of attorneys that the Committee deemed appropriate "rather than with reference to some 'suitable' level of competence."<sup>127</sup> The majority summarily dismissed his argument, explaining as follows:

Our holding is derived directly from the reasoning of *Parker* and *Bates*. Those cases unmistakably hold that, where the action complained of—here the failure to admit Ronwin to the Bar—was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action.<sup>128</sup>

The Court did not conduct a *Bates*-type analysis because Ronwin did not present a First Amendment challenge.

Justices Stevens, Blackmun, and White, dissenting, questioned the majority's blind deference to the state action doctrine: "When [state] . . . authority is delegated to those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit."<sup>129</sup> Recognizing the concern of capture, they observed that "[a] potential conflict arises, however, whenever government delegates licensing power to private parties whose economic

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mandates, and an affiliation with the state. . . [and] fail[ed] to recognize that these features cannot meaningfully check self-dealing in the way that elections and public visibility check municipal officers from self-dealing at the expense of their constituents" (footnote omitted).

127. *Hoover*, 466 U.S. at 565.

128. *Id.* at 579–80. The majority characterized the admission denial as an act of the Arizona Supreme Court, rather than a state agency. *See id.* at 588 (Stevens, J., dissenting) ("The majority's conclusion that the challenged action was that of the Arizona Supreme Court is, however, plainly wrong. Respondent alleged that the decision to place an artificial limit on the number of lawyers was made by petitioners—not by the State Supreme Court."). The dissent found significant the fact that the admission decision was made by a body with authority delegated by the court. *See id.* at 590 ("The fact that petitioners are part of a state agency under the direction of the sovereign is insufficient to cloak them in the sovereign's immunity; that much was also decided in *Goldfarb*."). Capture theory would question the anticompetitive effect of the decision whether by the court or a delegated authority.

129. *Id.* at 585.

interests may be served by limiting the number of competitors who may engage in a particular trade.”<sup>130</sup>

The Court’s expansion of the First Amendment to cover commercial speech over the years has resulted in what scholars call “an eclectic approach,” with a “diversity of speech” warranting constitutional status leading to a complexity that “[j]udges and commentators have been understandably reluctant to admit.”<sup>131</sup> Not only is the Court’s use of free speech principles to reach free competition complex, it is controversial and arguably unfounded. Other commentators observe that while, “disallowing state interference with commercial advertising serves other values that merit careful legislative consideration—aggregate economic efficiency and consumer opportunity to maximize utility in a free market—these values are not appropriate for judicial vindication under the first amendment.”<sup>132</sup>

Thus, rather than manipulate the First Amendment, courts might return to antitrust law—the body of law designed to further consumer interests in a free market and revisit the theoretical underpinnings supporting the state action exemption. Capture theory “offers a means for the Court to achieve the results of the commercial speech cases without embedding those results within the antimajoritarianism of the first amendment.”<sup>133</sup> As such, “those who criticize recent commercial speech cases for employing constitutional efficiency analysis should welcome capture preemption under the Sherman Act.”<sup>134</sup>

Relying on the First Amendment to assess economic constraints creates a haphazard, arbitrary system of judicial review. While a number of scholars propose antitrust solutions to address the concerns associated

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130. *Id.* at 584.

131. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1282 (1984) (observing that the “exploration of the relationship of the first amendment to economic regulation yields a valuable perspective on first amendment law”); *id.* at 1251 (concluding that the Supreme Court applies a “general balancing methodology or an eclectic approach” to the First Amendment).

132. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5–6 (1979) (“In our view, the first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of commercial speech. Thus the justifications supporting judicial abrogation of political choice to uphold the guarantees of the first amendment do not extend to commercial speech.”).

133. Wiley, *Capture Theory*, *supra* note 38, at 779.

134. *Id.* at 779 n.307 (claiming that “the Sherman Act is a preferable substitute for the first amendment if one believes that commercial speech cases place efficiency reasoning in an illegitimate constitutional context”).

with regulatory capture for the professions generally, but none recognizes the special situation of lawyer regulation.<sup>135</sup> Specific to the legal profession's inherent regulatory bias—but outside of the ambit of antitrust law—recommendations have been made to place regulatory authority in the legislature rather than the courts,<sup>136</sup> and to increase education of the judiciary and the profession about the implications of regulatory capture.<sup>137</sup> These recommendations, however, have proven unlikely to result in any meaningful change.

A better solution is to calibrate antitrust immunity for state action according to the level of disinterest of the state actor. Part II explains the contours of the state action doctrine and lays the groundwork for applying

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135. One scholar would remove from state action protection any regulations enacted by regulatory bodies comprised of members who have financial interests at stake in the economic constraint at issue. See Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672 (1991) (“[A]ntitrust stands for the . . . limited proposition that those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.”). Others “would look to the actual accountability of the [regulatory body] to determine when there is an appreciable risk that the challenged conduct may be the product of parties pursuing their own interests rather than state policy” and “would find that such risk is present whenever the entity consists in whole or in part of market participants and certainly where the entity is dominated by market participants.” Edlin & Haw, *supra* note 67, at 1142 (citations and internal punctuation omitted) (building upon the FTC’s argument in *North Carolina State Board of Dental Examiners*). In other words, they would apply both *Midcal* prongs to “all practitioner-dominated boards . . . regardless of the appointment process.” *Id.* at 1144. They recognize the significant consequences of this position, however: “Most licensing boards would fail the supervision prong if subjected to it; requiring state supervision for licensing boards that claim state action immunity creates the potential for sweeping changes to regulations affecting over a third of the nation’s workforce. *Id.* Another proposal would emphasize “permissive certification and mandatory registration.” Gellhorn, *supra* note 54, at 26 (“Engaging in the occupation without a license, or obtaining it by misrepresentation, would be made a serious offense, in order to stimulate prompt and accurate registration.”); see also Page, *supra* note 21, at 660 (advocating a “clear-statement approach” to resolve “the problem of capture”). Of course, it would also be possible to simply strip the professions of the common-law *Parker* exemption entirely, though, as a practical matter, this is unlikely to occur given the degree of entrenchment the state action doctrine currently enjoys.

136. See generally BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2011). This is similar to Gellhorn’s proposal for a regulatory body “not linked with an occupational group . . . created to receive complaints against licensees, investigate them and, if objectionable conduct is found, initiate proceedings looking toward revocation, suspension, or other appropriate discipline by a court or a special tribunal.” Gellhorn, *supra* note 54, at 26–27 (“A plan of this nature would, I believe, end the present abuse of licensure that services selfish interests by constricting occupational freedom.”).

137. See, e.g., Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 499 (2002) (observing that the legal “profession has been willfully blind to the danger of over identification with the business of lawyering. The institutions have been captured, but they remain unaware of their lack of neutrality. The solution to capture is education. Capture may never be eliminated; however, a judiciary that is aware of its biases can control them”).

a limited antitrust review to professional conduct rules created by lawyer-judges for the legal profession.

## II. STATE ACTION AND ANTITRUST IMMUNITY

Federal antitrust laws have been called “the Magna Carta of free enterprise” and described “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>138</sup> Their origin dates back to 1890,<sup>139</sup> when Congress passed the Sherman Act through the purview of the Commerce Clause to prevent certain business relationships, including cartels and monopolies, from seizing control of too much of the economy.<sup>140</sup> The Sherman Act is meant to be:

[A] comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>141</sup>

The law provides for criminal sanctions and treble damages as well as attorney fees for a successful challenge, which may be brought by the U.S. Department of Justice, the FTC, or private parties.<sup>142</sup>

Two different standards govern potential antitrust violations. Some activities like price-fixing or group boycotts are deemed illegal *per se*; other endeavors, such as monopolistic behavior, are scrutinized under the rule-of-reason, i.e., whether their purpose, operation, and effect are an unreasonable restraint on trade. To determine whether federal antitrust law will preempt a state law constraining competition, courts first ask

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138. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980) (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972)).

139. *See* Sherman Antitrust Act, ch. 647, §§ 1–7, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)). In June of 1890, the United States Congress passed the Sherman Antitrust Act. *Id.* Senator John Sherman (R-OH) authored the Act, which passed the Senate 51-1, 21 CONG. REC. 3153 (1890), and the House of Representatives 242-0, 21 CONG. REC. 6314 (1890).

140. 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman). Section I of the Sherman Act prohibits contracts or conspiracies in restraint of trade. 15 U.S.C. § 1. Section II prevents monopolies or attempts to monopolize. *Id.* § 2.

141. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

142. *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890). The Clayton Act, enacted in 1914, extended the right to sue under the antitrust laws to the Federal Trade Commission. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as 15 U.S.C. §§ 12–27).

whether the state law “mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.”<sup>143</sup> If so, the court will then determine whether the state law nonetheless is protected from federal preemption.<sup>144</sup>

A. *Anticompetitive State Regulation Typically is Exempt from Federal Antitrust Review*

The command of federal antitrust law does not apply to state sovereigns directly engaged in regulatory action because of the judge-made state action doctrine,<sup>145</sup> first articulated by the Supreme Court in *Parker v. Brown*. “The doctrine rests on the notion that, although Congress might have the power to displace certain forms of state regulation, it did not wish to do so,”<sup>146</sup> and is likely grounded in federalism and state sovereignty concerns although the legislative history is silent.<sup>147</sup> Indeed, the legislative history “contains no reference to the applicability of the act to those areas likely to be exempt . . . such as law, medicine, or other ‘learned professions.’”<sup>148</sup> To be sure, state governments must have freedom to legislate in ways where wealth is distributed by regulatory structures rather than free competition. Taken to the extreme, were the Sherman Act applied broadly, states would largely lose much of their authority.<sup>149</sup>

The state action doctrine’s application has inspired a well-developed (albeit confusing<sup>150</sup>) body of literature, yet no final consensus has emerged as to the rationale for exempting professional associations from antitrust law or to the methodology for applying any such exemption. This is

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143. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

144. *Id.*

145. See SECTION OF ANTITRUST LAW, AM. BAR ASS’N, STATE ACTION PRACTICE MANUAL 1 (2000).

146. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 215a, at 339 (3d ed. 2006).

147. See Spitzer, *supra* note 47, at 1293, 1295 (“The legislative history of the Sherman Act provides no guidance for creating a state action doctrine.”)

148. Note, *The Applicability of the Sherman Act to Legal Practice and Other “Non-Commercial” Activities*, 82 YALE L.J. 313, 321 (1972).

149. See David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning, and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 356–57 (1994) (“If the Sherman Act, with its national mandate for competitive markets, were applied to all state regulations it would pose a serious threat to the states’ very existence as meaningful government entities.”).

150. See, e.g., Elhauge, *supra* note 135, at 674 (“Although the series of cases establishing this . . . multi-tier immunity has settled some of the many doctrinal issues raised by state action immunity, the doctrine has continued to spawn more confusion and litigation than certainty.”).

especially true for the legal profession which enjoys a unique level of self-regulation. While a handful of commentators have addressed the antitrust implications of occupational licensing and industry self-regulation in a variety of areas,<sup>151</sup> none has fully explored the concerns about competition in the arena of lawyer regulation.<sup>152</sup> This lack of attention to the legal profession's exceptional regulatory structure makes it a particularly good case study for evaluating when, if ever, antitrust immunity ought to be limited where the sovereign itself holds membership in the regulated group.

This is not to say that states should be allowed to rubberstamp privately-driven economic constraints absent some sort of governmental justification. As commentators have noted, “[t]his is certainly not what the Court (or anyone else for that matter) has in mind when it speaks of the states as sovereign regulators, and allowing liability for such open defiance does not threaten the proper role of states in the federal system.”<sup>153</sup> On one hand, the Court has said that “[t]he reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act.”<sup>154</sup> In other words, the state action exemption does not apply “only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of the ‘state acting as a sovereign.’”<sup>155</sup> On the other hand, the Court also has said:

The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, ‘a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .’<sup>156</sup>

In theory, then, the point of removing so-called “state action” from the ambit of antitrust regulation is to respect governmental economic decisions where limits on competition are required to achieve some other

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151. See, e.g., Gellhorn, *supra* note 54, at 11; Edlin & Haw, *supra* note 67, at 1154–56; Elhauge, *supra* note 135, at 725.

152. Their work, discussed below in Part III, is helpful background for the inquiry here, though their conclusions fail to fully embrace the exceptional situation faced by the legal profession, where a sovereign, i.e., lawyer-judges acting as legislators, craft the regulations regarding who may enter profession and how the profession may be practiced.

153. See McGowan & Lemley, *supra* note 149, at 357.

154. *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984).

155. *Id.*

156. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (citing *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

public good (though again, under modern doctrine, a state need not demonstrate this to enjoy immunity—that the state acts is thought to be sufficient, without examination into motive<sup>157</sup>).

What constitutes state action for purposes of antitrust exemption, however, is not entirely clear, unless the legislature, executive, or judiciary (acting legislatively) has explicitly enacted the regulation.<sup>158</sup> When the state delegates its regulatory authority to an agency or association, courts struggle to apply the exemption, especially where the body is made up of private participants in the regulated group.<sup>159</sup> For decades it was widely assumed that federal antitrust law did not even apply to state regulation of the learned professions like physicians and lawyers.<sup>160</sup> Not until the 1970s did this view change, when the Court held that a minimum fee schedule promulgated by a county bar association violated the Act, as discussed above in section I.D.<sup>161</sup>

### B. *Private Interests May Also Be Exempt, If Directed by the State*

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*<sup>162</sup> supplies the test that courts currently apply when private actors engage in anti-competitive behavior at the direction of the state: they will be exempt if the challenged behavior is “clearly articulated and affirmatively expressed as state policy” and the policy is “actively

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157. See WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK 810 (2013-2014 ed. 2013) (“[A]ttempts were made to carve out special immunity exceptions where the state or local government officials approving the conduct allegedly acted in ‘bad faith’ or for ‘corrupt motives’ or where the officials ‘conspired’ to serve the interests of private parties rather than the public interest. These attempts were soundly rejected by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*”).

158. See, e.g., *Hoover*, 466 U.S. at 569 (“When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of ‘clear articulation’ and ‘active supervision.’”); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 107 F.3d 1026, 1036 (3d Cir. 1997) (stating where “the states are sovereign in imposing the [challenged economic constraint], the clear articulation and active supervision requirements . . . are inapplicable”).

159. See John Cirace, *An Economic Analysis of the “State-Municipal Action” Antitrust Cases*, 61 TEX. L. REV. 481, 484 (1982) (“[N]either the courts nor myriad commentators have been able to dispel the confusion and conflict between federal antitrust law and the several rationales for allowing states and their subdivisions to displace competition.”).

160. See WOLFRAM, *supra* note 17, at 38 (“For almost a century after the federal antitrust laws were first enacted, it was widely assumed that lawyers were exempt from their reach . . . . Anyone adventuresome enough to speculate about the matter would probably have been unable to convince many lawyers that the Supreme Court would apply the antitrust laws to them.”).

161. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–92 (1975).

162. 445 U.S. 97 (1980).

supervised” by the state.<sup>163</sup> The approaches historically adopted by various jurisdictions for applying the *Midcal* test fall loosely into three categories: (1) the Second, Fifth, and Tenth Circuits look to a “cursory approach” essentially eliminating the active supervision prong of *Midcal*;<sup>164</sup> (2) the First, Seventh, Ninth, and Eleventh Circuits use an “intermediate approach;”<sup>165</sup> and (3) the Fourth Circuit follows the FTC’s view in utilizing a “categorical approach,” applying both prongs of *Midcal* vigorously.<sup>166</sup> Private parties are exempt from antitrust liability when they endeavor to influence the adoption or enforcement of anticompetitive laws, a protection known as the *Noerr-Pennington* doctrine.<sup>167</sup>

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163. *Id.* at 105.

164. *See Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033 (5th Cir. 1998) (Louisiana’s state board of Certified Public Accountants (CPAs) prohibited registered CPAs from “engaging in the practice of . . . ‘incompatible professions’” like selling securities and other actions. *Id.* at 1034. The Court held that “[s]o long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority.” *Id.* at 1041. In order for the CPA Board to take advantage of state action protection, the defendants had to “simply demonstrate that they acted ‘pursuant to state policy to displace competition with regulation or monopoly public service’ that was ‘clearly articulated and affirmatively expressed.’” *Id.* at 1042.); *Porter Testing Lab. v. Bd. of Regents for Okla. Agric. & Mech. Colls.*, 993 F.2d 768 (10th Cir. 1993); *Cine 42nd St. Theatre Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (holding that the development corporation was presumed to be public-interested because it was “by statute a political subdivision of the state”).

165. *See Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293 (11th Cir. 1998); *Hass v. Or. State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Fuchs v. Rural Elec. Convenience Coop., Inc.*, 858 F.2d 1210, 1217–18 (7th Cir. 1988) (“We hold that when an entity charged with an antitrust violation is neither a municipality nor a state agency but does not have the attributes of a purely private actor, it may be held immune as a state actor without the active scrutiny of market conditions which is a necessary prerequisite for holding a private entity immune.”); *FTC v. Monahan*, 832 F.2d 688 (1st Cir. 1987); *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9 (1st Cir. 1987).

166. *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 360 (4th Cir. 2013).

167. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”); *see E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) (“[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”). The rationale for this immunity is based upon the First Amendment’s protection of political speech. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (scope of the protection depends on the “source, context, and nature of the competitive restraint at issue”); *McGowan & Lemley, supra* note 149, at 297 (“[A]t least with respect to requests directed at state legislators or those vested with state authority, the antitrust immunity doctrines are ‘complementary expressions of the principle that the antitrust laws regulate business, not politics; *Parker* protects the States’ acts of governing, and *Noerr* the citizens’ participation in government.” (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991))).

The U.S. Supreme Court most recently applied *Midcal* to restraints on competition by state-created professional regulatory bodies in a challenge by the FTC against the North Carolina State Board of Dental Examiners's practice of issuing cease-and-desist letters to non-dentists performing teeth-whitening services.<sup>168</sup> The FTC determined that the Board of Dental Examiners violated antitrust law in issuing the letters, finding that the Board acted as a group of private dentists rather than as a state actor, even though it was an arm of the state.<sup>169</sup> The Fourth Circuit agreed, applying the full *Midcal* test, noting 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* prongs."<sup>170</sup> The court found that the arrangement had no "active supervision" because the Board consisted of dentists, a dental hygienist, and a member elected by the state dental board.<sup>171</sup>

In a six-three decision, the Supreme Court affirmed the Fourth Circuit.<sup>172</sup> The majority assumed that the Board was a state agency and that its actions were taken pursuant to a clearly articulated and affirmatively expressed policy.<sup>173</sup> The decisive factor under *Parker* for state action immunity, however, was whether the sovereign is acting to implement its policies rather than being controlled by active market participants.<sup>174</sup> Justice Kennedy, writing for the majority, explained, "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade."<sup>175</sup> In other words, the Court found that the Board effectively operated as a private body because a "majority of the board's members are engaged in the active practice of the profession it regulates."<sup>176</sup>

Significantly, the Court declined to consider whether a similar limitation on antitrust immunity is warranted when the sovereign itself is a member of the profession it regulates. It did, however, indicate that

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168. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015).

169. See *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 368.

170. *Id.* (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227b, at 501 (3d ed. 2009)).

171. *Id.*

172. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1120.

173. *Id.* at 1110, 1121.

174. *Id.* at 1104.

175. *Id.* at 1114.

176. *Id.* at 1107.

promulgation of rules alone is not sufficient to constitute supervision. To be “actively supervised,” a politically accountable supervisor “must review the substance of the anticompetitive decision, not merely the procedures followed to product it,” “have the power to veto or modify particular decisions to ensure they accord with state policy,” and “may not itself be an active market participant.”<sup>177</sup> Moreover, in addition to these “constant requirements,” “the adequacy of supervision otherwise will depend on all the circumstances of a case.”<sup>178</sup>

Relatedly, the opinion in *North Carolina Dental Board* leaves open several questions relevant to this potential extension of the Court’s holding. First, what constitutes an “active market participant” in the regulated profession or “engaged in the active practice” of it?<sup>179</sup> Does this include retired members of the profession, or individuals trained in the profession who have moved on to other careers? Second, how do we define the relevant market? Third, how should we address intrinsic concerns beyond economic regulation, such as “procedural due process, official misconduct, and conflict of interest”?<sup>180</sup>

Ultimately, we do not yet know how the Court views regulation of competition when the sovereign itself, as members of the regulated profession, engages in the adoption, enforcement, and review of anticompetitive state action. This is true whether the relevant market and the meaning of active practice are defined narrowly or broadly.<sup>181</sup> For example, some might say that judges are not engaged in the “active practice”<sup>182</sup> of law; yet their membership in the legal profession and their essential role in the practice of law raise the same sorts of concerns underlying the majority opinion in *North Carolina Dental Board*. Moreover, many judges, especially at the state level, will return to private practice after a period of judicial service. Questions like these are likely

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177. *Id.* at 1116–17.

178. *Id.*

179. *Id.* at 1108, 1110.

180. Cirace, *supra* note 159, at 485 (“The use of a test with substantive elements in the narrow state action area does not necessarily indicate the appropriateness of a substantive test for economic regulation broad in impact or not displacing competition. State action cases, however, are not concerned exclusively with substantive issues. Questions of procedural due process, official misconduct, and conflict of interest are also inherent in these cases.” (citations omitted)).

181. The U.S. Department of Justice takes a fairly broad reading of this issue. See Statement of Interest on Behalf of the United States of America at 11 n.4, *TIKD Servs. LLC v. Fla. Bar*, No. 1:17-cv-24103 (S.D. Fl. Mar. 12, 2018), 2018 WL 3387406 (“Under *Dental Examiners*, state agency officials need only practice in the ‘occupation’ regulated by the agency in order to be considered active market participants. State officials need not be direct competitors of the plaintiff.”).

182. See *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1107.

to come up again given the uncertainty left by the Court's holding in *North Carolina Dental Board*, as noted by Justice Roberts in his dissent.<sup>183</sup> While some state bar associations proactively endeavored to reduce legal exposure by altering their practices, most did not.<sup>184</sup>

C. *Should the State Action Exemption Apply to Anticompetitive Restrictions Enacted by Members of the Regulated Group?*

The analysis undertaken here applies whether the anticompetitive regulatory actions are made by a body comprised of the regulated group's membership or directly by the sovereign itself. Though immunity for the state acting as a sovereign is, admittedly, a relatively well-settled principle in antitrust doctrine, I nevertheless question that assumption for the purposes of this Article. The sovereign ought not be wholly exempt from

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183. *See id.* at 1123 (Roberts, J., dissenting) (listing questions left by the majority opinion). Indeed, in the months following the Court's decision, two lawsuits soon followed. In June 2015, LegalZoom, an online provider of legal forms and lawyer referrals, sued the North Carolina State Bar for violating federal antitrust conspiracy laws, seeking an order requiring the State Bar to register LegalZoom's prepaid legal services plans so that they may be sold in North Carolina. *See* Complaint for Declaratory and Injunctive Relief at 21–22, *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111 (N.C. Super. Ct. Sept. 30, 2011), 2011 WL 8424700. This case ultimately settled, but the questions it raised still remain. *LegalZoom.com, Inc. v. N. C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015). The following month Express Lien, an online mechanics lien and construction payment platform, sued the Ohio State Bar Association alleging that the Bar violated antitrust law in “illegally and unreasonably restricting trade by accusing the [p]laintiff of the unauthorized practice of law.” Complaint at 4, *Express Lien, Inc. v. Cleveland Metro. Bar Ass’n*, No. 2:15-cv-02519 (E.D. La. July 9, 2015), 2015 WL 4295032. This case also settled, and Express Lien continues to operate in Ohio. *See* Order Dismissing Case, *Express Lien Inc. v. Cleveland Metro. Bar Ass’n*, No. 2:15-cv-02519 (E.D. La. Apr. 5, 2016), 2015 WL 4295032. Nevertheless, inevitably, courts will continue to be confronted with issues surrounding whether antitrust immunity should be limited when members of the regulated group promulgate competitive constraints. For example, as this Article goes to print, TIKD Services, LLC, a service matching individuals with parking tickets to lawyers via a mobile app, is pursuing an \$11.4 million antitrust suit against the Florida State Bar. Carolina Bolado, *DOJ Rebuts Fla. Bar’s Bid to Escape TIKD’s Antitrust Suit*, LAW360 (Mar. 12, 2018, 5:25 PM), <https://www.law360.com/articles/1021164/doj-rebuts-fla-bar-s-bid-to-escape-tikd-s-antitrust-suit> (last visited Sept. 1, 2018). On March 12, 2018, the U.S. Department of Justice filed a Statement of Interest in support of TIKD. Statement of Interest on Behalf of the United States of America, *supra* note 181.

184. For example, the Washington State Bar Association suspended the issuance of potentially anti-competitive advisory opinions. *See* Samson Habte, *Washington Bar Suspends Ethics Opinions, Cites Antitrust Fears*, BLOOMBERG BNA (Dec. 17, 2015), <https://www.bna.com/washington-bar-suspends-n57982065288/> [<https://perma.cc/UT96-WPUS>]. Similarly, though ultimately unsuccessful, the North Carolina State Bar proposed legislation that would have required the state attorney general to actively supervise any unauthorized practice of law actions that appeared to be anticompetitive. *See* S.B. 353, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015); Ronald L. Gibson, *An Update on Legislation and Litigation*, N.C. STATE BAR J., Summer 2015, at 5, 8.

federal competition law when the sovereign is regulating itself, given the inherent bias in this sort of arrangement.<sup>185</sup>

Consider the regulatory structure of the legal profession. When the judiciary regulates its own profession in anticompetitive ways, is it operating more like a governmental unit such as “a municipality, [where] there is little or no danger that it is involved in a *private* price-fixing arrangement”<sup>186</sup> or more like a “private party . . . [where] there is a real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State”?<sup>187</sup> Should the public be inherently suspicious of rules enacted by government officials who are members of the regulated profession, or should we give deference to them as insider experts in their field? Does it matter whether members of the protected group receive a financial benefit or other reward? If the officials are accountable to the public through elections, does this ameliorate concerns about self-interest? Are these the sorts of competition constraints deserving immunity from antitrust scrutiny under the state action doctrine? Or are these instances where the underlying principles supporting state action immunity—for example the disinterested public actor—are not present and thus should render the regulation subject to antitrust review? Part III responds to these questions.

Part III of this Article offers a new recommendation—a specialized antitrust review for regulations governing the practice of law to the extent they are controlled by lawyers or lawyer-judges, a conclusion that may follow for other professions as well.

### III. APPLYING ANTITRUST LAW TO LAWYER-JUDGE REGULATION OF THE LEGAL PROFESSION

Antitrust law is a desirable mechanism for review of professional regulations promulgated by state officials who belong to the regulated profession for at least two reasons. First, courts are vulnerable to the problems associated with capture as members of the profession they regulate. Second, the First Amendment is an imprecise tool for appropriately evaluating restrictions on competition. Relatedly, the free speech doctrine arguably has been over-extended to address the economics of competition causing unintended distortion in other areas of

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185. See generally BARTON, *supra* note 136; CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* (2011); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1 (1998).

186. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

187. *Id.*

First Amendment jurisprudence. How, then, should courts limit antitrust immunity in this context?

A. *A Proposal for Specialized Antitrust Review of Competitive Constraints Enacted by the Regulated Group*

Limiting antitrust immunity for judicial regulation of the legal profession involves a number of considerations. Do we apply federal antitrust law's standard per se and rule-of-reason tests or do we apply a modified antitrust review; for example, something similar to the "quick-look" analysis devised for collegiate athletics?<sup>188</sup> The latter option—a modified, consumer-based antitrust inquiry—likely works best. In short, federal antitrust law should preempt anticompetitive lawyer regulation if the rule "hurts consumers by impairing competition without solving some serious market problem in a way beneficial"<sup>189</sup> to the public or preserving an essential element of law practice.

Thus, a court first would identify whether or not a challenged regulation frustrates the competition goals of federal antitrust law.<sup>190</sup> Second, if so, the court would look to see if the sovereign regulator is also a member of the targeted profession. Third, assuming this is the case, the court next would inquire whether the regulation preserves an essential element of professional practice—e.g., the advice-giving and advocacy roles of a lawyer, such as the rule governing the duty of confidentiality. Fourth, the court, as a last step, would evaluate whether the regulation, even if anticompetitive, nevertheless benefits the consumer. If not, the regulation ought to be struck down. This consumer-driven focus mirrors the U.S. Supreme Court's articulated reasoning when it turned to the First Amendment to strike down the advertising ban in *Bates*.

Under a test like this, *Hoover v. Ronwin* would have come out as Justice Stevens advocated in his dissent,<sup>191</sup> with Mr. Ronwin receiving his day in

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188. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100–01, 109, 117 (1984) (proposing a middle ground approach between per se and the rule-of-reason called the "quick-look" analysis to be used when "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement" and where the restraint typically would be deemed illegal per se but "a certain degree of cooperation is necessary"); see also *Goldfarb vs. Va. State Bar*, 421 U.S. 773, 788 n.17 (1975) (observing that the "public service" aspect of a competitive constraint "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently" (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978))).

189. Wiley, *Capture Theory: Reply to Professors Page and Spitzer*, *supra* note 43, at 1336.

190. The *Bates* Court said as much, albeit grounded in the language of free speech. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363–65 (1977).

191. *Hoover v. Ronwin*, 466 U.S. 558, 587–88, (1984) (Stevens, J., dissenting) (observing that

court to prove whether the Arizona Supreme Court and bar authorities had acted in the anticompetitive ways he alleged. Artificially capping the number of competent lawyers admitted to practice in order to reduce competition and maintain artificially high prices would, if proven, harm consumers without resolving a market problem to the public's benefit or preserving a distinct aspect of the practice of law.

By contrast, one might argue that American Bar Association Model Rule of Professional Conduct 1.6<sup>192</sup> governing confidentiality (which has been adopted in most jurisdictions by state judiciaries) suppresses competition by constraining the information an attorney may share about details related to client matters. Perhaps if attorneys could use information about pending cases as a marketing tool, more competition would exist among legal service providers.<sup>193</sup> But this rule protects a critical element of the practice of law—the confidentiality an attorney owes to a client during and after the representation and, as such, would not be invalidated under the antitrust review proposed here.

Were courts to adopt the specialized antitrust review proposed here, a number of questions remain. For example, who should assess the remedy? Is it appropriate for lawyer-judges to supply the antidote to the very anticompetitive lawyer regulations they themselves tailor? As a matter of due process, perhaps federal jurisdiction should extend to challenges involving state lawyer conduct rules to avoid having those who adopt the rules determine their legality. What sort of remedy is best suited—the Sherman Act's automatic treble damages or injunctive relief or a combination of both? I leave these questions for another day but acknowledge that their resolution will be required should federal courts begin to apply antitrust law more robustly to professional regulation as contemplated here. Section III.B offers some preliminary insights on the consumer's perspective about how best to answer these questions.

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while it may “seem highly improbable that members of the profession entrusted by the State Supreme Court with a public obligation to administer an examination system that will measure applicants’ competence would betray that trust, and secretly subvert that system to serve their private ends[;] [n]evertheless, the probability that respondent will not prevail at trial is no justification for dismissing the complaint”).

192. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2014).

193. Such a challenge on antitrust grounds is not entirely unlikely. See, e.g., *Hunter v. Va. State Bar*, 786 F. Supp. 2d 1107, 1113 (E.D. Va. 2011) (holding on First Amendment grounds that attorney could blog about successful representations including client names notwithstanding Rule 1.6 confidentiality protections).

B. *The Consumer Law Market as a Case Study*

Does it matter whether the legal profession suffers from capture in regulating itself? In the absence of the regulatory reform advocated for here, the question is difficult to answer. Yet the plight for most Americans in need of legal services cannot be ignored. How might lawyer-judge-made professional regulations matter for individual consumers of legal services?

The consumer law market—i.e. those individuals who do not qualify for legal aid and are unwilling or unable to pay for an attorney who charges three-figures-an-hour for multiple hours<sup>194</sup>—has long been denied affordable, accessible, widely-adopted legal services. According to some estimates, this is as much as 80% or more of the American population.<sup>195</sup> Every decade going back at least to University of Chicago Law Professor Karl Llewellyn’s call in the 1930s for lawyers to “find[ ] the customer who

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194. This definition of the consumer law market is similar to that of “middle-classes” as articulated by George Harris and Derek Foran: “those individuals and households who are ineligible for publicly supported legal services but have not yet accumulated capital sufficient to sustain a comfortable lifestyle without maintaining their current income.” George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 *FORDHAM. L. REV.* 775, 789 (2001) (footnotes omitted). This encompasses most of the American public.

195. See generally DEBORAH L. RHODE, *ACCESS TO JUSTICE 3* (2004) [hereinafter RHODE, *ACCESS TO JUSTICE*] (“According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 *WIS. L. REV.* 101 (2013); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 *INT’L REV. L. & ECON.* 43, 43 (2013) [hereinafter Hadfield, *The Cost of Law*] (“The ordinary family obtains no legal help or advice with legal problems, muddling alone through the crises of job loss, divorce, bankruptcy, immigration challenges, access to services and benefits, injuries, and conflicts with neighbors or schools or health-care providers or local officials. We live in a law-thick world that people are left to navigate largely in the dark.”); Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in *MIDDLE INCOME ACCESS TO JUSTICE* (Michael Trebilcock et al. eds., 2012); SANDEFUR, *ACCESSING JUSTICE*, *supra* note 3; REBECCA L. SANDEFUR & AARON C. SMYTH, *AM. BAR FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT* (2011), [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf) [https://perma.cc/JL6R-BAFY]; D. MICHAEL DALE, *A.L. BURRUS INST. OF PUB. SERV. & RESEARCH, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA 27* (2009), [https://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/downloads/georgia\\_legal\\_needs\\_study.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/georgia_legal_needs_study.authcheckdam.pdf) [https://perma.cc/A76Y-NJGF]; D. MICHAEL DALE, *LEGAL NEEDS OF LOW INCOME HOUSEHOLDS IN MONTANA 5* (2005); DENISE R. JOHNSON ET AL., *COMM. ON EQUAL ACCESS TO LEGAL SERVS., REPORT ON INVESTIGATION OF NEED AND ASSESSMENT OF RESOURCES 7* (2001).

does not know he wants it and *mak[e]* him want it,”<sup>196</sup> members of the profession have bemoaned the plight of the average American who likely does not even recognize that she has a problem with a legal solution, let alone the requisite financial or informational resources to secure legal assistance. Yet, no concrete regulatory reform has occurred over the years in an effort to improve the competitive conditions for the consumer law market. This failure is unlikely to self-correct absent fundamental market restructuring.

Why has the American legal profession continued to ignore the needs of the middle-classes over the past century? Several reasons exist. First, the middle class lacks the sympathy of the poor.<sup>197</sup> Second, those attempting to provide low-cost legal services on a mass scale struggle to build an economically-sustainable business model.<sup>198</sup> Third, legal education’s priority has always been preparation for entry into mid- and large-sized law practice and, even with the modern emphasis on clinical training, largely omits any meaningful training on service to the consumer law market.

The problem is not one of demand—millions need legal help.<sup>199</sup> The problem is not one of supply—thousands of attorneys lost their jobs or struggle to find their first in the twenty-first century’s upside-down legal economy.<sup>200</sup> The problem rests in asymmetrical information coupled with high costs because the existing regulatory structure suppresses

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196. K. N. Llewellyn, *The Bar’s Troubles, and Poulitices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 115 (1938) (emphasis in original) (“[S]pecialized work, mass-production, cheapened production, advertising and *selling*—finding the customer who does not know he wants it, and *making* him want it: these are the characteristics of the age. Not, yet, of the Bar.” (emphasis in original)); see also Elliott E. Cheatham, *A Lawyer when Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973, 973 (1963) (“The wide gap between the need and its satisfaction by the bar has been indicated by numerous studies.”); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 133 (2010) (“[T]he bulk of civil legal services, and especially ex ante advisory services, are ultimately provided to corporations rather than ordinary folks.”); Barbara A. Stein, *Legal Services and the Middle Class*, 53 N.D. L. REV. 573, 580 (1977) (“[C]onsumer surveys demonstrate that the economic suffering of attorneys derives not from a scarcity of need on the part of the public, but from insufficient fulfillment of that need.”).

197. See generally Cheatham, *supra* note 196.

198. See RHODE, ACCESS TO JUSTICE, *supra* note 195, at 3 (providing a detailed overview of the lack of legal services for poor and moderate-income individuals and proposing reforms); Susan Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 722–23 (2001).

199. See Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1286 (2013).

200. *Id.* at 1284 (“The pervasive need for legal services is not because lawyers are unavailable; in fact, law schools are graduating new attorneys at unprecedented rates, and thousands of licensed, experienced attorneys are unemployed/underemployed.” (citations omitted)).

competition and maintains artificially high rates. Making information about law available through pro bono efforts and law-related education, while laudable to be sure, has not been a sufficient solution. One of the oft-cited arguments against liberalizing lawyer regulation is the speculation that non-lawyer legal services are dangerous to the public, and yet non-lawyer services are precisely what consumers demand.<sup>201</sup>

Given the legal profession's historic treatment of the consumer law market, one might be skeptical that meaningful legal representation will ever be uniformly available to the mass public. Is it possible to commoditize the legally-trained mind in a way where uniquely tailored legal advice can be delivered through an economically-sustainable model at a mass level? On the one hand, perhaps with the advent of modern computer and mobile technology coupled with the potential for artificial intelligence we now, finally, can harness cost-effective tools to perform tasks that previously took a human attorney many hours to complete. On the other hand, the profession witnessed similar technological revolutions, for example the typewriter at the turn of the century,<sup>202</sup> and these innovations did little to alleviate the persistent consumer legal need.

What might a vibrant consumer law market look like? Consider this proposal from nearly a century ago:

A group of capable young lawyers, on a salary and profit-sharing basis under mature business and legal direction, could set a precedent in specialized, low cost, large scale office organization. Coupled with group publicity, such an experiment would be likely to open up quickly considerable new business, and a method of handling it.<sup>203</sup>

A significant barrier to this 1930s proposal for legal services in a mass retail setting—considered a radical innovation then and still now—is a lack of financial options for lawyers to invest in technology due to

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201. See, e.g., Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1171 (2011) (“[The] traditional market for legal services is breaking down as lawyers lose their monopoly over law-related services and must compete with alternative providers of similar services.”).

202. See, e.g., Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 163–65 (1999) (noting the refusal of lawyers at prominent law firms such as Cravath, Swain & Moore and Sullivan & Cromwell to adopt use of the telephone); Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1853 (2008); Michael Simkovic, *The Economic Value of a Law Degree* 36 (Harv. L. Sch. Program on the Legal Profession, Paper No. 2013-6, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250585](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585) [https://perma.cc/53HA-B6JU] (“Predictions of structural change in the legal industry date back at least to the invention of the typewriter.” (citations omitted)).

203. Love et al., *supra* note 2, at 671.

anticompetitive lawyer regulation. Calls for reform to enable Internet and technology-driven legal services for the consumer law market extend over a decade, yet regulators have voluntarily done little to facilitate competition.<sup>204</sup> And it appears unlikely that any meaningful change will come absent external force.<sup>205</sup>

To realize the benefits of modern technology and design for the consumer law market, the legal profession must create a space for innovation to occur. Innovation requires ideas, competition, and capital,<sup>206</sup> all of which the existing regulatory structure for American law practice restricts because of the ban on non-lawyer ownership and investment as well as geographic practice restrictions.<sup>207</sup> Innovation also requires input

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204. See, e.g., Harris & Foran, *supra* note 194, at 805–06 (“Investments in technology by corporate-backed legal service providers would also allow for faster, more efficient, and more affordable service to those consumers once the connection was made. Routine questions could be answered, and routine services provided, largely through software technology, and consumers with more individualized needs could be identified through the same technology. The technology is available, the need is established, and the middle classes are on-line. What is missing are properly capitalized service providers willing to make the necessary investment.”). The ABA has responded to the impact of technology merely by incorporating an obligation to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” into the explanatory comments in Model Rule 1.1. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (AM. BAR. ASS’N 2014).

205. See Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 1 (2012) (suggesting that, if given the opportunity, the U.S. Supreme Court could address the issue of non-lawyer ownership and investment much in the same way it did with the blanket ban on lawyer advertising in *Bates v. State Bar of Arizona*); Ted Schneyer, “Professionalism” as Pathology: The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 40 FORDHAM URB. L.J. 75, 137 (2012) (“I was disappointed that the 20/20 Commission decided not to recommend our proposal for adoption by the ABA House of Delegates . . . [N]o relaxation of the ban on nonlawyer ownership of law firms by the ABA or state supreme courts seems likely in the short term—unless, of course, the ban is struck down in litigation.”).

206. See ROBERT D. COOTER & HANS-BERND SCHÄFER, SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS 120 (2012) (“To produce innovations, money and ideas must come together like the rings in Solomon’s knot.”); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 132–33 (1982) (“The impossibility of any individual or small group conceiving of all the possibilities, let alone evaluating their merits, is the great argument against central governmental planning and against arrangements such as professional monopolies that limit the possibilities of experimentation. On the other side, the great argument for the market is its tolerance of diversity; its ability to utilize a wide range of special knowledge and capacity. It renders special groups impotent to prevent experimentation and permits the customers and not the producers to decide what will serve the customers best.”).

207. Hadfield, *Legal Barriers to Innovation*, *supra* note 30, at 1723 (“Innovation is not merely the discovery of new ideas; it is the scaling up of those ideas into implementable organizations, systems, products, equipment, and processes that generate economic value. Professional regulation of legal markets significantly restricts the capacity for scaling up new legal ideas by limiting the potential to exploit economies of scale and scope.”); Kobayashi & Ribstein, *supra* note 201, at 1218 (“[M]any potential legal information innovations that are constrained by licensing laws [which] shows how the rise of the legal information market intensifies arguments for reexamining lawyer licensing laws.”).

and experimentation beyond the members of the profession itself. Collaborative partnerships with non-lawyers are stifled by anticompetitive rules prohibiting multi-disciplinary practice.

To fully (or even partially<sup>208</sup>) serve the unmet needs of the consumer law market, lawyers “should be free to organize firms to pursue business opportunities as they see fit and to select a form of governance from a menu of legal alternatives.”<sup>209</sup> This is a fundamental principle of organizational liberty and “[b]y removing prohibitions and allowing choice over organizational forms, economic liberty releases the energies of entrepreneurs and sends innovation on its creative, unpredictable path.”<sup>210</sup> Other scholars have documented the economic inefficiencies of lawyer regulation and lack of competition.<sup>211</sup> Their work provides further support for antitrust review of court-made lawyer regulation.

## CONCLUSION

When members of a profession, acting as the state, regulate their profession, the foundational assumptions underlying state action antitrust immunity become compromised. That is especially true in the case of lawyer-judge regulation. The delegating authority, the enactment/enforcement power, and the body reviewing constitutional challenges to the regulation are all members of the legal profession, whether lawyers or judges. To challenge the regulations, the case must be pled to lawyers or lawyer-judges, often the very judicial body responsible for enacting the rules in the first place. Even where these officials are subject to some measure of public accountability through elections or an appointment process, the fact remains that they are members of the very profession subject to the regulations they create and administer.

It is true that the justificatory values of competition within the profession may be partially vindicated via the First Amendment. Yet, substituting the constitution for antitrust leaves an arbitrary gap in review, where anticompetitive regulations not involving speech endure, even if harmful to consumers. While the special duties of professionals, such as lawyers, necessitate a different sort of test rather than that applied when private actors engage in anticompetitive activity, this does not mean the

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208. It may be that even with liberalization of the organizational/distribution rules what ails the consumer law market will not be fully cured; but there is at least a portion of the latent market that will be reached.

209. COOTER & SCHÄFER, *supra* note 206, at 136 (emphasis omitted).

210. *Id.*

211. See generally WINSTON, CRANDALL & MAHESHRI, *supra* note 185; Hadfield, *Legal Barriers to Innovation*, *supra* note 30; Hadfield, *The Cost of Law*, *supra* note 195, at 43; Hazard, Pearce & Stempel, *supra* note 55.

professions should escape all review under the cover of state action immunity. Rather, this Article calls for limiting antitrust immunity when members of the regulated profession, acting as the state, design rules that impair competition without curing a market problem to the public's benefit or preserving an essential element of professional practice. Doing so promises to democratize access to legal services for the American public.