Qualified (Immunity) for Licensing Board Service?

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INTRODUCTION

State licensing boards are state-empowered entities that regulate myriad professions, ranging from the mundane (law) to the mystical (fortune telling).[1] They control who can join, how the profession operates, and how their members are disciplined.[2] With such power, and the increasing prevalence of licensing boards,[3] the question arises: Who regulates these regulators? This is an especially important question because many state licensing boards are composed of active market participants;[4] granting regulatory power to the same group being regulated raises the concern that the licensing board will act like a cartel—a group of competitors agreeing to limit competition.[5] Although states may have important reasons, such as expertise,[6] for delegating regulatory

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1 See Aaron Edlin and Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U Pa L Rev 1093, 1096 (2014) (identifying various professions that require licensing). See also generally Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Upjohn 2006).

2 See Kleiner, *Licensing Occupations* at 29 (cited in note 1) (describing the various powers of state licensing boards).

3 See Edlin and Haw, 162 U Pa L Rev at 1096 (cited in note 1) (noting an increase from 5 percent of the population requiring licensing in the 1950s to nearly 33 percent in the modern era).

4 See id at 1103 (finding that 90 percent of licensing boards in Florida and 93 percent in Tennessee are controlled by a majority of "license-holders active in the profession").

5 See generally id (arguing that state licensing boards should be treated like cartels for purposes of antitrust scrutiny). See also Neil Katsuyama, Note, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish between Beneficial and Anticompetitive Professional Licenses*, 19 S Cal Interdisc L J 565, 569–77 (2010) (comparing the economics of anticompetitive licensing with the economics of cartels).

6 See *North Carolina State Board of Dental Examiners v Federal Trade Commission*, 135 S Ct 1101, 1115 (2015) ("State laws and institutions are sustained by th[e] tradition [of professional codes of ethics] when they draw upon the expertise and commitment of professionals.") For a discussion of the costs and benefits of having professionals regulate their own profession, see generally Jonathan Rose, *Professional Regulation: The Current*

control to active members of a profession, the resulting anticompetitive concerns have led to the scrutiny of licensing boards under the federal antitrust laws.[7] Not all board actions are subject to this scrutiny, but in order to be exempt from the federal antitrust laws, the licensing board's actions must receive sufficient approval from the state.[8] Thus, the concern of surreptitious, cartel-like behavior by licensing boards is potentially mitigated by the political accountability of requiring a state official to approve the board's actions.[9]

State-empowered entities are immune from federal antitrust scrutiny when their actions, even overtly anticompetitive ones, represent the state acting as a sovereign.[10] Recently, in *North Carolina State Board of Dental Examiners v Federal Trade Commission*,[11] the Supreme Court held that for state licensing boards with a controlling number of active market participants to be shielded by this defense, known as *Parker* immunity,[12] they must satisfy a two-pronged inquiry: (1) Was the action taken pursuant to a clearly articulated state policy, and (2) did the state actively supervise the board's implementation of that policy?[13] If the board fails either prong, the regulation falls within the ambit of the federal antitrust laws and can be enjoined as an anticompetitive

Controversy, 7 L & Hum Behav 103 (1983). See also Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U Chi L Rev 737, 755–57 (2012) (discussing some of the costs and benefits of licensing regimes compared to alternatives).

7 See Sherman Antitrust Act, 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7 (making "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce" illegal); Clayton Act, 38 Stat 730 (1914) (providing a private right of action for violations of the antitrust laws). See also, for example, *North Carolina State Board*, 135 S Ct at 1117 (affirming enjoinment of a state licensing board's anticompetitive actions).

8 See *North Carolina State Board*, 135 S Ct at 1110 (noting that the antitrust laws "confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity"), citing *Parker v Brown*, 317 US 341, 350–51 (1943).

9 See *Town of Hallie v City of Eau Claire*, 471 US 34, 45 & n 9 (1985) (stating that the political accountability of municipalities, in the form of mandatory disclosure regulations and the electoral process, weighed in favor of laxer antitrust scrutiny compared to state-empowered private actors). See also Sina Safvati, Comment, *Public-Private Divide in* Parker *State-Action Immunity*, 63 UCLA L Rev 1110, 1118–26 (2016) (arguing that the limitation of antitrust immunity for state licensing boards is premised, in part, on political accountability).

10 See *Hoover v Ronwin*, 466 US 558, 574 (1984).

11 135 S Ct 1101 (2015).

12 The defense is based on the Supreme Court's decision in *Parker v Brown*, 317 US 341 (1943). The defense has also been referred to as state action immunity, but this Comment refers to the defense as *Parker* immunity to avoid any confusion with the doctrine of state action under the Fourteenth Amendment.

13 *North Carolina State Board*, 135 S Ct at 1110, quoting *California Retail Liquor Dealers Association v Midcal Aluminum, Inc*, 445 US 97, 105 (1980) ("Midcal").

practice.[14] Although the board itself may enjoy immunity from monetary damages under the Eleventh Amendment,[15] the Supreme Court noted that individual board members may face liability for such antitrust violations by the board.[16] This gap in immunity for individual board members is a significant concern given the potential for treble damages[17] and criminal sanctions.[18]

The threat of personal liability for individual board members raises the concern that they may be deterred from vigorously pursuing board objectives and that talented professionals may avoid service on a licensing board altogether.[19] These same concerns have animated the Court in granting immunity to public officials when they violate an individual's constitutional or statutory rights that were not clearly established at the time of the violation.[20] This defense, known as qualified immunity, has been most commonly invoked in cases arising under 42 USC § 1983[21] and *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*,[22] but it has also been recognized by circuit courts for suits arising under

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14 See, for example, *North Carolina State Board*, 135 S Ct at 1117 (affirming enjoinment of the board's anticompetitive actions).

15 See *Goldfarb v Virginia State Bar*, 421 US 773, 792 n 22 (1975) (leaving unresolved the question whether a state agency can be immune from damages liability for antitrust violations under the Eleventh Amendment).

16 See *North Carolina State Board*, 135 S Ct at 1115 ("[T]his case . . . does not offer occasion to address the question whether agency officials, including board members, may, under *some* circumstances, enjoy immunity from damages liability.") (emphasis added). This Comment does not address whether state licensing board members could be immune from monetary damages for antitrust violations by the board under an Eleventh Amendment defense. For a related discussion, see generally Susan Beth Farmer, *Altering the Balance between State Sovereignty and Competition: The Impact of* Seminole Tribe *on the Antitrust State Action Immunity Doctrine*, 23 Ohio N U L Rev 1403 (1997) (discussing the interplay between the doctrines of *Parker* immunity and Eleventh Amendment immunity).

17 See 15 USC § 15 ("[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages . . . including a reasonable attorney's fee.") (emphasis added).

18 See *Community Communications Co v City of Boulder*, 455 US 40, 56 (1982) (noting that municipalities and corporate entities may be susceptible to criminal and civil sanctions under the federal antitrust laws when *Parker* immunity is unsuccessful). This Comment does not address the question whether individual state licensing board members could face criminal sanctions for antitrust violations by the board.

19 See *North Carolina State Board*, 135 S Ct at 1115 (noting these issues as potential concerns).

20 See *Harlow v Fitzgerald*, 457 US 800, 807, 818 (1982).

21 See 42 USC § 1983 (authorizing suits for monetary damages when state officials violate an individual's federal statutory or constitutional rights).

22 403 US 388 (1971) (authorizing suits for monetary damages when federal officials violate an individual's Fourth Amendment rights).

other statutes, including the antitrust laws.[23] Due to the shared concerns of government efficiency and the common-law-like jurisprudence of both § 1983 and federal antitrust law,[24] individual licensing board members should be entitled to invoke a qualified immunity defense for antitrust violations by the board. Applying qualified immunity to licensing board members would not only fill the gap in immunity between the board and its members left in *North Carolina State Board*,[25] but it could also lead to earlier, and less costly, termination of antitrust suits against individual board members at summary judgment.[26]

This Comment focuses on the question whether individual state licensing board members can claim qualified immunity for antitrust violations by the board. To establish when qualified immunity would be pertinent to antitrust violations, Part I discusses the Supreme Court's application of *Parker* immunity to state licensing boards. Part II then identifies the analytical framework the Court has developed for determining when private actors effectuating government objectives (like members of many state licensing boards) can claim qualified immunity. Part III briefly compares *Parker* and qualified immunity to demonstrate how the two doctrines can complement one another, and then it applies the Court's analytical approach discussed in Part II to state licensing board members. Although the analysis ultimately indicates that state licensing board members do not fit neatly into the qualified immunity doctrine, this Comment identifies support

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[23] See *Affiliated Capital Corp v City of Houston*, 735 F2d 1555, 1568–70 (5th Cir 1984) (holding that a mayor, who failed to satisfy *Parker* immunity, still enjoyed qualified immunity against an antitrust claim). Circuit courts permit qualified immunity to be claimed for violations of a variety of other statutes as well. See *Anselmo v County of Shasta*, 873 F Supp 2d 1247, 1260 n 10 (ED Cal 2012) (collecting cases). But see *Hepting v AT&T Corp*, 439 F Supp 2d 974, 1009 (ND Cal 2006) (rejecting qualified immunity for federal wiretap statutes based on preemption doctrine and suggesting qualified immunity should be largely limited to the § 1983/*Bivens* context from which it emerged).

[24] See Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, in Shyamkrishna Balganesh, ed, *Intellectual Property and the Common Law* 89, 89–90 (Cambridge 2013) (criticizing the pernicious tendency of commentators and courts to refer to some statutes—the most common examples being the Sherman Act and § 1983—as "common law statutes").

[25] See *North Carolina State Board*, 135 S Ct at 1115 (addressing the concerns of board member liability separately from the *Parker* immunity holding).

[26] Compare *Mitchell v Forsyth*, 472 US 511, 530 (1985) (authorizing interlocutory appeal for denial of qualified immunity under the collateral order doctrine and considering the claim suitable for immediate resolution), with *South Carolina State Board of Dentistry v Federal Trade Commission*, 455 F3d 436, 441 (4th Cir 2006) (denying interlocutory appeal for denial of *Parker* immunity).

for extending the defense to individual licensing board members based on historical and policy considerations.

I. *PARKER* IMMUNITY

The Sherman Act[27] makes "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce" illegal,[28] and the Clayton Act[29] enables "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws" to "recover threefold the damages . . . including a reasonable attorney's fee."[30] This broad prohibition against anticompetitive behaviors allows private plaintiffs to combat certain collective action agreements among competitors; however, there are instances in which competitors can agree to collective action without being subject to antitrust scrutiny.[31] When the state empowers a group of competitors to regulate their own industry (for example, a state licensing board comprising active market participants), such an entity may be exempt from federal antitrust scrutiny.[32] This exemption is referred to as *Parker* immunity,[33] which the Supreme Court first articulated in *Parker v Brown*.[34] Part I.A describes how the Court has developed the test for *Parker* immunity. Part I.B then discusses how the Court applied that test to a state licensing board in *North Carolina State Board*.

A. The Test for *Parker* Immunity

In *Parker*, California's raisin regulatory regime was attacked as a violation of the Sherman Act because it expressly limited

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27 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7.

28 Sherman Act § 1, 26 Stat at 209, 15 USC § 1.

29 38 Stat 730 (1914).

30 Clayton Act § 4, 38 Stat at 731, 15 USC § 15.

31 See, for example, *United Mine Workers of America v Pennington*, 381 US 657, 669–70 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."), citing *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127, 138, 140 (1961).

32 See *North Carolina State Board*, 135 S Ct at 1114 (discussing when state agencies controlled by active participants can benefit from *Parker* immunity).

33 The defense may be better described as an interpretation of the reach of the Sherman Act rather than as an immunity. See *Surgical Care Center of Hammond, LC v Hospital Service District No 1 of Tangipahoa Parish*, 171 F3d 231, 234 (5th Cir 1999) (en banc) ("'*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation.").

34 317 US 341, 352 (1943) (holding that the action at issue in the case was an instance of the state acting as sovereign and thus excluded from the Sherman Act's reach).

competition.[35] The California legislature had empowered a commission, composed entirely of politically appointed members, to maintain prices for agricultural commodities. This involved reviewing, adopting, and enforcing prorate marketing plans that were proposed by program committees, composed primarily of nominees chosen by private producers.[36]

The central antitrust issue in the case was whether the Sherman Act even applied to this type of state regulation.[37] In rejecting the argument that federal antitrust laws covered such state actions, the Court relied on the Constitution's careful balancing of the powers between the federal and state governments—dual sovereigns in the United States.[38] The Court applied this federalism canon[39] to the Sherman Act and found no textual support or legislative history indicating any congressional intent to impinge on state sovereignty.[40] Thus, the Court interpreted the statute as simply not applying when the state is "acting as a sovereign."[41] California's regulation satisfied this standard because the state actively engaged in reviewing, approving, and executing the raisin price-fixing program.[42] In the Court's view, this level of state involvement differed from other scenarios in which *Parker* immunity would not apply, such as when the state attempts to immunize an individual from antitrust scrutiny by simply authorizing the violation or declaring it lawful.[43] Conversely, under the Sherman Act, when a state legislature passes laws, it is acting as

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35 Id at 344.

36 Id at 346–47.

37 Id at 350–52.

38 *Parker*, 317 US at 351.

39 For a discussion of the policy rationales supporting the federalism canon in interpreting federal statutes, see *Gregory v Ashcroft*, 501 US 452, 457–62 (1991) (discussing the importance of having Congress make a clear statement when disturbing the balance of power between the state and federal governments).

40 *Parker*, 317 US at 350–52. The Court may also have been reluctant at the time of *Parker* to strike down state economic regulations under the federal antitrust laws because the Court had just recently backed away from striking down state regulatory laws under constitutional economic substantive due process. See Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 Colum L Rev 328, 329–30 (1975) (highlighting the importance of *Parker* immunity in avoiding judicial encroachment on state economic regulatory affairs).

41 *Hoover v Ronwin*, 466 US 558, 574 (1984), quoting *Bates v State Bar of Arizona*, 433 US 350, 360 (1977).

42 *Parker*, 317 US at 352.

43 Id at 351, citing *Northern Securities Co v United States*, 193 US 197, 332, 344–47 (1904).

a sovereign for *Parker* immunity purposes.[44] Hence, characterizing the actions of state-empowered entities as either the state acting as sovereign (*Parker* immune) or the state authorizing a violation of the federal antitrust laws (not *Parker* immune) is not simple. However, subsequent to *Parker*, the Court clarified when the actions of a state-empowered entity constitute the state acting as sovereign for *Parker* immunity purposes.

The Court introduced the modern test for *Parker* immunity in *California Retail Liquor Dealers Association v Midcal Aluminum, Inc*[45] ("Midcal"). In that case, California's wine resale program was attacked as a violation of the Sherman Act.[46] The California legislature required all wine producers and wholesalers to file price schedules with the state, which then constrained the price at which the wine could be resold to retailers.[47] The state neither controlled nor reviewed the listed prices, but it did penalize licensed wine merchants that sold wine below the price schedule.[48] The Court explicitly noted that such resale price maintenance agreements had been found to violate the Sherman Act when engaged in by private parties, but because the arrangements were enabled by the state, *Parker* immunity was implicated.[49]

To determine whether this resale program was entitled to *Parker* immunity, the Court read its precedents as establishing a two-pronged test.[50] The first prong of the inquiry requires that "the challenged restraint [ ] be one clearly articulated and affirmatively expressed as state policy,"[51] which includes cases in which the anticompetitive effects are the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."[52] The second prong requires "active[ ] supervis[ion]" by the state,[53] which the Court has described as serving an evidentiary

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44 See *Hoover*, 466 US at 567–68 (noting that state legislatures enacting legislation are ipso facto immune from antitrust scrutiny). See also *Bates*, 433 US at 361–62 (holding that a state supreme court acting in a legislative capacity is similarly immune).

45 445 US 97 (1980).

46 Id at 99.

47 Id at 99–100.

48 Id at 100.

49 See *Midcal*, 445 US at 102–03 (holding a resale price agreement to be an invalid restraint of trade under the federal antitrust laws), citing *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373, 407 (1911).

50 See *Midcal*, 445 US at 105.

51 Id at 105 (quotation marks omitted), quoting *City of Lafayette v Louisiana Power & Light Co*, 435 US 389, 410 (1978).

52 *Federal Trade Commission v Phoebe Putney Health System, Inc*, 568 US 216, 229 (2013).

53 *Midcal*, 445 US at 105, quoting *Louisiana Power & Light Co*, 435 US at 410.

function, ensuring that the entity is pursuing government objectives and not private price-fixing arrangements.[54] Applying this test in *Midcal*, the Court readily found the first prong to be met because the state expressly allowed and enforced the resale program.[55] The second prong was more problematic because the state did not set, review, or regulate the terms or prices of the agreements, instead empowering private actors to control those terms.[56] In the Court's view, *Parker* immunity was not satisfied because the lack of any supervision suggested that the state was simply authorizing a violation of the federal antitrust laws, a category of state activity explicitly excluded in *Parker*.[57]

Although the holding in *Midcal* created a two-pronged test for *Parker* immunity, not all state-created entities have to meet both prongs to evade antitrust scrutiny. In *Town of Hallie v City of Eau Claire*,[58] the Court recognized that even though municipalities are not sovereign,[59] and thus not categorically immune to antitrust scrutiny, they can enjoy *Parker* immunity by meeting only the first prong of the *Midcal* test.[60] The Court reasoned that municipalities are required to meet only this lower standard because they presumably act in the public's interest, given mandatory disclosure regimes and the electoral process, unlike private actors who presumably act in their own self-interest.[61] The Court also suggested that in the case of a "state agency, it is likely that active state supervision would also not be required."[62] This dicta culminated in three different approaches from the circuit courts in deciding how to treat state licensing boards.[63] In *North*

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54 *Town of Hallie v City of Eau Claire*, 471 US 34, 46 (1985).

55 *Midcal*, 445 US at 105.

56 Id at 105–06.

57 See id at 106, citing *Parker*, 317 US at 351.

58 471 US 34 (1985).

59 Id at 38. See also *Mt. Healthy City Board of Education v Doyle*, 429 US 274, 280–81 (1977) (noting that political subdivisions are not part of the sovereign state for Eleventh Amendment immunity purposes).

60 *Town of Hallie*, 471 US at 47.

61 See id at 45–47 & n 9. See also *North Carolina State Board*, 135 S Ct at 1112–13 (distinguishing the broad electorate and regulatory interests of a municipality with the more focused price-fixing interests of private actors).

62 *Town of Hallie*, 471 US at 46 n 10.

63 See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv J L & Pub Pol 931, 987–89 (2014) (reviewing the three-way circuit split).

Carolina State Board, the Court helped clarify which *Midcal* requirements state licensing boards had to meet to enjoy *Parker* immunity.[64]

B. *North Carolina State Board*

The different standards of *Parker* immunity—requiring only a clearly articulated state policy for political subdivisions[65] compared to both clear articulation and active state supervision for state-empowered private actors[66]—created a challenge in determining which of the *Midcal* prongs to apply to state licensing boards.[67] These boards, like political subdivisions, may be structured as state entities with public aims, yet, like state-empowered private actors, they are often composed of a majority of private actors with private aims. In resolving the question of which *Midcal* prong(s) to apply to a state licensing board, some circuits resorted to a minimal inquiry test, focusing only on the board's formal designation by the state as an agency or a political subdivision.[68] Other circuits employed a fact-intensive, multifactor test that considered how similar an entity was to a political subdivision based on its open records, structure, composition, and other factors.[69] The Fourth Circuit adopted yet another test that focused exclusively on whether the relevant decision-making committee was controlled by active market participants.[70] It was in

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64 *North Carolina State Board*, 135 S Ct at 1113–14.

65 *Town of Hallie*, 471 US at 47.

66 See *Midcal*, 445 US at 105.

67 See Volokh, 37 Harv J L & Pub Pol at 985–89 (cited in note 63) (discussing the challenge, and various approaches taken, in determining when a state agency is sufficiently public to merit the laxer antitrust treatment applied to political subdivisions).

68 See *Earles v State Board of Certified Public Accountants of Louisiana*, 139 F3d 1033, 1034, 1041 (5th Cir 1998); *Porter Testing Laboratory v Board of Regents for the Oklahoma Agricultural & Mechanical Colleges*, 993 F2d 768, 770, 772 (10th Cir 1993); *Cine 42nd Street Theater Corp v Nederlander Organization, Inc*, 790 F2d 1032, 1047 (2d Cir 1986). See also *North Carolina State Board*, 135 S Ct at 1117–18 (Alito dissenting) (arguing that, for *Parker* immunity purposes, it should be sufficient that the state has labeled the Board a state agency); Volokh, 37 Harv J L & Pub Pol at 987–88 (cited in note 63) (describing this analysis as a "[c]ursory [v]iew").

69 See *Bankers Insurance Co v Florida Residential Property and Casualty Joint Underwriting Association*, 137 F3d 1293, 1296–97 (11th Cir 1998); *Hass v Oregon State Bar*, 883 F2d 1453, 1455–56, 1460 (9th Cir 1989); *Fuchs v Rural Electric Convenience Cooperative Inc*, 858 F2d 1210, 1217–18 (7th Cir 1988); *Federal Trade Commission v Monahan*, 832 F2d 688, 688 (1st Cir 1987). See also Volokh, 37 Harv J L & Pub Pol at 988–89 (cited in note 63) (describing the intermediate view).

70 See *North Carolina State Board of Dental Examiners v Federal Trade Commission*, 717 F3d 359, 368 (4th Cir 2013). See also Volokh, 37 Harv J L & Pub Pol at 990–92 (cited in note 63) (describing the focused approach).

the face of this circuit split that the Court granted certiorari in *North Carolina State Board*. The Court ultimately held that state licensing boards composed of a "controlling number of decisionmakers [who] are active market participants in the occupation the board regulates must satisfy" both prongs of the *Midcal* test: a clearly articulated state policy and active state supervision.[71]

1. State licensing boards: More like municipalities or private trade associations?

As a general matter, state licensing boards operate by limiting entry into the profession and ensuring that practitioners meet specified standards.[72] For some professions, this includes setting the appropriate level of character fitness, experience, and education, going so far as to accredit only certain educational institutions.[73] The board can also regulate the entry of practitioners from outside of the state or country.[74] After entry into the profession, the board continues to regulate practitioners by setting professional standards and enforcing them via disciplinary proceedings, which can result in the loss of the license, monetary fines, or both.[75] The board's regulatory power is more attenuated over unlicensed practitioners, but it can still act toward these individuals in ways that implicate the federal antitrust laws.[76]

North Carolina established the North Carolina Dental Board of Examiners ("the Board") to regulate dentistry, with broad authority over licensed dentists.[77] It is composed of six dentists with active practices, who were elected by other licensed dentists, and two other individuals.[78] The Board's activity at issue was the issuance of cease-and-desist letters threatening criminal sanctions to nondentists providing teeth-whitening services.[79] Although the Board could have promulgated teeth-whitening regulations rather than issuing cease-and-desist letters, such regulations would

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71 *North Carolina State Board*, 135 S Ct at 1114.

72 See Kleiner, *Licensing Occupations* at 29 (cited in note 1).

73 Id.

74 Id.

75 Id.

76 See, for example, *North Carolina State Board*, 135 S Ct at 1107–09 (noting that the Board did not have authority over the unlicensed practice of dentistry any more than a private citizen, but the Board still acted in an anticompetitive manner).

77 Id at 1107.

78 One was a dental hygienist, and another was a "consumer" appointed by the governor. Id at 1108.

79 Id at 1108, 1116.

have had to comply with state administrative procedures and been approved by the independent North Carolina Rules Review Commission.[80]

In determining whether the Board's actions enjoyed *Parker* immunity, the Court grappled with which prong(s) of the *Midcal* test the Board had to satisfy.[81] The Court summarily rejected the possibility that the Board, as an agency of the state, could be ipso facto *Parker* immune.[82] Instead, the question was whether the Board functioned more like a municipality, subject only to the clear-articulation prong, or more like a state-empowered private trade association, subject to both prongs when performing government functions.[83] In the Court's view, a licensing board composed of a controlling number of active market participants raised the same anticompetitive concerns as a state-empowered private trade association because the members intrinsically suffered from "[d]ual allegiances" between their private interests and the state's interests.[84] The Court recognized that such self-interest need not be nefarious to create structural concerns regarding anticompetitive harms unintended by the state.[85] The Court contrasted state licensing boards with municipalities and other "prototypical state agencies"[86] based on the lack of a public election of the Board's members, the narrow industry the Board regulated, and the potential for a private price-fixing agenda.[87] Thus, in the Court's view, "[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest."[88]

Having ruled that the Board had to satisfy both prongs of the *Midcal* test, the Court easily found that the cease-and-desist letters at issue in the case were not immune from antitrust scrutiny under *Parker*.[89] The parties did not challenge the clear-articulation

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80 *North Carolina State Board*, 135 S Ct at 1108.

81 See id at 1110–14.

82 See id at 1110–11 (rejecting *Parker* immunity for a state agency), citing *Goldfarb v Virginia State Bar*, 421 US 773, 791 (1975).

83 See *North Carolina State Board*, 135 S Ct at 1112–13.

84 Id at 1111.

85 See id at 1114 ("This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals.").

86 Id.

87 See *North Carolina State Board*, 135 S Ct at 1113–14, citing *Allied Tube & Conduit Corp v Indian Head, Inc*, 486 US 492, 500 (1988).

88 *North Carolina State Board*, 135 S Ct at 1114.

89 Id at 1116.

requirement, so the Court assumed it was satisfied in this case.[90] This is likely due to the fact that the regulation at issue granted the Board broad authority to regulate the profession of dentistry and sending cease-and-desist letters to nondentist practitioners of teeth-whitening services seems like the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature" to the Board.[91] The Board did not contend, however, that there was any active state supervision over the cease-and-desist letters, and thus, because the Board had to satisfy both prongs of the *Midcal* test, the Court denied it *Parker* immunity.[92]

2. Unresolved: Personal monetary liability for board members?

Although the Court held that the Board did not enjoy *Parker* immunity for its actions in the case,[93] the Court reserved the question whether individual board members can claim other defenses to personal monetary liability for a board's antitrust violations.[94] The Court noted the concern that personal antitrust liability could dissuade professionals from joining state licensing boards.[95] But the Court did not weigh this concern in determining which *Midcal* prongs a board had to meet for *Parker* immunity.[96] The Court also opined that a state could simply defend or indemnify board members, or ensure *Parker* immunity by satisfying both prongs of the *Midcal* test.[97] The Court did not discuss the possibility of qualified immunity for individual board members, but it

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90 Id at 1110 ("The parties have assumed that the clear articulation requirement is satisfied, and we do the same.").

91 *Phoebe Putney Health System*, 568 US at 229 (describing one way of satisfying the *Midcal* clear-articulation requirement).

92 *North Carolina State Board*, 135 S Ct at 1116.

93 Id.

94 Id at 1115 ("[T]his case . . . does not present a claim for money damages [and therefore] does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability.").

95 Id.

96 See *North Carolina State Board*, 135 S Ct at 1115 (discussing the potential for individual board member liability in a separate section, and only after the Court determined which *Midcal* prongs a state licensing board had to meet for *Parker* immunity).

97 Id. California has responded to the Court's suggestion by encouraging state supervision and recognizing indemnification for licensing board members. See generally, for example, Kamala D. Harris, Opinion No 15-402, Cal Op Atty Gen (Sept 10, 2015) (available on Westlaw at 2015 WL 5927487) (discussing potential avenues for ensuring active state supervision of state licensing boards and noting that current state law likely requires indemnification of board members). Oklahoma has attempted to ensure adequate state supervision by centralizing review of board actions via executive order. See Okla Executive

did reference a qualified immunity case when discussing the possibility of professionals being deterred from government service.[98] Thus, there remains an unresolved question whether state licensing board members can claim an alternative defense in an antitrust case should the *Parker* immunity defense prove unavailing.[99]

II. QUALIFIED IMMUNITY

Government officials that violate an individual's constitutional or statutory rights can be immune from individual capacity suits under the defenses of absolute and qualified immunity.[100] Absolute immunity is limited to a subset of government functions and constitutional roles: legislative,[101] adjudicative,[102] and limited

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Order 2015-33 (2015), Okla Admin Code § 1:2015-33 (empowering the Oklahoma attorney general's office to review all nonrule board actions). Other states seem not to have responded to the decision. See Kathleen Foote, *Immune No Longer: State Professional Boards Consider Their Options*, 30 Antitrust 55, 56 (2015) (noting that, at the time of the article, the only state to pass legislation in reaction to *North Carolina State Board* was Connecticut); E. Dylan Rivers, *Regulating Regulators: Active Supervision of State Regulatory Boards in the Wake of* North Carolina State Board of Dental Examiners v. FTC, 90 Fla Bar J 43, 46–47 (2016) (noting the general lack of response from Florida to the decision).

98 *North Carolina State Board*, 135 S Ct at 1115, citing *Filarsky v Delia*, 566 US 377, 390 (2012).

99 This is an ongoing concern as complaints filed after *North Carolina State Board* have included claims for monetary relief against individual board members. See, for example, Verified First Amended Complaint for Injunctive and Other Relief, *Wallen v St Louis Metropolitan Taxicab Commission*, Civil Action No 4:15-cv-1432 (ED Mo filed Oct 20, 2016) (available on Westlaw at 2016 WL 8736744) (seeking monetary damages); *Bauer v Pennsylvania State Board of Auctioneer Examiners*, 188 F Supp 3d 510, 516 (WD Pa 2016) (staying the claim for monetary relief for concurrent state proceeding but dismissing the claim for injunctive relief).

100 Public officials sued in their official capacity are immune under the Eleventh Amendment from private suits for monetary damages when the state is the real party in interest. See *Pennhurst State School & Hospital v Halderman*, 465 US 89, 100–01 & n 11 (1984) (recognizing sovereign immunity for officials when relief would run directly against the state's treasury or administration). However, this immunity may not be available for suits against officials in their individual capacity (seeking personal monetary liability) even when the claim arises from official acts. See *Hafer v Melo*, 502 US 21, 30–31 (1991).

101 See *Eastland v United States Servicemen's Fund*, 421 US 491, 501 (1975) (recognizing immunity for legislators acting in their legislative capacity based on the Speech or Debate Clause of the Constitution); *Tenney v Brandhove*, 341 US 367, 378–79 (1951) (recognizing absolute immunity for a § 1983 claim against members of a state legislature acting in a legislative capacity).

102 See *Stump v Sparkman*, 435 US 349, 355–56 (1978) (recognizing immunity for judges acting in adjudicative roles); *Butz v Economou*, 438 US 478, 512–13 (1978) (recognizing immunity for prosecutors and executive officials acting in adjudicative roles). See also *Cleavinger v Saxner*, 474 US 193, 199–202 (1985) (detailing the factors to consider in granting qualified or absolute immunity for administrative adjudications); *Buckwalter v Nevada Board of Medical Examiners*, 678 F3d 737, 740–46 (9th Cir 2012) (granting an absolute immunity defense to a state licensing board acting in an adjudicative role).

executive[103] functions. The defense immunizes an official from monetary damages for constitutional or statutory violations that he or she commits when acting in those particular roles.[104] On the other hand, qualified immunity is a more limited, albeit more common, defense for officials who "perform[ ] discretionary functions."[105] This defense does not grant immunity to officials based on their governmental roles, but rather it immunizes officials only when they do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[106] Part II.A provides a very brief overview of how qualified immunity emerged and how the Court has developed the doctrine. Parts II.B and II.C then discuss how the Court approaches qualified immunity for private actors performing government functions, which requires analyzing the common law before enactment of the relevant statute and the policy rationales undergirding qualified immunity.

A. Brief Overview of Qualified Immunity

The doctrine of qualified immunity has emerged, and been largely developed, in the context of § 1983 and *Bivens* actions.[107] Under these causes of action, plaintiffs bring suits for monetary damages against individual government officials that have allegedly violated the plaintiff's federal constitutional[108] or statutory rights.[109] The text of § 1983 provides for no statutory defense to

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[103] See *Nixon v Fitzgerald*, 457 US 731, 756 (1982) (recognizing absolute immunity for the president of the United States); *Imbler v Pachtman*, 424 US 409, 427 (1976) (recognizing absolute immunity for particular prosecutorial functions).

[104] For an example of a case in which a special-function official did not receive absolute immunity for performing a nonimmunized government function, see *Forrester v White*, 484 US 219, 230 (1988) (allowing only a qualified immunity defense for a judge who dismissed a court employee, which is an executive, rather than judicial, function).

[105] *Harlow v Fitzgerald*, 457 US 800, 807, 818 (1982) ("For executive officials in general [ ] our cases make plain that qualified immunity represents the norm.").

[106] Id at 818. For a discussion addressing the difficulty of determining when a right is "clearly established," see generally Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 Touro L Rev 501 (2008).

[107] See *Scheuer v Rhodes*, 416 US 232, 247 (1974) (introducing the term "qualified immunity" into the Supreme Court lexicon in a § 1983 case); *Economou*, 438 US at 507–08 (extending qualified immunity defense to *Bivens* actions).

[108] See *Monroe v Pape*, 365 US 167, 172 (1961) (recognizing the availability of a suit under § 1983 against state officials violating federally guaranteed constitutional rights); *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 397 (1971) (recognizing a cause of action for monetary damages against federal officials for violations of an individual's Fourth Amendment rights).

[109] See *Maine v Thiboutot*, 448 US 1, 10–11 (1980) (recognizing a claim under § 1983 for a violation of a federal statute). For a discussion of enforcing federal statutory rights

monetary damages,[110] but historically the common law recognized certain immunities for public officials who violated an individual's rights.[111] The Court interpreted § 1983 as implicitly incorporating these common-law defenses in *Pierson v Ray*.[112] In that case, three police officers were sued under § 1983 for unconstitutionally arresting civil rights activists protesting segregation.[113] The Court held that the defendants could claim a defense based on the common-law immunity for law enforcement agents acting pursuant to probable cause and with a good-faith reasonable belief in the constitutionality of the statute being enforced.[114]

The Court subsequently clarified that *Pierson* required both a subjective ("good faith") and objective ("reasonable belief") inquiry into an official's actions to establish qualified immunity.[115] But in *Harlow v Fitzgerald*,[116] the Court replaced the hybrid inquiry with the modern objective test: an official is entitled to a qualified immunity defense if he or she did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[117] How to determine when a right is "clearly established" is less than clear,[118] but the analysis focuses on determining if a reasonable official would have known the actions

via § 1983, see generally Nick Daum, Comment, *Section 1983, Statutes, and Sovereign Immunity*, 112 Yale L J 353 (2002).

110 42 USC § 1983 ("Every person who, under color of [state law], . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . shall be liable to the party injured in an action at law.").

111 See *Filarsky v Delia*, 566 US 377, 385–89 (2012) (identifying a range of circumstances in which officials would be immunized at common law for violating another's rights, including adjudicative and law enforcement activities).

112 386 US 547, 557 (1967).

113 Id at 548–51.

114 Id at 555, 557 (noting that an officer should not be mulcted when enforcing a statute "he reasonably believed to be valid").

115 See *Scheuer*, 416 US at 247–48 ("It is the existence of reasonable grounds for the belief . . . coupled with good-faith belief, that affords a basis for qualified immunity."). See also *Wood v Strickland*, 420 US 308, 321–22 (1975) (explicitly noting the objective and subjective elements of the *Pierson* test).

116 457 US 800 (1982).

117 Id at 815–20 (reasoning that the subjective element of the qualified immunity inquiry led to costly discovery and litigation that was incommensurate with its benefit for protecting the rights of individuals).

118 See generally Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 Minn L Rev Headnotes 62 (2016) (criticizing the surreptitious expansion of qualified immunity through the Court's broadening of what constitutes "reasonable" and restricting what constitutes "clearly established").

at issue violated another's rights based on existing precedent that put the question beyond debate.[119]

Despite the common-law justification for recognizing qualified immunity in § 1983 cases, the doctrine has been viewed as a child of modern judicial conception, and thus the courts have exercised wide discretion in raising it.[120] One example is the Court's transformation of the common-law test for immunity into the modern objective test described above. Another example is the courts' extension of the defense to causes of action outside of § 1983; the Supreme Court has intimated that the defense may be available for other statutes,[121] and it has recognized the defense for *Bivens* actions, a *constitutional* rather than a statutory cause of action.[122] The circuit courts have also exercised discretion by reading the defense into a variety of different statutes.[123]

In addition to the expansion of the availability of qualified immunity to different types of claims, the courts have also expansively applied the defense to different categories of government officials.[124] Courts have even recognized that private actors performing government functions are entitled to qualified immunity

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[119] See *Ashcroft v al-Kidd*, 563 US 731, 741 (2011) (noting that the law must be sufficiently clear that every reasonable official would know that he or she is violating an individual's rights, but that there need not be "a case directly on point").

[120] See *Economou*, 438 US at 501–02 (discussing how the immunity doctrine has been viewed as largely of judicial design). See also *Hepting v AT&T Corp*, 439 F Supp 2d 974, 1009 (ND Cal 2006) (characterizing the emergence of the qualified immunity defense for § 1983 claims as a response to the Court's expansion of § 1983 liability).

[121] See *Mitchell v Forsyth*, 472 US 511, 535 n 13 (1985) (noting that a qualified immunity defense would have likely failed in the case because the actions "would clearly have been illegal," without suggesting that the defense would not be available because the claim was under a statute other than § 1983).

[122] See *Economou*, 438 US at 500–04 (reasoning that federal officials sued under *Bivens* for violations of constitutional rights should be entitled to the same qualified immunity defense as state officials sued under § 1983).

[123] See, for example, *Anselmo v County of Shasta*, 873 F Supp 2d 1247, 1260 n 10 (ED Cal 2012) (collecting qualified immunity cases involving statutes other than § 1983, including the Rehabilitation Act, the Food Stamp Act, and the Racketeer Influenced and Corrupt Organizations Act); *Gonzalez v Lee County Housing Authority*, 161 F3d 1290, 1299–1300 & n 34 (11th Cir 1998) (recognizing a qualified immunity defense for a Fair Housing Act claim); *Tapley v Collins*, 211 F3d 1210, 1214 (11th Cir 2000) (recognizing a qualified immunity defense for a claim under the Electronic Communications Privacy Act). But see, for example, *Hepting*, 439 F Supp 2d at 1009 (rejecting a qualified immunity defense under the federal wiretap statutes as being preempted by the availability of a different statutory defense).

[124] See Andrew W. Weis, Comment, *Qualified Immunity for "Private" § 1983 Defendants after* Filarsky v. Delia, 30 Ga St U L Rev 1037, 1047 n 51 (2014) (providing evidence that qualified immunity has been extended to public officials without requiring the same historical inquiry as the Court performed in *Pierson* for law enforcement officials).

in certain circumstances.[125] Specifically, private defendants effectuating government objectives are entitled to claim qualified immunity when there is a "tradition of immunity [ ] so firmly rooted in the common law and [ ] supported by such strong policy reasons" that Congress would have expressly abrogated the defense in the relevant statute if it intended to do so.[126]

B. "Tradition of Immunity . . . Firmly Rooted in the Common Law"

The Court first engaged the question whether private defendants could claim qualified immunity in *Wyatt v Cole*.[127] In that case, the private defendants faced liability under § 1983 for enforcing a state replevin statute[128] that was held to be an unconstitutional violation of the plaintiff's due process rights.[129] Looking to the common law, the Court identified the analogous torts as malicious prosecution and abuse of process.[130] Despite identifying common-law cases that recognized a good-faith defense for private defendants against these types of torts,[131] similar to the common-law defense identified in *Pierson*,[132] the Court held this to be an insufficient "tradition of immunity." It rejected the ability of the private defendants to claim qualified immunity because they were not furthering any discernable government interest in enforcing the replevin statute.[133]

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[125] See, for example, *Filarsky*, 566 US at 393–94 (holding that a private attorney working part-time for a city investigation could claim qualified immunity for a § 1983 claim arising from the investigation).

[126] *Wyatt v Cole*, 504 US 158, 164 (1992) (quotation marks omitted), quoting *Owen v City of Independence*, 445 US 622, 637 (1980).

[127] 504 US 158 (1992).

[128] Id at 159–60.

[129] Id at 160 (noting that the replevin statute unconstitutionally limited the judge's discretion to deny the initial issuance of the replevin order).

[130] See id at 164.

[131] *Wyatt*, 504 US at 164–65, citing *Malley v Briggs*, 475 US 335, 340–41 (1986). See also *Malley*, 475 US at 341 n 3 (collecting common-law cases recognizing that private citizens were liable for false complaints only when done maliciously and without probable cause); *Folsom Investment Company, Inc v Moore*, 681 F2d 1032, 1038 (5th Cir 1982) (providing more historical analysis of the good-faith defense for malicious prosecution charges).

[132] *Wyatt*, 504 US at 165 (noting the common law's good-faith defense for false arrests by police officers), citing *Pierson*, 386 US at 555–57.

[133] *Wyatt*, 504 US at 168. But see id at 179–80 (Rehnquist dissenting) (noting the substantial public interest in having individuals rely on the law rather than on self-help).

The Court again denied qualified immunity to private actors in *Richardson v McKnight*,[134] but this time the defendants were performing a substantial government function—guarding a private prison.[135] Although public prison guards enjoy qualified immunity,[136] the Court still denied application of the defense to the private guards based, in part, on insufficient support in the common law.[137] The plaintiff claimed that the prison guards injured him by using restraints that were too tight,[138] and the Court analogized this § 1983 claim to the common-law tort of prisoner mistreatment, which allowed for recovery of damages against private prison management.[139] Although the Court identified a number of common-law cases holding private prison management liable for such torts, there was a dearth of case law supporting or refuting liability for private prison guards.[140] Based on this lack of "conclusive evidence," the Court found insufficient historical support for recognizing qualified immunity for the private prison guards.[141] The dissent criticized the majority as requiring the defendant to identify a specific common-law case recognizing immunity for a substantially similar defendant.[142] Instead, the dissent argued for a broader functional view of the common law, which generally recognized immunity for private actors performing government functions.[143]

Most recently, relying on a historical approach similar to the one presented by the *Richardson* dissent,[144] the Court has unanimously recognized qualified immunity for a private attorney

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134 521 US 399 (1997).

135 Id at 401–02.

136 Id at 405, citing *Procunier v Navarette*, 434 US 555, 561–62 (1978).

137 See *Richardson*, 434 US at 404–07.

138 Id at 401.

139 See id at 404–07 (identifying a number of cases in both England and the United States in which prisoners successfully sued private prison managers for mistreatment).

140 Id at 404–07. See also id at 414–15 (Scalia dissenting) (criticizing the majority as resting its historical analysis on the lack of a particular case recognizing immunity for private prison guards without looking to the broader immunity recognized by common law for private citizens performing government objectives).

141 *Richardson*, 521 US at 407.

142 Id at 414–15 (Scalia dissenting).

143 Id at 415–16 (Scalia dissenting).

144 See *Filarsky*, 566 US at 384 (noting that understanding the common-law protections pre–§ 1983 requires "an appreciation of the nature of government at that time").

working part-time for the government.[145] In *Filarsky v Delia*,[146] the part-time attorney was sued under § 1983 for violating the plaintiff's Fourth Amendment rights by demanding that the plaintiff, as a target of a city's investigation into disability fraud, provide pertinent evidence from his home.[147] The Court broadly analogized between the present violation and common-law cases against government officials performing criminal investigations, but it did not dwell on whether there was a particular common-law case in which immunity was recognized for a private attorney involved in a government investigation.[148] Instead, the Court provided a historical overview of the extent to which government relied on part-time participation by private citizens prior to enactment of § 1983.[149] The government was much smaller and largely limited to local institutions, eschewing a professionally staffed bureaucracy because of budgetary constraints and lack of necessity.[150] Thus, government officials often had to split their time between public service and their own professional occupation in order to receive sufficient compensation.[151] Even law enforcement was outsourced to private citizens at times, and during those times the common law recognized a similar immunity for private citizens as it did for public officials.[152] Hence, the Court found that the extensive participation of private actors in government and the immunity at common law for those part-time government workers supported recognizing qualified immunity for the part-time government lawyer.[153]

The evolution of the Court's approach to qualified immunity for private actors effectuating government objectives suggests

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145 See id at 394–96 (Ginsburg concurring) (agreeing that the private attorney should be capable of claiming qualified immunity); id at 397–98 (Sotomayor concurring) (agreeing that the private attorney should be entitled to claim qualified immunity—but only based on a case-by-case analysis, not a general blanket immunity for part-time government workers).

146 566 US 377 (2012).

147 Id at 380–82.

148 See id at 384–85 (relying on a case about police officers conducting a criminal investigation to establish that qualified immunity is available for the investigative activities at issue), citing *Pearson v Callahan*, 55 US 223, 243–44 (2009).

149 *Filarsky*, 566 US at 384–89.

150 Id at 384–85.

151 Id. For example, a local ferryman would double as a public wharfmaster, and even the attorney general of the United States was a part-time government employee until 1853. Id at 386.

152 Id at 387–88 (identifying common-law cases immunizing private actors assisting the sheriff in executing a warrant).

153 *Filarsky*, 566 US at 389.

that after analogizing between the present cause of action and the common law,[154] the courts should search for particular common-law cases in which immunity was granted to similarly situated defendants.[155] It also suggests that they should consider broader structural features of government around the time the relevant statute was enacted.[156]

C. "Supported by Such Strong Policy Reasons"

After considering whether there is common-law support for extending qualified immunity to private parties effectuating government objectives, the Court then considers the applicability of three policy concerns undergirding the doctrine of qualified immunity: (1) undue timidity of officials in exercising their discretionary duties, (2) effects on government recruiting of talented candidates, and (3) distraction from official duties by litigation.[157]

1. Undue timidity.

The Court has often used undue timidity on the part of government officials performing discretionary tasks as the guiding policy concern for the qualified immunity analysis.[158] Because qualified immunity is intended to benefit the public by having officials perform their discretionary duties, undue timidity on the

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[154] The Court often looks to the common law in both England and the United States antedating enactment of the relevant statute. See *Richardson*, 521 US at 404–07 (inquiring into common-law cases in both the United States and England); *Wyatt*, 504 US at 164 (citing reviews of case law from both the United States and England); *Filarsky*, 566 US at 384–89 (focusing the analysis on the United States).

[155] See *Richardson*, 521 US at 404–07 (using the lack of common-law cases recognizing immunity for private prison guards to support rejecting qualified immunity in the case). See also id at 415–16 (Scalia dissenting) (criticizing the majority for focusing only on whether the defendants could identify a particular pre–§ 1983 case granting immunity to similarly situated defendants rather than considering the common law's general recognition of immunity for private actors performing government work).

[156] See *Filarsky*, 566 US at 384–89 (approaching the historical analysis by viewing the broader context of the government pre–§ 1983 rather than identifying particularly similar common-law cases granting immunity).

[157] See id at 389–92 (reaffirming the applicability of the policy rationale analysis from *Richardson*).

[158] See *Richardson*, 521 US at 408 (noting that immunity protects the public from "unwarranted timidity on the part of public officials by, for example, 'encouraging the vigorous exercise of official authority'"), quoting *Economou*, 438 US at 506; *Harlow*, 457 US at 814 (recognizing the need to protect the discretionary functions of government officials); *Wood*, 420 US at 319 (explaining that denying immunity to school board members would lead to "intimidation" in decision-making), quoting *Pierson*, 386 US at 554.

part of officials based on their fear of personal liability for mistakes made vis-à-vis that discretion would undermine the very purpose of the doctrine.[159] Thus, the Court has focused the undue timidity inquiry on determining whether there are sufficient private incentives to offset fear of personal liability; if there are, then the need for qualified immunity is considered less compelling for ensuring efficient government action.[160]

Private incentives weighing against undue timidity and qualified immunity include the potential for personal profit and market competition. In *Wyatt*, the Court found undue timidity to be of minimal concern because, in enforcing the replevin statute, the defendants had no public-interest motive, only a personal incentive—money.[161] Because qualified immunity was designed to benefit the public by encouraging officials to perform their discretionary duties, the justification for immunizing the private defendants was absent.[162] In addition to personal incentives, the Court has also looked to whether there are market, as opposed to political, forces ensuring efficient performance of government tasks. In *Richardson*, the Court dismissed the undue timidity concern for private prison guards because there was putatively competition for the state prison contract.[163] In the Court's view, this competition would penalize lax enforcement of regulations due to the threat of replacement, while § 1983 liability would diminish overly aggressive enforcement.[164] Additionally, unlike public prisons, the private prison system was not bound by rigid civil service salary requirements and thus could institute incentive-based pay to compete in the market.[165] Because the Court found these economic

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159 See *Richardson*, 521 US at 408 (describing the basis of the undue timidity concern).

160 See id at 410 (noting that market forces provided sufficient incentives to allay undue timidity).

161 *Wyatt*, 504 US at 167–69 (noting that the public interest protecting functions of qualified immunity have minimal applicability to private actors pursuing entirely private ends).

162 Id.

163 *Richardson*, 521 US at 409. The contract for private prisons was renewed every three years with the possibility of the state canceling after the first year, which the majority viewed as creating a competitive market. See id at 409–10. But see id at 419–20 (Scalia dissenting) (characterizing the decision to continue with a particular private prison as political, rather than economic, because of the unlikelihood that economic factors—cost and quality—would outweigh political allegiances or friendships, especially considering that it was the public's money being spent on the operation).

164 See id at 409.

165 See id at 410.

incentives sufficient to offset the fear of personal liability for private prison guards, it reasoned that qualified immunity was unnecessary.[166]

The potential for private gains does not automatically end the inquiry into undue timidity. In *Filarsky*, the private attorney could have demanded higher pay for his government work to offset potential § 1983 liability, but the Court did not mention this possibility. Additionally, even though there may be market competition between attorneys for part-time government work, thereby diminishing the undue timidity concern, the Court distinguished *Richardson*'s market analysis as applying only when dealing with for-profit firms engaged in a substantial government administrative task with limited government supervision.[167] For typical part-time workers, like the attorney in *Filarsky*, the Court did not view the market analysis as particularly relevant.[168] The Court also expressed concern that smaller local governments would bear disproportionate privatization costs by having to pay a higher premium to offset potential liability for part-time government workers compared to well-funded political subdivisions that could afford full-time specialized professionals who enjoy free qualified immunity.[169] Thus, due to the potential disparity in costs for obtaining specialized labor between different political subdivisions, and the lack of sufficient private incentives, the Court found undue timidity to be sufficiently concerning that qualified immunity was warranted.[170]

2. Effects on recruiting talented candidates.

The second rationale the Court considers is whether the government can recruit talented individuals for government work if qualified immunity is not available. In *Richardson*, the Court stated that the availability of indemnification limits this concern,[171] but law enforcement officials still enjoy qualified immunity

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166 See id at 412.

167 See *Filarsky*, 566 US at 393 (emphasizing the narrowness of *Richardson*'s holding), citing *Richardson*, 521 US at 413.

168 See *Filarsky*, 566 US at 393.

169 See id at 394 (noting that New York City had sufficient resources to pay for a full-time investigator, who could enjoy qualified immunity, while the city at issue could not and had to rely on part-time assistance).

170 See id at 393–94.

171 See *Richardson*, 521 US at 410.

despite widespread indemnification.[172] Additionally, the Court recognized that private guards could demand higher pay for their potential liability because the prison was not limited to civil-service pay requirements.[173] This contrasts with the Court's ruling in *Filarsky*, in which the Court found the concern of liability deterring candidates to be substantial for those with specialized knowledge or expertise, despite the ability to demand higher pay or indemnification for exposure to personal liability.[174] In the Court's view, "when there is a particular need for specialized knowledge or expertise" the government often requires outside assistance from part-time private professionals, who would be more likely to "decline public engagements if they do not receive the same immunity" as their public counterparts.[175] This concern is enhanced by the possibility that the private actor could face full liability for the actions of both herself and her government counterparts.[176]

3. Distraction of officials by excessive litigation.

The final policy rationale the Court has considered is whether an official would be unduly distracted by litigation if qualified immunity were to be denied. In *Richardson*, the Court recognized this concern as being of limited utility to the qualified immunity analysis, given the expected prevalence of litigation even when qualified immunity is available.[177] Additionally, the state retained important discretionary functions governing prison conditions, thereby reducing the likelihood of a lawsuit against the private prison.[178] In contrast, the *Filarsky* Court identified the threat of distraction as a more significant concern because litigation

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172 See Joanna C. Schwartz, *Police Indemnification*, 89 NYU L Rev 885, 913 (2014) (identifying 99.98 percent of cases against individual police officers as ultimately being paid by the government via indemnification regimes).

173 See *Richardson*, 521 US at 410 (noting that in the prison contract, the private prison can "avoid many civil-service restrictions," thereby enabling the firm to respond to "market pressures through rewards and penalties that operate directly upon its employees"). The guards may decide not to demand indemnification protection during the hiring process, however, if they feared such a request would indicate a propensity for violating others' federal statutory or constitutional rights.

174 See *Filarsky*, 566 US at 388–90.

175 Id.

176 See id at 391. See also id at 398 (Sotomayor concurring) (recognizing the intimidating effect of facing full liability for joint private and public work if qualified immunity were to be denied to the part-time attorney).

177 See *Richardson*, 521 US at 411–12.

178 See id at 411. The State's decision not to extend sovereign immunity to the private prisons also weighed against the distraction concern because the state would have recognized the potential for suit against the private prisons and employees. See id at 412.

against private actors performing part-time government work could ensnare public officials who were also working on the same project.[179] In this way, public officials who are entitled to qualified immunity could still be forced into litigation, eroding the policy protections of granting those officials qualified immunity in the first place.[180]

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The Court's approach to determining when a private actor effectuating a government objective is entitled to qualified immunity is based on the legal fiction that, for a "tradition of immunity . . . firmly rooted in the common law and [ ] supported by [ ] strong policy reasons," Congress would have expressly abrogated the defense in the statute if it had intended to do so.[181] The inquiry into whether the defense was "firmly rooted"[182] in common-law tradition involves not only identifying particularly relevant common-law cases analogous to the modern action, but also a broader conceptualization of how government operated before the statute was enacted. For the policy rationale inquiry, the Court has identified three "strong policy reasons"[183] undergirding qualified immunity. The most important is the concern of undue timidity, which the Court has found to be less compelling in cases in which there are sufficient private and market incentives to offset the risk of personal liability. The Court also looks to whether recruitment of talented candidates would be impacted if qualified immunity were not available, especially when those candidates have specialized expertise. Finally, the Court probes, less forcefully, whether officials would be substantially distracted by litigation.

III. QUALIFIED IMMUNITY FOR STATE LICENSING BOARD MEMBERS

State licensing boards are involved in a variety of actions that implicate federal antitrust laws,[184] which raises the concern of

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179 See *Filarsky*, 566 US at 391.

180 See id.

181 *Wyatt*, 504 US at 164 (quotation marks omitted), quoting *Owen*, 445 US at 637.

182 *Wyatt*, 504 US at 164 (quotation marks omitted), quoting *Owen*, 445 US at 637.

183 *Wyatt*, 504 US at 164 (quotation marks omitted), quoting *Owen*, 445 US at 637.

184 See generally Edlin and Haw, 162 U Pa L Rev 1093 (cited in note 1) (comparing the actions of state licensing boards to cartels—a core evil regulated by the federal antitrust laws). See also Katsuyama, Note, 19 S Cal Interdisc L J at 569–77 (cited in note 5) (comparing the actions of state licensing boards to state-sponsored cartels).

liability for board members if the board's actions violate those laws.[185] As discussed in Part I, *Parker* immunity offers members a powerful defense, but it requires both that the state clearly articulate a policy of displacing competition and that it actively supervise its implementation.[186] Actions taken by state licensing boards do not always meet these requirements,[187] and thus there remains a question of what defenses an individual licensing board member can raise in an antitrust case.[188] One potential defense is qualified immunity.[189]

Before addressing whether the law supports recognizing qualified immunity for individual licensing board members involved in antitrust cases, Part III.A compares *Parker* and qualified immunity to delineate their common features and their complementary roles. Parts III.B and III.C then apply the Court's qualified immunity analysis presented in Part II to licensing board members by considering the common law's treatment of licensing regimes and how the policy rationales apply to licensing boards. Both of these inquiries support recognizing the availability of a qualified immunity defense for licensing board members.

A. Relationship between *Parker* Immunity and Qualified Immunity

Section 1983 and the federal antitrust laws share the distinction of being unusual federal statutory regimes whose jurisprudence have been largely left to the courts, detached from a strong statutory tether.[190] Neither was envisioned to apply to as broad a category of cases as they have come to cover since their enactment: § 1983 was relegated to very particular types of actions

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185 See *North Carolina State Board*, 135 S Ct at 1115 (noting the possibility of personal monetary liability for individual licensing board members when the board is not immune under *Parker*).

186 See id at 1110, 1114.

187 See, for example, id at 1116 (finding *Parker* immunity unavailable due to lack of state supervision of the board's actions at issue in the case); *Goldfarb v Virginia State Bar*, 421 US 773, 791 (1975) (finding *Parker* immunity unavailable due to a lack of state oversight).

188 See *North Carolina State Board*, 135 S Ct at 1115 (leaving unresolved the question whether "board members, may, under some circumstances, enjoy immunity from damages liability"). For a discussion of defenses available to board members acting in an adjudicative role, see note 102 (discussing the absolute immunity analysis for quasi-judicial activities by agencies).

189 See *Harlow*, 457 US at 807 (recognizing qualified immunity as the more commonly available defense for public officials performing discretionary tasks).

190 See Lemos, *Interpretive Methodology and Delegations to Courts* at 89–90 (cited in note 24).

taken by state officials,[191] and the Sherman Act did not reach traditional state regulations due to Congress's limited Commerce Clause[192] powers at the time.[193] Both have expanded along the contours of the Constitution, with the Fourteenth Amendment providing substance to § 1983 claims[194] and the Commerce Clause increasing the reach of the federal antitrust laws.[195] Additionally, although neither provides for statutory defenses against monetary damages,[196] the Court's expansion of liability under these two regimes has been followed by a parallel expansion of court-crafted defenses:[197] qualified and *Parker* immunities.

Despite the broad similarities between § 1983 and antitrust jurisprudence, the respective defenses developed by the courts have distinct purposes and functions. The Court has justified qualified immunity as a balance between the public's interest in

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191 See Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 Hofstra L Rev 265, 267 (1987) (noting that lack of early enforcement of § 1983 was based primarily on the limited reach of the statute, covering only officials who violated an individual's rights by acting pursuant to affirmative state law).

192 US Const Art I, § 8, cl 3.

193 See *North Carolina State Board*, 135 S Ct at 1118 (Alito dissenting) (discussing the limited reach of the Sherman Act to state regulations at the time of its enactment). See also generally David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 Tulane L Rev 1069 (1995) (criticizing the expansion of the Commerce Clause powers as a departure from the original principles animating the clause).

194 See Levit, 15 Hofstra L Rev at 267 & n 11 (cited in note 191) (noting the Court's expansion of rights protected under § 1983), citing *Monroe v Pape*, 365 US 167, 171 (1961).

195 See *Midcal*, 445 US at 110–11 (noting Congress intended to exercise the full extent of its Commerce Clause powers when enacting the Sherman Act); *North Carolina State Board*, 135 S Ct at 1118 (Alito dissenting) (describing the expansion of the Sherman Act in concert with the expanded interpretation of the Commerce Clause), quoting *Hospital Building Co v Trustees of Rex Hospital*, 425 US 738, 743 n 2 (1976).

196 See 15 USC § 15 ("Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages."); 42 USC § 1983 ("Every person who, under color of [state law], . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law.").

197 The limited Commerce Clause powers of Congress at the time of the federal antitrust laws' enactment and the statutory silence regarding state officials suggest that Congress did not intend, nor indeed even consider, the antitrust laws to abrogate applicable common-law defenses for such officials. In contrast, § 1983 expressly provides for a very limited defense, which some have argued demonstrates Congress's intent to abrogate common-law immunities. See 42 USC § 1983 ("[I]n any action brought against a judicial officer . . . injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."); *Pierson*, 386 US at 561–63 (Douglas dissenting) (arguing that the limited exception in § 1983 and the accompanying legislative history weigh in favor of precluding immunity against monetary damages for judicial officers). In this way, there may be a stronger argument for recognizing qualified immunity in the context of the antitrust laws than in the § 1983 context.

vindicating violations of individuals' rights and the public's interest in having government officials efficiently perform their discretionary duties.[198] Thus, the doctrine attempts to limit costs of mistakes on the part of officials without cloaking the actions from judicial scrutiny.[199] *Parker* immunity, on the other hand, is premised on federalism concerns:[200] states are sovereigns that exert regulatory authority within their borders, and thus federal antitrust scrutiny of such regulations requires an overt expenditure of political capital by the federal government.[201] Even if a state's regulation is undoubtedly anticompetitive,[202] the defense can still cloak the regulation from federal antitrust scrutiny.[203] Thus, from a broad perspective, qualified immunity shields individual officials while *Parker* immunity shields state actions—two distinct categories arising from different goals.[204] The Court's separate treatment in *North Carolina State Board* of its *Parker* immunity analysis and its consideration of potential effects on the liability of government actors further demonstrates the distinct role the two doctrines play.[205] Such differences show that qualified immunity and *Parker* immunity could be complementary defenses for individual licensing board members facing personal liability for antitrust violations by the board. To determine whether these private actors performing a government function would be entitled to claim qualified immunity, the analysis focuses on determining whether the common law and pertinent policy rationales support recognizing the defense for individual licensing board members.[206]

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198 See *Butz v Economou*, 438 US 478, 506 (1978); *Wyatt*, 504 US at 167 (noting the trade-off between compensating those injured by government officials and ensuring adequate government function).

199 *Economou*, 438 US at 506–07.

200 See *Parker*, 317 US at 350–51 (discussing the balance of sovereign powers between the states and federal government in the context of the antitrust laws).

201 See id at 350–51 (requiring a heightened level of congressional intent to invade the state's domain for antitrust scrutiny to apply).

202 See, for example, *Midcal*, 445 US at 102 (noting that the regulation at issue in the case would be an illegal restraint of trade if performed by purely private actors), citing *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373, 407 (1911).

203 See *Parker*, 317 US at 350–52.

204 This is an overly simplistic caricature, as *Parker* immunity incidentally shields public officials by excluding the action from the antitrust laws altogether. But qualified immunity is not a shield for laws or actions that authorize violations of an individual's constitutional or statutory rights.

205 See *North Carolina State Board*, 135 S Ct at 1115 (discussing potential member liability in an entirely separate section and only after the Court decided the appropriate level of antitrust scrutiny of the Board's actions).

206 See Parts II.B–C (discussing the relevant case law).

B. The Common-Law Tradition Regarding State Licensing Boards

When determining whether a particular category of public officials is entitled to claim qualified immunity, the Court engages in a historical analysis to determine whether similar officials were immune at common law for analogous causes of action.[207] The Court's approach in *Richardson* and *Wyatt* suggests that this analysis focuses on identifying particular cases in which immunity was granted to similarly situated defendants,[208] but the Court's approach in *Filarsky* supports also broadly considering how government operated before the relevant statute was enacted.[209] Thus, for antitrust claims against state licensing board members, the historical inquiry entails both searching for common-law cases granting immunity to individuals working for entities that resemble modern licensing boards and broadly considering how governments approached occupational licensing before enactment of the federal antitrust laws.

1. A short history of occupational licensing.

Government regulation of occupations has deep historical antecedents, dating back at least to the Code of Hammurabi.[210] Outsourcing of this regulatory control also has historical roots; in medieval England, control over trades was often vested in guilds, which determined who could participate in the trade and under

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[207] See *Wyatt*, 504 US at 164 (comparing the case to common-law malicious prosecution); *Richardson*, 521 US at 405 (comparing the case to common-law mistreatment of prisoners); *Filarsky*, 566 US at 385–86 (comparing the case to common-law criminal investigations). The common-law tradition is not always dispositive. See, for example, *Wyatt*, 504 US at 165–67 (finding that policy rationales outweighed indications in the common law that private individuals had immunity for similar offenses).

[208] See *Wyatt*, 504 US at 164–65 (identifying a good-faith defense for similarly situated defendants at common law); *Richardson*, 521 US at 415–16 (Scalia dissenting) (characterizing the majority's reluctance to acknowledge a common-law tradition of immunity as based on the lack of a specific pre–§ 1983 case granting immunity for private guards).

[209] See *Filarsky*, 566 US at 384–90 (approaching the inquiry by broadly considering how private actors historically participated in a wide range of government actions, often with the benefit of immunity).

[210] See Kleiner, *Licensing Occupations* at 19 (cited in note 1) (noting the Code's medical fee schedule).

what circumstances.[211] By the end of the sixteenth century,[212] the guilds' regulatory control came under siege with the emergence of the common law's antipathy toward restraints of trade and monopolies,[213] predecessor doctrines to modern antitrust jurisprudence.[214] The former doctrine invalidated voluntary restraints of trade, such as covenants not to compete, if they were unreasonable.[215] The latter doctrine condemned involuntary guild bylaws[216] and royal grants of private monopolies[217] that limited entry into trades, but guild bylaws enforcing customs and government-granted monopolies to guilds continued to be allowed.[218] Parliament

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[211] See Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 Va L Rev 1313, 1319–22, 1366–67 (2005) (discussing the importance and legal authority of guilds in the English regulatory state). But see generally Gary Richardson, *A Tale of Two Theories: Monopolies and Craft Guilds in Medieval England and Modern Imagination*, 23 J Hist Econ Thought 217 (2001) (arguing that guilds did not have "monopoly" powers as the term is understood today but rather had more limited regulatory control).

[212] Some scholars have argued that the common-law doctrines applied to monopolies and restraints were common-law innovations that had minimal support before the sixteenth century. See, for example, William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U Chi L Rev 355, 356–62 (1954) (arguing that the common law against monopolies was largely an invention of Lord Edward Coke).

[213] The doctrines are sometimes described as one category, with monopolies identified as one type of involuntary restraint of trade. Compare, for example, Jacob I. Corré, *The Argument, Decision, and Reports of* Darcy v. Allen, 45 Emory L J 1261, 1302–05 (1996) (describing the common law on monopolies in terms of restraint of trade), with Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 31–37 (Cambridge 2003) (distinguishing between common-law cases involving restraints of trade and those with monopolies).

[214] See Letwin, 21 U Chi L Rev at 356–67, 373–75 (cited in note 212) (detailing the historical development of the doctrines and their relationship to modern antitrust jurisprudence). For a discussion of the limitation of these common-law analogies for modern antitrust jurisprudence, see Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 Cal L Rev 1, 55–63 (1981).

[215] See Letwin, 21 U Chi L Rev at 373–75 (cited in note 212); Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* 8–11 (Carswell 1986); J.D. Heydon, *The Restraint of Trade Doctrine* 8–17 (Butterworths 1971) (describing the historical development of the common-law doctrine of restraint of trade).

[216] "Involuntary" means a regulation that operated by law or custom rather than by private agreement or contract, which were instead considered voluntary restraints of trade. See Heydon, *The Restraint of Trade Doctrine* at 11–17 (cited in note 215), citing *Mitchel v Reynolds*, 24 Eng Rep 347 (KB 1711); Trebilcock, *The Common Law of Restraint of Trade* at 6–14 (cited in note 215) (distinguishing between the separate doctrines of involuntary and voluntary restraints of trade).

[217] See Letwin, 21 U Chi L Rev at 360–64 (cited in note 212) (describing early common-law cases on monopolies).

[218] See id at 359–62, 364, 367 (describing robust guild control, including continued grants of monopolies from Parliament, following emergence of the limitation on royally granted monopolies); Nachbar, 91 Va L Rev at 1354–56 (cited in note 211) (noting the general success of guilds in the common law for regulating trades, even after the emergence of the restraint-of-trade doctrine).

waded into the fray with passage of the Statute of Monopolies of 1624,[219] which restricted royal grants of monopoly but continued to allow for regulatory control by guilds.[220] In fact, in the famous *Case of Monopolies*, the English courts struck down a royal grant of monopoly on playing cards,[221] yet after the Statute of Monopolies was enacted, Parliament granted a similar monopoly.[222] Despite the erosion of some regulatory authority of guilds, no common-law cases seem to have been brought against restraints of trade by self-regulating professional organizations.[223] Additionally, third parties were often unsuccessful in recovering monetary damages from unreasonable restraints of trade, unless the restraint was maliciously designed to injure the plaintiff.[224]

The turbulent relationship between occupational licensing and early competition law in England sailed over to the United States with a constitutional gloss. Early common-law cases against monopolies and restraints of trade focused on the individual's qualified right to pursue a trade, which laid the foundation for economic substantive due process arguments against government regulations in the United States.[225] Despite this tension, the cases and customs predating the Sherman Act indicate a level of acceptance of state licensing regimes as important mechanisms of state government. For example, in *Downer v Lent*,[226] the California

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219 21 James 1 ch 3, § 6 (1624), reprinted in 4 Statutes of the Realm 1212, 1213 (1819).

220 See Harold G. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* 128 & n 21 (Toronto 1947) (noting the proliferation of Parliament granted monopolies following the Statute of Monopolies); Letwin, 21 U Chi L Rev at 367 (cited in note 212) (discussing exceptions in the Statute of Monopolies for corporations and guilds).

221 *Darcy v Allin*, 74 Eng Rep 1131, 1140 (QB 1602).

222 Fox, *Monopolies and Patents* at 128 n 21 (cited in note 220).

223 See *The Pharmaceutical Society of Great Britain v Dickson*, 1970 AC 403, 436 (HL 1968) ("[T]his doctrine [ ] affecting involuntary restraints has not been applied to a profession in any reported case.").

224 See Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va L Rev 759, 784–86 (1955) (noting the highly restricted third-party cause of action for contracts in unreasonable restraint of trade), citing *Bohn Manufacturing Co v Hollis*, 55 NW 1119, 1121 (Minn 1893).

225 See Mark A. Graber and Howard Gillman, 1 *The Complete American Constitutionalism: Introduction and the Colonial Era* 312–21 (Oxford 2015) (discussing the historical basis and reproducing the text of the relevant cases and statute); Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 Cal L Rev 487, 492–94 (1965) (noting the historical tension between freedom to contract and occupational licensing regimes). See also generally Steven G. Calabresi and Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv J L & Pub Pol 983 (2013) (discussing the evolving attacks against government-granted monopolies under various constitutional provisions).

226 6 Cal 94 (1856).

Supreme Court summarily rejected suit against the Board of Pilot Commissioners, a licensing board, for revoking a member's license.[227] Although the board's actions were quasi-judicial, and thus may implicate absolute, rather than qualified, immunity,[228] the state court recognized broad immunity because the law relied on the discretion of officials.[229] The US Supreme Court also recognized the importance of state licensing boards in *Dent v West Virginia*,[230] holding that these types of state regulations do not unduly infringe an individual's right to pursue "any lawful calling."[231] Following this decision, and during the period (1890 to 1910) immediately following enactment of the Sherman Act (1890) and preceding the Clayton Act (1914), there was a dramatic increase in the number of state occupational licensing regimes.[232] Many of these regulatory regimes vested control of the profession in boards composed of active market participants, and neither the Constitution nor the federal antitrust laws seem to have been successfully used to challenge that delegation of authority.[233]

This brief foray into history demonstrates that there was tension between occupational regulation and the common-law precursors to modern antitrust law, but the law recognized such regulatory regimes as important elements of state government by the time the federal antitrust laws were enacted.

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[227] See id at 95.

[228] For a discussion of when government officials performing adjudicative functions can claim absolute, instead of qualified, immunity, see note 102.

[229] See *Downer*, 6 Cal at 95 ("Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment.").

[230] 129 US 114 (1889).

[231] See id at 121–22 (recognizing "from time immemorial" the state's prerogative in requiring licensing for professionals to protect public health and safety).

[232] See Kleiner, *Occupational Licensing* at 20–21 (cited in note 1) (discussing the flourishing of state occupational licensing regimes during the period of 1890 to 1910). See also Friedman, 53 Cal L Rev at 507 (cited in note 225) (contrasting the Sherman Act's allowance of occupational licensing associations with its prohibition of other types of associations during that time period).

[233] See Friedman, 53 Cal L Rev at 496–97, 511–24 (cited in note 225) (discussing the growth of "friendly" licensing—regulated actors controlling regulatory bodies—and the courts' general lack of success in limiting such licensing during the period of 1890 to 1910). One exception in which the courts were routinely willing to strike down licensing requirements was for regulations on farriers. Id at 517–20 (noting that some courts distinguished between state restrictions on "common vocations," which were struck down, and those that touched on the health, safety, and welfare of society, which were upheld as acceptable state regulations).

2. The historical context of occupational licensing supports extending qualified immunity.

The first step in the Court's approach to identifying a common-law tradition of immunity is to identify the common-law actions that are analogous to the modern variant. In the case of an antitrust claim against state licensing board members, the closest common-law analogy would be the treatment of monopolies and restraints of trade.[234] The Court then considers whether there are common-law cases immunizing similarly situated defendants. For licensing board members, the state court in *Downer* recognized immunity for similarly situated defendants, but the action at issue did not involve competition laws, making the case only tangential evidence of immunity at common law. For causes of action based on competition law (restraints of trade and monopolies), third parties were typically unable to recover monetary damages unless the plaintiff could show the defendant's anticompetitive actions were done maliciously.[235] In this way, the common law adopted a good-faith defense to third-party claims for monetary damages arising from violations of the competition laws. This good-faith defense mirrors the common-law defense identified in *Pierson* that was used to justify recognizing qualified immunity in the context of § 1983, indicating common-law support for extending qualified immunity to licensing board members.[236]

Although this Comment does not identify a particular common-law case immunizing occupational regulators for anticompetitive behavior, the Court has been willing to consider the broader historical context in determining whether there is support for recognizing a qualified immunity defense.[237] Government delegation of occupational regulatory control to private associations was a historically accepted practice by the time the federal antitrust laws were enacted. Even as antitrust's predecessor doctrines emerged in England, control over trade continued to be vested in and exercised by guilds—government-empowered organizations composed of private actors.[238] In the United States,

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[234] For a discussion of the analogy between modern antitrust laws and early common-law treatment of monopolies and restraints of trade, see note 214 and accompanying text.

[235] For a discussion of the limited third-party cause of action, see note 224 and accompanying text.

[236] For a discussion of the holding in *Pierson*, see note 114 and accompanying text.

[237] See text accompanying notes 146–56.

[238] See note 218 (describing the various successes of guilds in retaining regulatory control after emergence of the common law's antipathy toward restraints of trade).

occupational regulations were similarly outsourced to state-empowered active market participants before and after the enactment of the Sherman Act, seemingly without judicial obstruction.[239] Although there is historical support for distinguishing between self-regulating "learned professions" and other licensed occupations,[240] the Court's reasoning in *Filarsky* rejects a categorical approach to the historical analysis.[241]

The historical analysis of occupational licensing regimes indicates that courts rejected illegitimate delegations of monopoly power. But they also recognized the states' prerogative in regulating professions for public health and safety and denied monetary recovery for third parties when the relevant restraint of trade was made in good faith. This common-law approach toward occupational regulation could be recreated in modern antitrust jurisprudence by recognizing qualified immunity for state licensing board members: regulations not appropriately authorized by the state (not *Parker* immune) could be enjoined, while monetary recovery would be limited to particular types of violations (those that failed qualified immunity).

C. Policy Rationales

After considering the common-law tradition of immunity, the Court then analyzes the policy rationales animating the qualified immunity defense.[242] First, the Court looks to whether personal liability would lead to undue timidity on the part of officials performing their discretionary duties.[243] Second, the Court considers

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[239] See Friedman, 53 Cal L Rev at 496–97, 511–24 (cited in note 225) (discussing the general reluctance of the judiciary to interfere with the delegation of regulatory control to active market participants).

[240] See *Richardson*, 521 US at 407 (noting that the common law recognized immunity for certain types of private defendants performing government work, including doctors and lawyers), citing *Tower v Glover*, 467 US 914, 921 (1984); *The Pharmaceutical Society of Great Britain*, 1970 AC at 436 (discussing the lack of common-law cases regarding restraints of trade by self-regulated learned professions). See also Friedman, 53 Cal L Rev at 517–20 (cited in note 225) (discussing the propensity of some courts to strike down state licensing requirements for "common vocations"); Steven B. Johnson and John B. Corgel, *Antitrust Immunity and the Economics of Occupational Licensing*, 20 Am Bus L J 471, 475–76 (1983) (discussing how the courts have engaged in lower antitrust scrutiny for collective actions taken by "learned professions").

[241] See *Filarsky*, 566 US at 387–89 (looking to the breadth of government action performed by private actors before enactment of § 1983 rather than only at investigative functions relevant to the case at bar).

[242] *Richardson*, 521 US at 407–08.

[243] See id at 408, citing *Harlow*, 457 US at 814.

whether liability would impact the talent pool of candidates looking to work for the government.[244] Last, the Court analyzes the extent to which litigation would distract officials from their work.[245]

1. Uncertain *Parker* immunity raises undue timidity concerns.

Members of state licensing boards are often drawn from active market participants in the profession,[246] leading to private economic incentives for zealous pursuit of anticompetitive regulations.[247] This weighs against the concern that these board members would be unduly timid in the face of potential antitrust liability. As made clear in *North Carolina State Board*, active market participants have incentives to vigorously pursue regulation of their own market beyond the public's interest,[248] which convinced the Court to require active state supervision of the Board's actions.[249] For example, eight of the ten dentists on the Board were offering teeth-whitening services when the cease-and-desist letters at issue in the case were sent to nondentist competitors.[250] "[U]sing the mechanisms of government to achieve their own ends"[251] is the same concern that led the Court in *Wyatt* to deny qualified immunity to the private defendants in that case.[252] Additionally, like the private prison in *Richardson*, there are external forces that incentivize licensing board members to avoid

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244 *Richardson*, 521 US at 411, citing *Wyatt*, 504 at 167.

245 *Richardson*, 521 US at 411, citing *Mitchell v Forsyth*, 472 US 511, 526 (1985).

246 Edlin and Haw, 162 U Pa L Rev at 1103 (cited in note 1) (finding more than 90 percent of licensing boards in Florida and Tennessee are composed of a majority of active market participants). For a discussion of why a state may want to have active market participants on state licensing boards, see note 6.

247 See *North Carolina State Board*, 135 S Ct at 1112 (discussing the concern of private incentives for active market participants acting as licensing board members).

248 See id at 1114 ("[T]here is no doubt that the members of such associations often have economic incentives to restrain competition."), quoting *Allied Tube & Conduit Corp v Indian Head, Inc*, 486 US 492, 500 (1988).

249 See *North Carolina State Board*, 135 S Ct at 1114 ("When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.").

250 Id at 1108.

251 *Filarsky*, 566 US at 392 (distinguishing the defendants in *Wyatt* from "individuals working for the government in pursuit of government objectives").

252 See *Wyatt*, 504 US at 168 (noting that private actors are not principally concerned with enhancing the public good and thus are undeserving of qualified immunity). See also *North Carolina State Board*, 135 S Ct at 1114 (noting a concern that licensing board members will "confus[e] their own interests with the State's policy goals").

overly timid regulatory actions.[253] For example, the board members in *North Carolina State Board* were voted into office by other licensed members of the profession.[254] Thus, selecting who participates on the licensing board may be more akin to market competition than a political contest, punishing insufficient regulatory rent for the profession with replacement on the board.[255] As the Court noted in *North Carolina State Board*, the focused regulatory control of a licensing board made it more likely to pursue private price-fixing ends than a governmental entity with broader regulatory interests, such as a municipality.[256]

Licensing board members have a clear conflict of interest when they regulate a profession they are still actively involved in. This is distinguishable from typical part-time government workers mentioned in *Filarsky*, who likely do not have an inherent conflict between their personal interests and those of the public.[257] Full-time licensing board members would not reap private benefits from their pursuit of government policy during their official tenure, but a part-time member has a "[d]ual allegiance[ ]" that makes his actions suspect under the antitrust laws.[258] Additionally, unlike the resource-strapped political subdivision in *Filarsky*, there is less of a concern that a state could not afford to pay a higher premium or provide indemnification for part-time board members.[259] Because this does not raise the same magnitude of concerns for deterring privatization, and the market for regulatory control over occupational licensing seems robust, the reasoning in

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253 See *Richardson*, 521 US at 410 (noting that market pressures provided incentives to the private prisons such that qualified immunity was not necessary for private prison guards to ensure efficient execution of government duties).

254 *North Carolina State Board*, 135 S Ct at 1108.

255 Even the *Richardson* dissent would have a difficult time finding that state licensing boards have no economic motives to violate the antitrust laws. See *Richardson*, 521 US at 421–22 (Scalia dissenting) (arguing that the idea that private prison guards have a profit motive to violate a prisoner's rights is implausible and contrary to available data).

256 See *North Carolina State Board*, 135 S Ct at 1114.

257 See *Filarsky*, 566 US at 394 (holding that part-time government workers are not precluded from claiming qualified immunity).

258 *North Carolina State Board*, 135 S Ct at 1111.

259 If a state licensing board had geographically limited regulatory authority, similar to a special-function government unit, members could be immunized under the Local Government Antitrust Act of 1984, Pub L No 98-544, 98 Stat 2750, codified at 15 USC §§ 34–36. See 15 USC § 34(1)(B) (defining antitrust-immunized "local government" to include "special function governmental unit[s]" like schools or sanitary districts); *Local Government Antitrust Act of 1984*, HR Rep No 98-965, 98th Cong, 2d Sess 20 (1984), reprinted in 1984 USCCAN 4602, 4621 ("Such a [special-function government unit] would have a geographic jurisdiction that is not contiguous with, and is generally substantially smaller than, that of the state.").

Filarksy supporting qualified immunity does not readily extend to active market participants serving on state licensing boards.

There are, however, strong countervailing reasons why these incentives may be insufficient for licensing board members to exercise their state-empowered discretion. The actions of a state licensing board necessarily implicate questions of anticompetitive behavior: it is, at its core, an agreement among competitors not to compete along certain dimensions.[260] This is significant as it implicates the full panoply of remedies for antitrust violations if the board's actions do not enjoy *Parker* immunity.[261] Although the concern may be mitigated by the applicable standard of antitrust scrutiny for state licensing boards,[262] members may still not be so enthusiastic in pursuing board actions that are inherently anticompetitive. Board members' liability is not entirely dependent on their own actions—they enjoy *Parker* immunity only when the board's actions have been "active[ly] supervis[ed]" by the state.[263] Although board members could inquire into how the state is supervising the board's actions, no member could be certain that the public official responsible for such an activity is actively performing her duty. This situation, in which agents can be liable for the (in)action of their principals, is unusual and highly contentious.[264]

Beyond the unavoidable uncertainty of actual state supervision, there is also residual uncertainty of what entities are covered

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[260] See note 5 (discussing how state licensing boards can act like cartels by agreeing to limit competition without benefiting the public).

[261] See *Community Communications Co, Inc v City of Boulder*, 455 US 40, 56 (1982) (noting that public officials may be susceptible to the full suite of antitrust remedies when *Parker* immunity is not available).

[262] Sometimes the Court has applied a more lenient antitrust standard for actions taken by professional organizations compared to other private organizations. See, for example, *Federal Trade Commission v Indiana Federation of Dentists*, 476 US 447, 458–59 (1986) (applying a lower level of scrutiny for the collective actions of a dental trade association). See also generally Johnson and Corgel, 20 Am Bus L J 471 (cited in note 240) (discussing how the courts have required a lower antitrust scrutiny for collective actions taken by "learned professions").

[263] See *North Carolina State Board*, 135 S Ct at 1114.

[264] See generally, for example, Deborah Schmall, et al, *Corporate Officers Beware—California Court Revives and Expands the "Responsible Corporate Officer Doctrine" and Imposes Millions in Personal Fines* (Paul Hastings, Jan 2009), archived at http://perma.cc/5YL5-XTUV (discussing how the responsible-corporate-officer doctrine makes corporate officers, the agents, liable for civil fines caused by the (in)action of the corporation, their principal); Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 Temple L Rev 283 (2012) (criticizing the expanding responsible-corporate-officer doctrine as being unsupported by tort, criminal, and corporate legal principles).

by the rule in *North Carolina State Board*. The Court distinguished between "prototypical state agencies" and those composed of a controlling number of active market participants[265] but did not define "controlling," "active," or "market participant."[266] These issues raise the concern of undue timidity, especially because "[a]n uncertain immunity is little better than no immunity at all,"[267] indicating that despite the potential for private and market incentives, this concern weighs in favor of qualified immunity.

2. The risk of personal liability may deter professional candidates.

The possibility of facing treble antitrust damages for participating on a state licensing board may deter qualified candidates from participating in the first place.[268] The Court has stated that the possibility of indemnification weighs against this concern,[269] yet the Court has expanded the availability of qualified immunity despite prevalent indemnification.[270] The Court also ignored the possibility of indemnification in *Filarsky*, calling into question the relevance of this issue (to the Court) for the qualified immunity analysis. Thus, although licensing board members may be indemnified by the state,[271] this does not seem to be significant to the qualified immunity analysis.[272]

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[265] *North Carolina State Board*, 135 S Ct at 1114.

[266] See id at 1122–23 (Alito dissenting) (criticizing the majority opinion as leaving substantial uncertainty).

[267] *Filarsky*, 566 US at 392.

[268] See *North Carolina State Board*, 135 S Ct at 1115 (identifying this issue as a potential concern for state licensing boards).

[269] See id.

[270] See generally Kinports, 100 Min L Rev Headnotes 62 (cited in note 118); Schwartz, 89 NYU L Rev 885 (cited in note 172).

[271] See Harris, Cal Op Atty Gen at *15–18 (cited in note 97) (noting that California likely has a duty to indemnify and defend board members, but identifying a concern that treble antitrust damages may constitute punitive damages and thus not be covered by the relevant indemnification statute); Rivers, 90 Fla Bar J at 47 & n 54 (cited in note 97) (noting the uncertainty in Florida law regarding whether licensing board members would be indemnified for antitrust violations by the board).

[272] See generally, for example, *Mullenix v Luna*, 136 S Ct 305 (2015) (granting qualified immunity to a police official without any discussion of indemnification). In this way, qualified immunity may be better viewed as a means of reducing costs for local governments rather than the individual officials. For a discussion of the consequences of having government pay for constitutional torts, see generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345 (2000) (arguing that economic costs may not achieve the desired level of deterrence for political actors). But see generally Myriam E. Gilles, *In Defense of Making Government*

It is also unclear if the economic incentives for zealous pursuit of board action discussed in Part III.C.1 would induce professionals to pursue board membership given the opportunity for free riding; nonboard professionals could benefit from the anticompetitive pursuits of the board while not facing personal liability for such activities. For example, in *North Carolina State Board*, non-Board dentists, who had complained of competing with nondentists for teeth-whitening services, benefited from the Board's anticompetitive elimination of the competition and did not have to worry about personal liability.[273] Additionally, when public officials on a licensing board can claim immunity, the concern of facing full antitrust liability may dissuade private actors from serving on these boards.[274] Beyond monetary damages, the specter of professional sanctions for antitrust violations may also deter licensing board service.[275] These issues are all the more concerning for those with specialized expertise, given the Court's acknowledgement that these types of professionals do not need to work for the government.[276] There may be personal benefits from participating on a licensing board,[277] but given the potential for antitrust liability anytime the board acts, talented professionals may wish to avoid the hassle of part-time board membership altogether.

3. Immunity would not likely mitigate distraction by litigation.

Qualified immunity would undoubtedly decrease the stress for individual licensing board members, but it would not likely impact the distraction of officials by affecting either the quantity or extent of antitrust litigation against the board. Every antitrust suit against a board member for a violation by the board would already ensnare public officials, either as codefendants to enjoin an anticompetitive regulation or as witnesses to establish active

Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga L Rev 845 (2001) (acknowledging that optimal deterrence may not be achieved, but simple deterrence could be achieved by making government pay for constitutional violations).

273 *North Carolina State Board*, 135 S Ct at 1108.

274 *Filarsky*, 566 US at 398 (Sotomayor concurring).

275 See generally, for example, *Disciplinary Counsel v Margolis*, 870 NE2d 1158 (Ohio 2007) (ordering professional sanctions against a lawyer for violations of the federal antitrust laws).

276 *Filarsky*, 566 US at 390.

277 Ethics and a sense of service may animate professionals electing to work on licensing boards. See *North Carolina State Board*, 135 S Ct at 1115.

state supervision for *Parker* immunity.[278] By requiring a showing of state supervision for *Parker* immunity, the holding in *North Carolina State Board* anticipates a certain level of involvement for officials in antitrust litigation.[279] Although the Court noted in *Filarsky* that distraction of officials who qualify for immunity in § 1983 cases is a concern,[280] the Court's acceptance of such distraction in the context of antitrust litigation suggests that the concern is not as pressing in these situations. In fact, some circuit courts have refused to allow interlocutory appeal of a denial of *Parker* immunity, suggesting a diminished concern of prolonging litigation on such matters.[281] Also, similar to the situation in *Richardson*, the concern of distraction is attenuated by the retention of significant duties by state officials, including reviewing, approving, and enforcing the board's regulations.[282] Such state control not only ensures *Parker* immunity but also limits exposure of part-time workers to liability if there is a defect in the immunity.

The availability of qualified immunity would not significantly affect the level of distraction from government work, but the Court has not given this concern much weight. There is a residual level of litigation even when qualified immunity is available as a defense, so distraction by litigation cannot itself be determinative of whether qualified immunity should be available.[283] Thus, given the aforementioned concerns of undue timidity and deterring qualified candidates from state licensing board service, the policy rationales support recognizing qualified immunity for individual state licensing board members.

D. Applying Qualified Immunity to Licensing Board Members

The common-law and policy rationales support extending qualified immunity to individual licensing board members facing

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[278] See generally, for example, *Bauer v Pennsylvania State Board of Auctioneer Examiners*, 188 F Supp 3d 510 (WD Pa 2016) (describing how the plaintiff sought both injunctive relief against the board's regulation and monetary relief against individual board members).

[279] See *North Carolina State Board*, 135 S Ct at 1114.

[280] See *Filarsky*, 566 US at 391.

[281] See, for example, *South Carolina State Board of Dentistry v Federal Trade Commission*, 455 F3d 436, 441 (4th Cir 2006); *Huron Valley Hospital, Inc v City of Pontiac*, 792 F2d 563, 567 (6th Cir 1986).

[282] See, for example, *North Carolina State Board*, 135 S Ct at 1107–08 (describing limits on the Board's powers).

[283] See *Richardson*, 521 US at 411.

liability for antitrust violations by the board, but that does not answer the question whether such immunity would succeed in any particular case. It may be helpful to identify how the doctrine could apply in particular examples to illuminate both the complementary functions of qualified and *Parker* immunity and the limits of immunity in general.

The Fifth Circuit has already provided one example. In *Affiliated Capital Corp v City of Houston*,[284] a mayor was sued for violating the federal antitrust laws in a cable franchising scheme.[285] He could not claim *Parker* immunity because the city was not effectuating a clearly articulated state policy,[286] but qualified immunity was still available because it was not "clearly established" at the time of the anticompetitive arrangement that a home-rule city, like the mayor's, was not per se *Parker* immune.[287] Thus, qualified immunity did not create an absolute bar for monetary damages based on the mayor's role but instead shielded the official only for reasonable mistakes as to the law at the time.

As another example, the Board in *North Carolina State Board* failed to satisfy *Parker* immunity, so the Court affirmed an injunction against the Board's actions as a violation of the federal antitrust laws.[288] The result would be the same if the Board members could claim qualified immunity, but monetary damages would be barred if the members were not violating a "clearly established" right. It is arguable that the board members would not be liable in *North Carolina State Board*, given that at the time there was a three-way circuit split, and unclear precedent in the relevant circuit, for how licensing boards should be treated under

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284 735 F2d 1555 (5th Cir 1984).

285 Id at 1557–59.

286 Id at 1569–70 (noting that only after the actions at issue in the case was it clearly established that home-rule cities were not per se *Parker* immune and thus could be liable under the Sherman Act), citing generally *Community Communications Co*, 455 US 40.

287 *Affiliated Capital*, 735 F2d at 1569 (noting the lack of "clearly established" rights due to the plurality nature of the relevant Supreme Court decision), citing generally *City of Lafayette v Louisiana Power & Light Co*, 435 US 389 (1978) (plurality).

288 *North Carolina State Board*, 135 S Ct at 1117. Suit was brought by the Federal Trade Commission under 15 USC § 45, but the case was treated as generally concerning federal antitrust laws. Id at 1108–09.

Midcal.[289] Because the Board satisfied the first *Midcal* prong,[290] a reasonable licensing board member may not have been aware that he or she was not *Parker* immune, and thus could not violate a "clearly established" right by sending the cease-and-desist letters.[291]

A more challenging example would be the hypothetical response of North Carolina to the ruling in *North Carolina State Board*. If the state subsequently actively supervised the Board via enactment and enforcement of reviewing procedures for all Board activities, then the Board's actions would be *Parker* immune. However, if the state created reviewing procedures, but engaged in only perfunctory supervision,[292] then the Board's actions could fail *Parker* immunity as not being actively supervised by the state. In such a case, the Board's action could be enjoined if anticompetitive, but determining whether individual licensing Board members could be personally liable for the violation would require an analysis of qualified immunity. If it was reasonable for the Board members to believe that they were being supervised by the state, and thus that *Parker* could reasonably be assumed to apply, then they could successfully invoke qualified immunity.[293] In this way, qualified immunity serves to protect reasonable mistakes made by officials exercising discretionary duties, not unreasonable ignorance of federal antitrust law's requirements.[294]

The above situation applies the "clearly established" inquiry to the licensing board member's prediction of whether *Parker* immunity would apply to the board's actions. If it was "clearly established" that *Parker* immunity would not apply, there is still the possibility that the board member did not violate "clearly established" rights arising under the federal antitrust laws. This

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289 For a discussion of the three-way circuit split, see Part I.B. See also *North Carolina State Board of Dental Examiners v Federal Trade Commission*, 717 F3d 359, 368–70 (4th Cir 2013) (noting that the Fourth Circuit had previously required active state supervision by a state agency operated by market participants, but the case predated the Supreme Court cases of *Midcal* and *Town of Hallie*), citing *Asheville Tobacco Board of Trade, Inc v Federal Trade Commission*, 263 F2d 502, 509 (4th Cir 1959).

290 *North Carolina State Board*, 135 S Ct at 1110 (accepting the parties' assumption that the clear-articulation requirement was satisfied).

291 See *Town of Hallie*, 471 US at 46 n 10 (suggesting state agencies, like the Board in *North Carolina State Board*, need satisfy only the first *Midcal* prong for *Parker* immunity).

292 See *Federal Trade Commission v Ticor Title Insurance Company*, 504 US 621, 638 (1992) (holding that the state supervision prong of *Parker* immunity requires more than a state simply having the ability to veto an agency's actions).

293 For a discussion of how the Fifth Circuit has applied a similar analysis in the context of *Parker* and qualified immunity, see notes 284–87 and accompanying text.

294 See *Economou*, 438 US at 506–07 (noting that it is not unfair to require awareness of clearly established rights when performing one's official duties).

analysis is more complicated because there are varying levels of antitrust scrutiny applied to different types of actions and different types of organizations.[295] The variation in antitrust scrutiny is significant to the "clearly established" inquiry because some actions are considered to presumptively violate the antitrust laws while others undergo a more rigorous balancing inquiry. The former approach is the per se analysis, and the latter is the rule-of-reason analysis.[296] It may be that the appropriate level of antitrust scrutiny and qualified immunity's "clearly established" inquiry collapse into a single question. A per se violation covers actions that clearly violate the antitrust laws, leading to a violation of a "clearly established" right and therefore no qualified immunity. On the other hand, a rule-of-reason violation covers a wide array of different activities that require a factually intensive balancing to know if they violate the antitrust laws; thus, these types of actions likely do not violate "clearly established" rights given the uncertainty, and qualified immunity could be available. This Comment does not attempt to address the intricacies of this issue but instead presents it as a possible avenue for future consideration.

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Courts should recognize qualified immunity for individual licensing board members against claims arising under the federal antitrust laws given the strong historical underpinnings and policy support for such a defense. The common law has recognized immunity for certain licensing board activities, and occupational licensing has a rich historical pedigree as a significant tool of government regulation. The policy rationales undergirding qualified immunity also support recognizing the defense for licensing board members; undue timidity is a substantial concern given the uncertainty in accurately predicting *Parker* immunity, and there is a real possibility that talented professionals will eschew service on licensing boards to free ride off the anticompetitive results rather than face personal liability.

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[295] See Christopher L. Sagers, *Examples and Explanations: Antitrust* 85–90 (Wolters Kluwer 2d ed 2014) (discussing the general categories of antitrust scrutiny under 15 USC § 1); Johnson and Corgel, 20 Am Bus L J at 475–76 (cited in note 240) (discussing the lower antitrust scrutiny applied to collective actions taken by "learned professions").

[296] See Sagers, *Antitrust* at 87–90 (cited in note 295) (distinguishing between the types of analysis). But see id at 93–95 (highlighting the continuum of levels of antitrust scrutiny rather than rigid categories), quoting *California Dental Association v Federal Trade Commission*, 526 US 726, 779–81 (1999).

CONCLUSION

State licensing boards perform the important government function of regulating professions, but there is a concern that these boards can be captured by interest groups and pursue private, anticompetitive ends. The Supreme Court has attempted to address this concern by allowing antitrust scrutiny of licensing board actions when the board's actions are either not authorized or not supervised by the state. This allows anticompetitive regulations that do not represent the state's interests to be enjoined, but it also exposes licensing board members to personal monetary liability. In this way, qualified immunity is a tool for filling the gap between the sovereign immunity of the board and the personal liability of the board members. History supports extending the defense to licensing board members, as some actions of the boards were immunized at common law and there was general acceptance of occupational regulatory regimes as part of government by the time the federal antitrust laws were enacted. Additionally, the policy rationales undergirding qualified immunity support its extension to licensing board members. Professionals serving on licensing boards may have economic incentives to aggressively regulate the market, but these incentives are tempered by professional ethics and the danger of failing to accurately predict *Parker* immunity. Furthermore, personal liability would likely limit participation of talented candidates on these boards, especially for part-time members who could enjoy the benefits of the board's actions without exposure to antitrust liability. Applying the defense to licensing board members also does not completely shield their behavior. Qualified immunity applies only when members make reasonable mistakes in exercising their state-empowered discretionary duties, similar to their public counterparts. Thus, there is a strong case to be made for extending qualified immunity to private professionals who are qualified to serve on state licensing boards.