The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-Regulation Cases Tell Us About the Cavities in Antitrust Law

*Peter C. Carstensen**

"Under the Sherman Act a combination formed [solely] for the purpose . . . of raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal *per se*."[1]

"[A] 'naked restraint on price and output requires some competitive justification . . . .'"[2]

There is an inescapable inconsistency between the general rule that naked (cartelistic) restraints of competition are per se illegal and the treatment of such restraints when engaged in by self-regulatory professional organizations, standard setting organizations, and various private organizations that regulate competition in variety of athletic and other activities. Most observers believe that some of that cartelistic regulation may be not only socially and economically desirable but also necessary to serve the public interest. The judicial effort to explain when cartels or other naked restraints on competition within or between such groups and others are lawful and when they are not has floundered on the lack of specificity of the "rule of reason" which invites linking any justification for a restraint to some ambiguous assertion of "reasonableness." The inevitable implication is that any cartel could be lawful if it were reasonable and served some "pro-competitive," "consumer welfare," or other "public interest" goal. This

* Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. I am deeply indebted to Anthony Gray for insights in the distinction between real ethical issues and the common use of the term to describe regulation. Similarly, my colleague Alta Charo has instructed me on the important distinctions between regulation of economic conduct by professionals and the establishment of standards for the substantive performance of a professional activity. Darren Bush, Harry First, Chris Sagers, and Spencer Weber Waller read an earlier draft and greatly assisted me in understanding the challenges that my approach faces. I particularly want to single out Professors Sagers and Bush for their extended comments and questions. I presented a revised version of this paper at the 19th Annual Loyola Antitrust Colloquium at which I gained further quite helpful comments from Rebecca Haw Allensworth and Melissa Maxman as well as the attendees. Finally, Erik Eisenheim has proved reliable and helpful research assistance on this project.

1. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
2. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769 (1999) (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984)).

Article contends that this approach is wrong. Instead, what courts are in fact doing is preempting certain kinds of restraints from antitrust law review, although this is evident only by implication. This Article applies the Carstensen-Roth framework to explain such preemption or exemption. Three elements are necessary: state law, federal law, constitutional law, or some generally accepted public interest goal must authorize the organization to regulate some aspect of the market, the regulation at issue must be within the scope of that authorization, and the process used to adopt and implement the regulation must be appropriate under the circumstances. Naked restraints satisfying these elements are exempt from antitrust law review, and courts applying antitrust law should not undertake to determine the substantive "reasonableness" of such regulations. This framework adheres to the general rule that naked restraints of competition are always per se illegal unless exempt and provides a clearer basis for determining when and whether a restraint can be lawful. The three Supreme Court decisions reviewing FTC challenges to conspiracies among dentists to restrict and regulate competition in dental care provide the basis to illustrate and test this approach.

INTRODUCTION

Organized groups of dentists have gone to the Supreme Court three times in the last thirty years to defend naked, cartelistic restraints on competition within and between their profession and alternative services. They have lost twice and won once. In 1986, the Court upheld an FTC challenge to the Indiana Federation of Dentists agreement among its members to refuse to provide information to insurers necessary to review claims for dental services.[3] But in 1999, it rejected the FTC's effort to condemn the California Dental Association's cartelistic restrictions on advertising by dentists.[4] Then in 2015, the Court again embraced an FTC challenge and condemned the North Carolina Dental Board's collusive suppression of competition from third parties.[5] Thus, a decision of a trade association to suppress competition among its members is arguably lawful, but a comparable association of dentists cannot agree with each other to boycott insurers nor can a state agency undertake to restrict the practice of dentistry by non-dentists without active supervision by the state! The logic of these distinctions is not transparent. All three of these agreements are indistinguishable from traditional cartels that antitrust law otherwise consistently condemns as per se illegal.

These dental cases are part of a larger set of professional regulation cases that the Court has decided. Those decisions seem to create a similarly confusing pattern of liability. Consulting engineers cannot forbid price competition but may impose other "ethical" standards on their members.[6] Bar associations cannot fix fees or otherwise regulate competition unless they have the authorization of some supervising state authority and the restraint serves some "public interest aspect" of the profession.[7] Confusingly, even when a public authority has approved a restraint on advertising competition that restraint can still be unconstitutional.[8] Yet if an association of professionals imposes a similar advertising restraint it can be lawful.[9] Similarly, doctors have an express exemption from antitrust law to police the quality of the work done by

3. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 447–48 (1986) (finding unlawful collusion to withhold x-rays from insurers).

4. *Cal. Dental Ass'n*, 526 U.S. at 757 (holding collusion to suppress advertising of discounts or quality could be lawful).

5. N.C. Dental Bd. of Exam'rs v. FTC, 574 U.S. 494, 494–95 (2015) (finding collusive suppression of competition from non-dentists subject to antitrust and forbidden because it is not shielded by state action immunity).

6. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978) ("Ethical norms may serve to regulate and promote this competition [within the learned professions] and thus fall within the Rule of Reason.").

7. Goldfarb v. Va. State Bar, 421 U.S. 773, 788–89 n.17 (1975).

8. Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977).

9. *Cal. Dental Ass'n*, 526 U.S. at 759.

other doctors except that they cannot use that authority without some outside, active supervision over their decisions.[10] All these restraints are essentially cartelistic combinations that justify themselves as regulation of professional conduct. In other contexts, cartelistic combinations are per se illegal regardless of the justification offered. Thus, usually cartelistic conduct is held per se unlawful but sometimes it is "reasonable" and so lawful.

Despite the apparent lack of consistency in these outcomes, they reflect an implicit logic that is also observable in a variety of other comparable areas where exemptions from, or preemptions of, antitrust law are at issue. But the flawed nature of conventional antitrust categories and their inappropriate uses[11] has obscured the potential coherence of this unarticulated framework and has led advocates and judges into using terms that do not adequately describe the analytic process being used. As a result, some decisions are highly questionable. This is especially true with respect to the implicit assertion that courts and agencies have the right and capacity to decide the merits of the substantive terms of regulatory regimes as a matter of antitrust law. Moreover, the apparent acceptance of some cartelistic restraint as "reasonable" and so lawful creates a serious inconsistency with the antitrust doctrine of per se illegality for cartels.

At the outset, then, it is central to recognize that the three dental cases and the bulk of the other professional and similar cases involve claims of a right to regulate economically significant conduct involving market participants not otherwise engaged in any joint productive activity. This differentiates these cases functionally from situations in which the parties to a restraint are engaged in a legitimate, productive joint venture or are in the process of transferring some good or property from one to the other. In such cases, the legitimate needs of the transaction define what restraints, ancillary to that transaction, may be lawful. This distinction in the functional relationship between the restraint and the other activities of the parties is central to having a coherent and logical framework for

10. Patrick v. Burget, 486 U.S. 94, 102–03 (1988). Indeed, beyond the professions, the NCAA restrains competition among colleges for the services of "student-athletes," and standard setting organizations may impose a variety of restraints in the form of standardization. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (upholding the right of the NCAA to regulate payments to college athletes); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 510–11 (1988) (holding the National Fire Protective Association is authorized to set safety standards but must employ appropriate process to do so).

11. *See generally* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207 (2008) (explaining while categories historically were helpful, their meanings have shifted and are now manipulated by companies to get the outcome they desire).

evaluating restraints.[12] However, as the foregoing discussion demonstrates, not all naked restraints are necessarily illegal. So, while the naked/ancillary distinction is central, antitrust law needs to have a principled way to explain when and on what terms a naked restraint of completion might be lawful.

Unfortunately, contemporary antitrust has evolved a broad "rule of reason" that in some cases ignores the functional distinction and has as its ultimate criterion an open-ended, ad hoc balancing of potentially positive and negative effects of restraints. This approach has historical doctrinal roots dating back to a dissent in the earliest restraint of trade case.[13] It also relies on the shift of antitrust theory from a focus on protecting the market process to an assessment of the consequences of a restraint. If the contribution to "consumer welfare"—itself an undefined and undefinable term[14]—exceeds the harm to consumers, then the good outweighs the bad and the restraint is reasonable. But cartels are generally illegal regardless of their effect on consumer welfare, and this still dominates much of antitrust.[15] This results in a lack of consistency in the resulting antitrust standards or a coherent explication of the basis of those decisions that do assess the "merits" of naked restraints. However, if one looks at the specific issues that recur in the cases involving preemption of antitrust by regulation, a set of implicit criteria and standards exist.

The thesis of this Article is that these apparently deviant decisions involve the question of whether otherwise per se unlawful conduct is exempt from antitrust law based on the regulatory authority of the actors. Alternatively, these results imply a preemption of antitrust law.[16] This is especially problematic when that authority originates from a de facto

12. The same basic analysis is applicable to the analysis of conduct by monopolists, but the elaboration of that point is best left to another day.

13. *See generally* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343–74 (1897) (White, J., dissenting) (contending that all restraints, including cartels, should be subject to a reasonableness test).

14. *Compare* Herbert J. Hovenkamp, Is Antitrust's Consumer Welfare Principle Imperiled? 18 (2019) (unpublished manuscript) (on file with University of Pennsylvania Law School Legal Scholarship Repository), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2987&context=faculty_scholarship [https://perma.cc/49MP-TESS] (acknowledging that competition law is concerned with harm to producers as well as consumers, concluded that "the word 'consumer' [in consumer welfare] . . . is a term of art") *with* PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE 16–37 (2017) [hereinafter CARSTENSEN, COMPETITION POLICY] (critiquing the goal of consumer welfare).

15. *See generally* United States v. Kemp & Assocs., 907 F.3d 1264 (10th Cir. 2018) (rejecting the trial court's use of rule of reason to decide a cartel case where defendants asserted significant efficiencies resulted from the naked restraint).

16. The terms "exemption" and "preemption" are used interchangeably here as both mean that antitrust law does not apply to the underlying conduct.

authorization accorded to self-regulatory groups.[17] A three-step framework of analysis explains and predicts the outcomes in many of these cases. It also can explain how courts in cases such as *California Dental* reached decisions that are questionable. To be sure, other frames of reference might still uphold the validity of even those restraints, but such frames create important risks for the integrity of competition law generally.[18] In contrast, the per se legal framework explicitly recognizes that the specific regulations of a lawful regulatory regime are not appropriate subjects for antitrust review. Any such review necessarily would require the antitrust court to act as a regulator, but antitrust law provides no criteria for making such decisions. Other legal standards can, however, provide a basis for judicial review, but those do not involve antitrust law. In application, the per se legal framework would condemn almost all contemporary professional self-regulation that is not subject to supervision by a disinterested and effective agency of the state.[19]

Part I of this Article expands on the two problems at the core of the misuse of the rule of reason in these cases. First, the contemporary understanding of the "rule of reason" is that it permits the justification of cartelistic restraints based on a balancing of their pro- and anti-competitive effects. Second, the confused and ultimately incorrect equating of regulatory rules with ethics, as well as conflating economic regulation with standards for the actual practice of a profession, has reinforced the reliance on open-ended reasonableness as a criterion. Part II describes the per se legal analysis developed by Carstensen and Roth that utilizes a three-step analytic framework for understanding these cases.[20] Part III examines in some detail the decisions in the three dental cases to show that substantively they all involved the question of exemption for otherwise naked, cartelistic restraints on competition. Part IV expands on the challenges that professional and other self-regulation present to antitrust law by contrasting the open-ended use of a "reasonableness" criterion and the standards that emerge from the per se

17. Other important areas are standard setting organizations. *See, e.g.*, Am. Soc. Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982). This includes the NCAA, which regulates college sports. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984) ("Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports.").

18. *See, e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1095 (2014) (suggesting that professional regulatory authorities not exempted by state action immunity be allowed to defend their regulations on their merits via a modification of the per se rule against cartels).

19. As will be discussed *infra*, text accompanying notes 281–87, other contexts may require different methods of ensuring appropriate oversight of the regulations adopted and enforced by de facto regulatory entities.

20. *See* Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A [Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 45 ANTITRUST BULL. 349, 349–50 (2000) (detailing the framework).

legal framework. It also returns briefly to the unhelpful reliance on ethics and substantive standards in evaluating the merits of these cases as well as whether the distinctions between exclusion of competitors and restraint among competitors might be useful to distinguish the legality of the competitive effects of these regulations. Part V concludes with a reconsideration of challenges competition law faces going forward in evaluating various kinds of de facto regulatory restraints.

I. TWO PROBLEMS WITH CONTEMPORARY ANTITRUST DOCTRINE AFFECTING PROFESSIONAL ORGANIZATION RESTRAINTS

This Part addresses two significant problems that confront antitrust law. The first is the contemporary use of an open-ended definition of the "rule of reason" that makes it the polar opposite of a rule. The second is the combination of the misuse of the term "ethics" to describe professional economic regulation and the failure to separate standards of practice from regulations related to the business practices of a profession.

A. *The Ruleless Character of the "Rule" of Reason*

In 1897, in *Trans-Missouri*, Justice Edward White's dissent argued that cartels should be evaluated for their "reasonableness" including the reasonableness of the prices they fixed.[21] His view was that unless the prices were unreasonable, the restraint would be lawful. The majority rejected that position and instead employed the forerunner of the per se rule. A year later then-Judge William Howard Taft, writing for the Sixth Circuit, used the *Addyston Pipe* case to explicate and modify the *Trans-Missouri* rule.[22] The result was a central distinction between naked restraints and ancillary ones.[23] The distinction is between an ancillary restraint whose function is to facilitate some other legitimate productive venture or transaction between or among the parties and a naked restraint whose function is to exploit market power. An ancillary restraint either

21. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343–74 (1897) (White, J., dissenting).

22. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

23. This distinction has its origin in the common law of England, Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 349; 1 P. Wms. 181, 185–88, and found its greatest and clearest articulation in then-Judge Taft's opinion in *Addyston Pipe & Steel*, 85 F. at 279–80. The centrality of the insight is universally acclaimed. Moreover, it provides the fundamental basis for Bork's critique of antitrust. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 800–01 (1965); *see* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 272 (1986) (contending that the Sherman Act be read consistent with *Addyston Pipe*). For another effort to expand on this framework, see Peter C. Carstensen & Richard F. Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 WIS. L. REV. 1, 17–29 (1986).

addresses some need to define and thereby restrain the relationship among the parties or controls a risk of opportunistic conduct by either party. As such, its reasonableness derives from its utility in serving the legitimate needs of a business transaction. If the restraint is unnecessary to protect those legitimate interests, it would necessarily be unreasonable. Similarly, if its competitive effect is excessive in comparison with other roughly equal alternatives, it is also unreasonable.

A naked restraint only functions to create, allocate, or exploit market power. These are "cartelistic" restraints whether they restrict price, output, quality, or any other dimension of competition including entry into the market. All such restraints regulate the market in which they operate. They can control price, restrict output, allocate customers, constrain the variety of products, or limit promotion. In the usual industrial context, the underlying objective is to increase the gains to the parties directly, by exploitation, or indirectly, by restricting competition.

Government regulations that impose licensing requirements, restrict market access, impose hours, or otherwise control the way in which competition will take place have an analogous function. When the government imposes such restraints, presumably the public interest is being served.[24] Empirical analysis of the justification and effect of much regulation at the national, state, and local levels of government has shown that this presumption is not well founded in many cases.[25] Moreover, even when there are legitimate reasons for regulations, it is frequently the case that the actual regulations provide unnecessary ("unreasonable") protections for incumbents and unduly broad exclusion of competition. At one time, the constitutional doctrine of substantive due process allowed courts to look critically at the nature of regulatory restraints and determine whether they were "reasonable" or not.[26] The doctrine has

24. Public choice theory disputes this view by focusing on the economic incentives of those seeking to influence the regulatory process. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY, at v (1962) (detailing the economic incentives); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 302–03 (1974) (discussing how rent seeking is competitive and its effects). This theory is often used to explain the use of licensing. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 210 (2016) (discussing public choice theory in licensing).

25. *See, e.g.*, Krueger, *supra* note 24, at 302; Larkin, *supra* note 24, at 330; Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723 (2005); Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1567, 1570 (2017).

26. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). Alan Meese has argued that the *Standard Oil* decision embedded the *Lochner* substantive due process analysis in the rule of reason. Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL L. REV. 783, 783–84 (2012). The analysis here rejects that characterization because it would accept the open-ended reasonableness standard.

proven unworkable in any consistent and rational way.[27] As a result, the courts have had to stand back from an open-ended review of the merits of regulatory legislation and rules. This is not without its costs to the economy.

There is a need for better general criteria for judicial review of the merits of regulatory regimes.[28] However, where a more specific constitutional or statutory provision exists, courts can constrain legislative or administrative regulation.[29] For purposes of this analysis, the central point is that courts have not developed the doctrinal tools that permit them to have a consistent critical analysis of regulatory statutes, ordinances, and rules that impose unreasonable requirements. This challenge also explains why antitrust law has as its core value that naked restraints are themselves inherently unreasonable (per se illegal). There is a burgeoning literature focused especially on occupational licensing that is seeking better standards.[30] Those debates are beyond the scope of this discussion, except as the failure of direct oversight of regulation demonstrates why antitrust law is no better suited to make such judgements than is the Due Process Clause of the Constitution.

In analysis of naked restraints by antitrust, as with government regulation, there is no principled way to determine what is reasonable. To try to do so is for courts to

> [S]et sail on a sea of doubt, and . . . assume[] the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.[31]

In contrast, an ancillary restraint is amenable to a principled standard of review based on the legitimate needs of the transaction or venture. The

27. *See* Nebbia v. New York, 291 U.S. 502, 514 (1934) (finding no basis in the due process clause for condemning provisions of the Agriculture and Markets Law); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (rejecting constitutional challenge to anticompetitive local regulation).

28. *See generally* Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where Is Attorney General "Waldo"?*, 56 ANTITRUST BULL. 771 (2011) [hereinafter Carstensen, *Where Is Attorney General Waldo*] (discussing the problem of creating standards for review of unnecessarily anticompetitive local and state regulations).

29. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 353 (1977) (rejecting a broad prohibition on lawyer advertising based on the First Amendment); United States v. Yellow Cab Co., 340 U.S. 543, 556–57 (1951) (holding interstate commerce considerations overcame local grant of monopoly for transferring travelers among Chicago rail stations); County of Milwaukee v. Williams, 732 N.W.2d 770, 788 (Wis. 2007) (finding a local ordinance that excluded taxis from meeting pre-arranged passengers at an airport violated state law requiring open access by businesses to airports).

30. *See, e.g.*, Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 26–27 (1976) (explaining why occupational licensing should seek a higher standard); Law & Kim, *supra* note 25 (discussing occupational licensing); Larkin, *supra* note 24, at 210 (calling for the Supreme Court to intervene to protect the public from the excess of occupational licensing).

31. United States v. Addyston Pipe & Steel Co., 85 F. 271, 278, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

analysis is applicable to any restraint if the proponents engage in some legitimate, productive transaction or venture. Establishing the validity of that venture provides the basis to determine whether the parties face the need to define some element of the transaction or address some risk of opportunistic behavior by a mutually agreeable restraint. Given proof of that need, the next question is whether the specific restraint at issue functions to resolve that need or risk. Finally, if there is a less restrictive way to accomplish the same goal, then the specific restraint is unreasonable as it imposes excessive burdens for which there is no offsetting benefit. This four-step process can be demanding in application and so the courts have in practice employed presumptions that limit the need to go the full analysis.

From 1897 to 1912, the Supreme Court decided a number of cases involving restraints of trade. It upheld some. Those cases involved restraints that were prima facie ancillary to some legitimate venture or transaction.[32] Those it condemned were naked, cartelistic restraints, except arguably *Northern Securities* in 1904.[33] That case involved a merger resulting in a monopoly on railroad services across the northern United States, from Minnesota to Washington. While the four-justice plurality seemed to rest its decision on a categorical rejection of any combination among competitors, the crucial fifth vote came from a justice who focused on the lack of actual integration produced by the holding company and its subsidiaries as evidenced by the profit distribution scheme based on the activities of the underlying railroads rather than on earnings of the entire enterprise.[34] Cases after *Northern Securities* followed the same pattern of rejecting cartels and subjecting potentially ancillary restraints to a more nuanced test to determine reasonableness.[35]

32. *See, e.g.*, Anderson v. United States, 171 U.S. 604 (1898) (joint venture to provide services to cattle buyers at a stockyard included restraints on members conduct held lawful); Hopkins v. United States, 171 U.S. 578 (1898) (joint venture to provide services to brokers at a stockyard included restraints on members conduct held lawful).

33. N. Sec. Co. v. United States, 193 U.S. 197, 356 (1904).

34. *See id.* at 360–64 (Brewer, J., concurring); *see also* Peter C. Carstensen, *Lost in (Doctrinal) Translation: The Misleading Retelling of the Supreme Court's Antitrust Decisions on Restraints of Trade*, 62 S.M.U. L. Rev. 525, 536–39 (2009) [hereinafter Carstensen, *Lost in (Doctrinal) Translation*] (discussing *Northern Securities*).

35. *See* Shawnee Compress Co. v. Anderson, 209 U.S. 423, 426 (1908) (condemning Shawnee Compress' use of leases to exclude competition and entrench a monopoly); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 374 (1911) (holding minimum resale price restrictions invalid). The opinion following earlier reviews of resale price maintenance in over the counter pharmaceuticals held the restraint unlawful. But it did so because the defendant's justification for the restraint was that it furthered the interest of retailers in suppressing competition. That is, it was naked restraint for the benefit of the retailers. *See* Carstensen, *Lost in (Doctrinal) Translation*, *supra* note 34, at 536–39; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 305, 360 (1989).

In *Standard Oil* and *American Tobacco*, Chief Justice White formally embraced a "rule of reason" under which the two monopolies were condemned as unlawful under both Section 1 and Section 2 of the Sherman Act.[36] Many commentators and courts believe that these decisions adopted White's earlier expansive view of reasonableness.[37] But in one of the few lucid passages in those opinions, White stated that this rule of reason accepted the correctness of *Trans-Missouri*.[38] The implication, often ignored, is that naked restraints are inherently unreasonable. Subsequent decisions in the 1920s reinforced the conclusion that naked restraints were illegal per se.[39] There were some apparent or actually deviant decisions in that period as well.[40] But the core distinction survived and was reinforced strongly in the *Socony*

36. *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. Am. Tobacco Co., 221 U.S. 106, 179–80 (1911).

37. *See, e.g.*, ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 58 (2d ed. 2009); LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 192 (2000) ("White's majority opinion . . . , because it also made reasonableness the fulcrum, is sometimes said to have retreated from holdings in *Trans-Missouri* and *Joint-Traffic* . . . [because of] Justice White's use of language borrowed from his dissent in the earlier case[s] . . . ."); *see also* ROBERT PITOFSKY ET AL., TRADE REGULATION: CASES AND MATERIALS 55–56 (5th ed. 2003) (noting that the doctrine in this period, 1890 to 1911, was internally inconsistent and illogical literal formalism).

38. *Standard Oil Co.*, 221 U.S. at 66–69; *Am. Tobacco Co.*, 221 U.S. at 179.

39. *See, e.g.*, United States v. Trenton Potteries, 273 U.S. 392, 394 (1927) (holding that an agreement between 80 percent of the sanitary pottery manufacturers and distributors to fix and maintain uniform prices violated the Sherman Act); United States v. Am. Linseed Oil Co., 262 U.S. 371, 389 (1923) (invalidating the practices of the linseed oil industry that required companies to share intimate details of their internal affairs through a so-called bureau); E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612–13 (1914) (lumber retailers illegally conspired to prevent wholesale retailers from selling directly to consumers).

40. *See* Nat'l Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 413 (1923) (upholding a naked production allocation agreement among manufacturers to limit demand for labor which was later interpreted as an example of the labor exemption); Bd. Of Trade of City of Chi. v. United States, 246 U.S. 231, 241 (1918) (upholding restraints on nighttime trading) This decision is commonly understood to have facilitated some kind of price fixing among traders. *But see* Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 3 (1992) [hereinafter Carstensen, *The Hollow Core of Antitrust*] (demonstrating that the restraints were ancillary to the operation of the commodities market and had no demonstrable effect on the commissions traders could earn). *See also* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (overturning an injunction against a joint venture to market coal that planned to set prices for the products sold). This venture is generally recognized to have had the goal of the organization a cartel plan for the coal industry, but the specific case did not provide clear evidence of that unlawful intent.

decision.[41] Indeed, the Court has consistently condemned cartels as "the supreme evil of antitrust . . . ."[42]

Unfortunately, the naked-ancillary distinction was largely lost on antitrust jurisprudence until revived by the early work of Robert Bork.[43] As a result, the decisions in the period from 1914 to the later 1970s lacked any clear definition of the criteria for reasonableness or when exactly a per se rule attached. Because of Bork's general hostility to most restraint of trade decisions, mainstream scholars and practitioners tended to downplay the centrality of the ancillary concept even after he highlighted its relevance.[44] In *BMI*, the Court came close to restoring some analytic clarity, including citing *Addyston Pipe*, but ultimately failed to provide a full statement of the standard.[45]

In part, the use of presumptions of legality and illegality with respect to potentially ancillary restraints inhibited a fuller statement of the underlying theory. Indeed, since forward-looking contracts by definition involve restraints on the freedom of one or both parties, the federal judiciary would be overwhelmed if every such restraint were subject to full blown antitrust inquiry. In such cases, the challenger must demonstrate that serious competitive concerns exist.[46] For example, this presumption of legality applies to vertical restraint cases generally

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41. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) ("Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.").

42. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

43. *See* Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SEC. 211 (1959) (suggesting the importance of ancillary restraints to the application of Section 1 of the Sherman Act); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt.1), 74 YALE L.J. 775, 800 (1965) ("The modem law generally holds naked or non-ancillary agreements fixing prices or dividing markets illegal without more, as Taft thought the law should, but his attempt to establish a category of lawful ancillary restraints has had much less success."); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 377, 383–84 (1966) (distinguishing "naked" as opposed to "ancillary" restraints).

44. *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 949 (2016) (discussing the lack of courts and commentators willing to analyze and balance competitive effects).

45. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (quoting United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act.").

46. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1293 ("[M]ost courts have disposed of Rule of Reason cases on the ground that the plaintiff failed to prove a significant anticompetitive effect . . . ."); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827 (2009) (finding most rule of reason cases fail because the challenger does not establish that there is sufficient harm to competition to warrant further review of the merits of the restraint).

because prima facie there is a transaction to which the restraint presumptively is ancillary.[47] Moreover, as at least one subsequent case has shown, there can be a narrow definition of ancillarity that leaves some restraints facially internal to a venture subject to a rule of reason even if not "ancillary."[48] However, the underlying analysis would be identical to the ancillary restraint analysis if the presumption of legality for such internal restraints were rebutted.[49]

On the other hand, there is also a "quick look" that creates a presumption of illegality against certain, usually horizontal, restraints because prima facie they appear unlikely to be reasonably ancillary to the legitimate productive transaction or venture in which the parties are participating.[50] But such restraints can still be lawful if necessary for the legitimate needs of the parties.[51] As will be evaluated later in this discussion, the term "quick look" has also applied to the question of whether a private regulatory restraint was exempt from antitrust law, further confounding the meaning of the concept.

Further complicating the analysis of restraints, a series of decisions eliminating the older per se rules condemning vertical restraints failed to articulate a coherent standard by which such restraints might be judged.[52]

47. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977) (upholding geographic restraints on retailer location as part of revised plan of marketing). The assumption of ancillarity in that case is questionable. *See generally* Peter C. Carstensen, *Vertical Restraints and the* Schwinn *Doctrine: Rules for the Creation and Dissipation of Economic Power*, 26 CASE W. RES. L. REV. 771 (1976).

48. Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) ("[T]he ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold . . . ."). Despite this holding, the opinion did not reject the application of the rule of reason to such a restraint if it was in fact unreasonable. *See* Peter C. Carstensen, *Using* Dagher *to Refine the Analysis of Mergers and Joint Ventures in Petroleum Industries and Beyond*, 19 LOY. CONSUMER L. REV. 447, 466–67 (2007) (extrinsic facts combined with the lack of an articulated justification for the restrictive agreements suggest that the restraints may well have facilitated tacit collusion in the pricing of gasoline).

49. *See* Carstensen, *supra* note 48, at 455–56 (noting that the distinction of "ancillary" restraints requires stricter review for external restraints compared to the strong presumption of validity for internal restraint).

50. *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005) (a joint venture to produce a recording could not restrain competition from potential substitute recordings not part of the venture); Realcomp II, Ltd. v. FTC, 635 F.3d 815, 836 (6th Cir. 2011) (restrictive terms in joint venture agreement on listing properties for sale were unreasonable), *cert. denied*, 565 U.S. 942 (2011).

51. *See* Broad. Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (upholding a horizontal price fixing agreement among independent music copyright owners as "necessary" to their joint marketing venture).

52. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("[T]he rule of reason, not a per se rule of unlawfulness, would be the appropriate standard to judge vertical price restraints."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 733–34 (1988)

Indeed, the initial decision in this line—*Continental TV*—ended with the conclusion that "the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*."[53] As lower courts subsequently observed, this left extreme uncertainty as to what the standard might be.[54] Certainly some of the opinions of the Court in this period suggested that an open-ended inquiry into the merits of a restraint regardless of its function was appropriate.[55]

The binary nature of the per se/rule of reason dichotomy reflects the poverty of antitrust doctrinal language. Given two categories and a need to do a more refined analysis, any decision involving a nuanced analysis is included in the open-ended rule of reason category.[56] This results in the kind of situations on which this Article focuses.

Not only do some scholars contend that certain cartels are economically desirable and so should be lawful but a few judges themselves have reached similar conclusions.[57] That some naked restraints should be upheld on their merits as lawful under the antitrust laws as a result of a rule of reason balancing approach creates a serious conflict within antitrust doctrine: which cartels can defend themselves on the grounds that they create on balance some benefit and which are not so empowered?[58] There is no principled way to explain when or how

(reinforcing the rejection of a need for vertical *per se* illegality and horizontal *per se* illegality symmetry); State Oil Co. v. Khan, 522 U.S. 3, 7 (1977) (overruling a previous case which had decided that vertical maximum price fixing is a per se violation of that statute); *Cont'l T.V.*, 433 U.S. at 57–58 (overruling the *per se* rule established in *Schwinn*).

53. *Cont'l T.V.*, 433 U.S. at 9.

54. *See, e.g.*, Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1568 (11th Cir. 1983) (recognizing that the *Sylvania* rule provides limited guidance as to rule of reason application).

55. *See* Arizona v. Maricopa Med. Soc'y, 457 U.S. 332, 361–362 (1982) (Powell, J., dissenting) (recommending a more "discerning" approach, given that there are instances of legal price-fixing).

56. Another example of this confusion involves the exchange of information among competitors. Such conduct may not restrain competition, but it may also facilitate either tacit or express collusion. In the latter case, the exchange is part of a naked restraint of competition and should be unlawful. In the former, there is no restraint express or implied and so there can be no violation because despite the agreement, the absence of restraint means the agreement by definition does not affect competition.

57. *See* United States v. Kemp & Assocs., Inc., No. 2:16–CR–00403–DS, 2017 WL 3720695 (D. Utah Aug. 28, 2017), *rev'd*, 907 F.3d 1264 (10th Cir. 2018); *see also* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 495 (2012) ("The cartel agreement or merger to monopoly that creates a bilateral monopoly results in an increase in total surplus and, therefore, would seem to survive a rule of reason test where the goal is total welfare. . . . From the perspective of total welfare, a horizontal agreement or a merger to monopoly is desirable.").

58. *See, e.g.*, *Kemp & Assocs.*, 2017 WL 3720695 (applying rule of reason to a cartel that claimed it achieved economic efficiencies), *rev'd on other grounds*, United States v. Kemp & Assocs, Inc., 907 F.3d 1264 (10th Cir. 2018) (advising the trial court to reconsider its decision that the rule of reason applies to a cartel). Recent decisions from the Ninth Circuit confirm that naked restraints are per se illegal. *See* United States v. Sanchez, 760 F. App'x 533, 536 (9th Cir. 2019)

courts can or should draw this line.[59] The burden on any party challenging a cartel should be to prove that the cartel has had on balance an unreasonable effect. But how could courts consistently resolve that question since by definition a naked restraint restricts competition in some way? Requiring such proof in general in cartel cases would, of course, greatly weaken or even destroy antitrust law. It is for this reason that the contemporary "rule of reason" approach in the professional self-regulatory context is wrong and an existential threat to the integrity of antitrust doctrine. There is, however, a different path consistent with the overall structure of antitrust law to provide a principled basis for reviewing the legality of specific regulations, even when adopted by groups without formal state or federal authority to regulate economic activity. Explaining that path is the goal of this Article. Recognition of that path calls into question the contemporary adherence to White's early version of reasonableness.

B. The Role and Relevance of "Ethics" and Substantive Standards in Professional Regulation

The term "ethics" appears frequently in the professional cases. The implication, never clearly articulated, is that professionals need to have stricter standards of ethics that in turn manifest themselves in restraints on competitive conduct. The term ethics is inherently ambiguous. It can mean the duty to obey the rules applicable to the relevant activity. Alternatively, it describes the process of choosing among several ways to proceed, the overall best choice is the ethical one where there are significant harmful potentials that can affect some participants in the process. Further complicating the underlying set of challenges facing professionals is the need for standards as to the actual practice of the profession. The existence and interaction of these considerations, when combined with the lack of a clear doctrinal category for the review and

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(rejecting application of the rule of reason to a naked bid-rigging conspiracy); United States v. Guillory, 740 F. App'x 554, 556 (9th Cir. 2018) (holding the rule of reason inquiry does not apply to per se illegal agreements). An older example is found in *United States v. Brown University*, 5 F.3d 658 (3rd Cir. 1993), where the Third Circuit remanded a case involving a cartel among Ivy League schools to fix discounts for the lower court to consider the various "good thing" defenses that MIT offered. Not surprisingly, MIT choose to settle the case at that point by accepting the consent decree that its fellow conspirators had already accepted. Meanwhile, Congress exempted some kinds of information sharing among college financial aid officials from antitrust law, but not the kind of egregious collusion that had existed.

59. *See, e,g.*, Robert Connolly, *The End Is Near for the Per Se Rule in Criminal Antitrust Prosecutions* (Mar. 20, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356731 [https://perma.cc/G53R-6Z3P] (arguing that the per se rule must fail because it violates the Sixth Amendment and denies the defendant the right to argue that its conduct was not an unlawful restraint).

evaluation of professional self-regulatory decisions, explain in a significant way the underlying confusion in the case law.

1. The "Ethics" as Regulation and as Moral Choice

The dental cases all use ethics as an alternative term for regulation.[60] Indeed, this is a common use of the term. What is at issue in these cases is who will regulate various aspects of the profession, especially with respect to issues of competition. This use of "ethics" most notably in the *NCDB* decision reflects an underlying premise that professional organizations have some inherent right to regulate the practice of professionals in the field.[61]

It is helpful to distinguish the use of "ethics" to describe regulatory questions from the ethical issues that involve choices among alternative ways to deal with a situation. These choices require deciding among legally permissible alternative actions, which affect others. Moreover, if the issue recurs with some regularity that the choice may become more imbedded in practice. This can make such ethical responses look more like regulations. But the central difference is that these ethical responses address the substantive conduct of the professional in delivering professional services where there are alternative responses.

It is often the case that actors facing such dilemmas turn to third parties for advice and counsel. The Institute for Global Ethics (IGE) was one such entity.[62] It provided both specific counseling and training to help individuals and entities better respond to such ethical issues. According to IGE's former CEO, Anthony Gray, the goal of good ethical decision-making is to have a process that is both procedurally fair and is seen as fair and reasonable by all stakeholders so that the resulting decisions are accepted even if they are contrary to the interest of the party concerned.[63] In a very rough outline, the desired process is transparent, explainable, repeatable, and defendable. The process should narrow and focus the issue to clarify the interests at stake and likely results.[64] The process itself rests on some core values that IGE believes are widely shared around the

60. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 512 (2015) (using the terms "ethical" and "self-regulation" within the same paragraph, demonstrating how the two terms are conflated by even the Court).

61. *Id.*

62. The Institute closed in late 2019. The work of Rushworth Kidder provided the theoretical basis for its approach. *See* RUSHWORTH M. KIDDER, HOW GOOD PEOPLE MAKE TOUGH CHOICES (1995). For information generally see, James E. Nalen, *Institute for Global Ethics*, 6 J. BUS. FIN. LIBRARIANSHIP at 73 (2001).

63. Interview with Anthony Grey, Chief Executive Officer, Institute for Global Ethics (May 23, 2018) (on file with author).

64. These criteria mirror those of ancillary restraint analysis, but that is because good decision-making should involve these characteristics regardless of the goals being served.

world among people of very different cultures, backgrounds, and goals. This kind of ethical decision-making is quite distinct from the rule-oriented commands on how to conduct business that are central to the professional self-regulation cases.

Thus, in a genuine ethical case, the question is what an individual or entity should do regardless of what others might do or wish. Thus, there is no "conspiracy" among those who reach similar ethical conclusions because each is acting unilaterally. Moreover, the focus of such ethical considerations is on the conduct or decisions of the actor involved. Hence, decisions intended to exclude third parties from the market or facilitate collective exploitation would fall outside the framework of ethical decision making. To be sure, a conclusion that certain parties or practices present a risk to the public interest might be a plausible basis to advocate for a state regulation that limited such conduct.

Many justifications for professional licensure and limits on the scope of practice for specific types of professionals, such as nurses or dental hygienists, invoke claims based on the need to protect patients or clients from harm. Such regulations are often characterized as involving ethical issues. This is not descriptively useful. The purported regulatory rationale is that the risks of allowing such individuals to provide certain types of service generally outweighs the potential benefits. Much scholarship has focused on the validity of these assertions. While there is a plausible basis for some professional licensure and for limits on the scope of what a licensed professional, especially one with a subordinate status, may do, the more general finding is that the contemporary regulations largely serve to restrict competition, entrench more dominant classes of professionals, and exploit patients and clients.[65] Again, the complexity of separating the genuine public interest benefits from the public choice manipulation of the legal regimes is beyond the scope of this paper, but it is not the task of antitrust law to review the merits of regulations.

In sum, the assertion that the regulations at issue in the professional self-regulation cases involve ethical choices is not a helpful way to frame the issue. In fact, it obscures the claim of regulatory authority and its exercise. This is most evident in the *CDA* and *NCDB* decisions, as they addressed the merits of the specific restraints implemented by their respective organizations to restrict advertising or exclude competition.

65. *See* Ryan Nunn & Gabriel Scheffler, *Occupational Licensing and the Limits of Public Choice Theory*, 4 ADMIN. L. REV. ACCORD 25, 29 (2019) (legitimate reasons exist for licensing many occupations, but the evidence shows that in many cases it is either unnecessary or excessively restrictive).

2. Substantive Standards of Practice[66]

A second important distinction is that between regulation of the business practices of professionals and the establishment, and enforcement of standards for substantive practice of the profession. In some fields, such as medicine, there are a wide range of sources for standards including the National Institutes for Health, discipline specific professional organizations, and third-party advisory groups that recommend best practices. Unlike regulations aimed at protecting the economic wellbeing of professionals or specifying how they should compete in the market, these standards set forth the way in which the professional ought to provide the professional services. Different constellations of professionals often have different standards for performing the same medical task. Moreover, there can be overlaps among the skills of related clusters of medical professionals leading again to different standards for treatments.

Other professions may have fewer differences. Accountants have a set of standards that they generally are expected to adhere to in conducting audits.[67] Lawyers have a generally consistent set of professional standards governing relationships with clients, conflicts of interest, and related issues. Many of these standards are adopted and enforced through public agencies often relying on professional expertise.[68]

The failure to adhere to substantive standards gives rise to malpractice claims. The concern is neither exploitation nor exclusion. It is that the professional failed to perform the services in the manner that they should have been provided. Here, the test is the merit of the standard based on the supporting scientific or professional consensus about acceptable practice. Such standards usually do not command or control when and how professionals compete in the market to sell their services. But if they should have that impact, then they should have antitrust review to determine whether the economic impact was the unavoidable incident to the adherence to the substantive standard.

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66. I am much indebted to my colleague, Professor R. Alta Charo, for educating me about this topic with particular reference to the practice of medicine.

67. The SEC oversees the Financial Standards Accounting Board that that establishes the generally accepted accounting principles that all accountants must employ. *See* Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 191, 234–35 (2018) (explaining the delegation of authority from the agency).

68. At the oral argument in *NCDB*, Justice Breyer opined that he would prefer that the state authorize brain surgeons to set the standards for who can practice that skill. *See* Nina Totenberg, *Supreme Court Hears Arguments in Teeth Whitening Case*, NPR (Oct. 14, 2014), https://www.npr.org/2014/10/14/356177201/supreme-court-hears-arguments-in-teeth-whitening-case [https://perma.cc/CGY4-DGCY] (noting a preference for brain surgeons over bureaucrats for deciding licensing).

It is important to distinguish regulations governing the scope of practice from the standards describing or prescribing how to perform particular procedures. A professional will not commit "malpractice" based on violation of a scope of practice regulation[69] even if such conduct may lead to administrative sanctions. Scope of practice rules often serve to restrict the economic opportunity of professionals, such as dental hygienists and nurses, by excluding them from providing services for which they have the necessary skill and training.[70] As with licensure generally, overcoming the undesirable and unnecessary adverse effects of these rules raises a host of complex considerations.[71]

Professional certification is a special case. The process of credentialing requires an enterprise that itself provides services and evaluations of individuals. Hence, it functions to produce specialized information that has economic value to both users and those being credentialed. The competitive concern is that such activities tend to result in a gateway control over access to the credential, which means that the credentialing enterprise is a monopoly. While it makes sense to have a professional certification system to ensure that those offering specific types of service have the training and continuing education necessary (but not sufficient) to practice the professional skill, such gatekeeping is distinct from setting a standard on how a service is to be performed. As Justice Breyer opined, we probably prefer that brain surgeons decide who ought to be a brain surgeon rather than a hospital administrator or a political appointee.[72] Nevertheless, the gatekeeper function of certification requires oversight when such certification is essential to access to the market or retention of ones position in that market. Thus, unlike regulation, certification restraints that either exclude alternatives or exploit those needing certification can fit into conventional rule of reason analysis comparable to that used in evaluating other types of monopolistic conduct.

The central point of this section is that the complexity of setting standards for many aspects of professional services requires careful analysis of the function and role of the specific standard or regulation. Standards provide guidance to professionals and their customers as to how the service should be performed. Such regulations usually have at best only an indirect impact on competition. Certification is the result of

69. The classic illustration of this fact is the tort case of *Brown v. Shyne*, 151 N.E. 197, 199 (1926), where the chiropractor could not be found to be negligent merely because he violated that statute restricting the practice of medicine to MD doctors.

70. *See* Gabriel Scheffler, *Unlocking Access to Health Care: A Federalist Approach to Reporting Occupational Licensing*, 29 HEALTH MATRIX 293, 313–15 (2019) (noting that these restrictive practices also do not improve patient outcomes).

71. *See id.* at 336–52 (discussing the inadequacy of various proposed reforms for healthcare provider licensing).

72. Totenberg, *supra* note 68.

a productive enterprise but raises more difficult and challenging issues when a single enterprise controls admission to professional practice and so has the capacity to exploit or exclude.

II. THE PER SE LEGALITY MODEL

As demonstrated in Section I.A, American antitrust law rests on a fundamental distinction between restraints that are ancillary to legitimate productive business ventures or transactions, and those that are the result of a naked, cartelistic restraint on competition that creates, allocates, and/or exploits market power. Purely naked restraints have no external benchmark for a court to assess the justification for and reasonableness of the restraints.[73] In *Addyston Pipe*, Taft observed: "[T]here is no measure of what is necessary . . . except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition."[74] For this reason, the Second Restatement of Contracts holds that any such contract is void and unenforceable.[75] Thus, neither contract law nor antitrust law provides a basis to evaluate the merits of such restraints. As a result, most cartels are per se illegal, but courts have refused to condemn some. Most of these cases involve a cartel that is subject to oversight by a public agency.[76] These cases in effect apply some form of preemption based on state or federal law or constitutional provisions.[77] However, some cartels including the NCAA, standard setting organizations, and some professional self-regulatory organizations are not subject to such supervision.[78]

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73. Seeking the "intent" of the parties will not provide a consistent basis for evaluation because it is very likely that putative public interest claims will mask anticompetitive intent.

74. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

75. *See* RESTATEMENT (SECOND) OF CONTRACTS §187 (AM. LAW. INST. 1981) (contracts that involve only naked restraints are not valid contracts). Deeper tensions may exist between contract law and antitrust law's presumption of legality where the contract is lawful in contract terms but unlawful in antitrust terms. The converse is also a potential outcome. *See generally* Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357 (2002).

76. *See*, *e.g.*, S. Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 52 (1985) (allowing trucking companies to collude on prices based on state supervision); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (lack of active supervision resulted in rejection of state effort to authorize minimum prices).

77. *See, e.g.*, Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 267 (2007) (considering whether the antitrust claims conflicted with federal securities law). The labor exemption is comparable as well because the NLRB provides oversight and the statutes specify the scope of lawful bargaining.

78. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1071 (9th Cir. 2015) (describing how an agreement restricting compensation of college players is not subject to any oversight by a public

The question then becomes what factors explain why some cartels can be legal, but the vast majority is not. The more transparent cases involve express exemptions from antitrust law found in federal statutes,[79] constitutional protections,[80] and state action immunities.[81] These are basically situations in which some non-public entity has authority to regulate some aspect of market conduct, preempting standard antitrust jurisdiction.[82] Such regulation is inherently anticompetitive in the sense that it forecloses the ability of those regulated to engage in otherwise economically rational conduct. Harder to explain are the cases involving naked restraints on competition imposed by professional self-regulatory organizations, standard setting entities, and entities in a range of other activities, from college athletics to quarter horse shows, which are either upheld or condemned on their merits after a "rule of reason" inquiry that compels the courts to set forth on the "sea of doubt."[83]

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regulator); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495 (1988) (recognizing that the national fire safety council sets fire safety standards used by insurers, builders, state and local government but it is not subject to any public oversight); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999) (a private association's regulation of advertising by dentists in California, not subject to state oversight, was not necessarily illegal).

79. *See generally* PETER CARSTENSEN & CHRISTOPHER SAGERS, ABA SECTION OF ANTITRUST LAW: FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007).

80. *See, e.g.*, E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (noting that the freedom to petition does not violate antitrust laws); Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993) (upholding the immunity for petitioner speech first identified in *Noerr*).

81. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 346 (1943) (upholding California state law permitting agricultural commodity price regulation); N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503 (2015) (showing a dental regulatory agency required disinterested oversight of its decisions to qualify for state action immunity); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224–25 (2013) (holding state-action immunity did not apply to hospital authorities making acquisitions that substantially lessen competition).

82. A partial exception involves petitioning government which is constitutionally protected, but even then, sham petitioning conduct is not exempt from antitrust law. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972) (showing sham litigation can violate antitrust law). Other partial exceptions include the Capper-Volstead Act, 7 U.S.C. § 298 (2018), that exempts farm cooperatives from antitrust liability with respect to a limited set of activities. *See, e.g.*, *In re* Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1152 (D. Idaho 2011) (showing that production limits are not within the scope of the exemption).

83. *See, e.g.*, *Cal. Dental Ass'n*, 526 U.S. at 776 (holding the California Dental Association could regulate advertising by its members); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984) (affirming the NCAA right to regulate college athletics but restricting its scope); *Allied Tube & Conduit Corp.*, 486 U.S. at 497–98 (affirming the right of a trade association to create standards that excluded products from the market to ensure reasonable fire safety, but rejecting specific decisions based on bad and unreviewable process); Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (upholding right of association to establish standards that excluded cloned horses from registration).

In 2000, Carstensen and Roth proposed a framework to explain this group of antitrust cases that all involved some form of exemption of anticompetitive, usually cartelistic, conduct.[84] Based on the methods used to assess express exemptions, the conclusion is that the professional self-regulation, standard setting, and similar decisions all involved (implicitly) analogous questions of exemption from antitrust law based on regulatory authority and practice. This analysis identified a three-step framework that explains and predicts the outcome of these cases. Moreover, although courts do not overtly employ this framework, it is possible to identify when courts may have erred because they assumed the answer to one of those steps. This framework avoids the inherent ambiguity of labeling such an analysis as an application of the "rule of reason."[85] Such decisions would mean that a court applying antitrust law has held the substance of the conduct to be lawful in itself. But identical conduct is usually per se illegal.

The first step is to establish that the actors have authority from statute, constitution, or public policy to impose some restraint on the market. The first two of these sources are relatively straightforward: Does some statute or constitutional provision authorize, expressly or by necessary implication, some non-public entity to regulate some aspect of competition? Most of the cases involve interpreting statutes or the constitution that arguably exempt conduct from standard antitrust analysis.[86] The analysis can be complex, especially when the exemption is not explicit but nonetheless arguably necessary for the effective operation of the alternative regulatory scheme.[87] Similar issues can arise in determining whether state legislatures intended to insulate specific activities from antitrust law.[88] The basic question, however, remains straightforward.

A more difficult issue arises when the source of authority comes from a non-legislative or constitutional "public policy." Without the standard

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84. Carstensen & Roth, *supra* note 20.

85. The method laid out in the following paragraphs is analogous to the ancillary restraint analytic framework laid out in *Addyston Pipe* but uses distinct criteria.

86. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135–36 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 664–65 (1965).

87. *See, e.g.*, Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 285 (2007) (holding that securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case); *cf.* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (rejecting antitrust challenge to exclusionary conduct because of the capacity of the FCC and New York PSC to provide effective regulation of this conduct).

88. *Compare* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43 (1985) (state authorization of tying the provision of water and sewer service to annexation included an implicit authorization of the anticompetitive effects and so was within the state action exemption of antitrust law) *with* FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 227 (2013) (holding the state action exemption did not apply to hospital authority acquisitions even though authorized by state law).

legislative or constitutional markers, courts appear to rely on intuition about such grants. In the case of the NCAA, the Supreme Court recognized that its establishment responded to a public demand for regulation of college athletics with respect to safety, rules of the game, and preservation of a distinct class of athletic programs.[89] Many scholars dispute this characterization and contend that the NCAA is a "joint venture" among colleges to produce college sports.[90] The limited function of the NCAA, particularly with respect to football, is to regulate a limited number of aspects of college sports. These regulations have no relationship to any putative joint venture. Indeed, Part VI of the opinion in dicta explicitly recognized the authority of the NCAA to regulate specific elements of college sports.[91] The false assertion of a legitimate productive joint venture reflects an effort to fit the manifest authorization of powers to the NCAA into Taft's naked-ancillary framework. The better understanding is that the NCAA has authority to regulate college athletics.

Similar delegations of regulatory authority exist with respect to various sports associated with the Olympic Games and other international competitions.[92] The global regulator of swimming determines who can compete in events around the world and controls access to the Olympics.[93] The world tennis association regulates where contests can occur and who can participate.[94] The quarter-horse association has the right to define the characteristics of such horses although the association was not a joint venture.[95] Another "association" has the right to approve

89. *See NCAA*, 468 U.S. at 89, 102, 117–21 (acknowledging the NCAA's "historic role in the preservation and encouragement of intercollegiate amateur athletics"); *see also* JOHN J. MILLER, THE BIG SCRUM: HOW TEDDY ROOSEVELT SAVED FOOTBALL 193–204 (2011) (reviewing the origin of the NCAA in response to regulatory concerns over the safety of college football); Peter C. Carstensen & Paul Olzowka, *Antitrust Law, Student Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545 (1995).

90. *See, e.g.*, Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretatio*n, 32 ANTITRUST BULL. 375, 388 (1987) ("The fact that restrictions on players are needed may only prove the existence of ancillary or incidental restraints necessary for the success of the joint venture.").

91. *NCAA*, 468 U.S. at 117–21.

92. *See, e.g.*, Gold Medal LLC v. USA Track & Field, 899 F.3d 712, 713 (9th Cir. 2018) (describing how the Olympic Committee has exclusive jurisdiction over all US Olympic participation).

93. *See* Lieff Cabraser, *Lieff Cabraser & Co-Counsel Announce Elite Swimmers, Pro Swimming League, Sue FINA Over Antitrust Violations*, LIEFF CABRASER CIV. JUST. BLOG (Dec. 8, 2018), https://www.lieffcabraser.com/2018/12/lieff-cabraser-co-counsel-announce-elite-swimmers-pro-swimming-league-sue-fina-over-antitrust-violations/ [https://perma.cc/K5RL-ETWY].

94. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 824 (3d Cir. 2010).

95. Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 325 (5th Cir. 2015) (noting that this group only regulates which horses qualify as quarter horses).

and regulate "official" rodeos.[96] These cases illustrate that regulatory authority does not require explicit legislative approval.

Professional self-regulation preceded the emergence of formal state regulation. The Supreme Court pointed to this history as providing a basis to claim a regulatory authority for such entities that is separate and distinct from any regulation that the states provide.[97] In context of the *North Carolina Dental Board* case, the Court did not have occasion to consider the continued validity of such authority when the state has created a statutory system to provide oversight of the profession. However, the Court had earlier observed that a private group engaged in a naked restraint of competition cannot excuse its conduct by reference to a goal of implementing a state law.[98] Certainly, in other contexts the Court has explicitly rejected claims that the underlying goal of a naked restraint was in some way desirable.[99] This serves to highlight the importance of establishing some cognizable delegation of regulatory authority to the private group based on history or some other generally accepted public policy.

Standard setting organizations can be essential to guiding public and private determinations of safety or interoperability; yet they look very similar to cartels that try to standardize products to reduce competition.[100] The necessity of standards to facilitate interoperability or ensure safety provide the public policy justification for such organizations. It is also evident that such powers can be used to harm competition because of the resulting exclusionary power.[101] Congress has recognized the social and economic necessity of such entities by specifying important aspects of their organization and decision making

96. Elite Rodeo Ass'n. v. Prof'l Rodeo Cowboys Ass'n, 159 F. Supp. 3d 738, 740–41 (N.D. Tex. 2016).

97. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 512 (2015) ([T]hose who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State . . . .").

98. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 466 (1986).

99. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (condemning a group boycott seeking better pay for court appointed defense lawyers); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (condemning a group boycott seeking to protect original dress designers from unauthorized copying).

100. *Cf.* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

101. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500–01 (1988) ("When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages."); Am. Soc'y of Mech. Eng'rs, Inc. v. HydroLevel Corp., 456 U.S. 556, 559 (1982) (noting that it was advantageous for businesses to adhere to private industry regulations to prevent boiler explosions).

process.[102] When such entities adhere to those requirements, their antitrust liability is limited even if the specific conduct were to fall outside the scope of their regulatory authority or involve bad process.[103]

If general authority to impose regulation on market activity exists, the second step requires determination that the specific anticompetitive regulation is within the scope of that authorization. In the case of statutes or the United States Constitution, standard tools of construction apply. Does the statute or the section of the Constitution authorize the regulation at issue in the case, or does the statute preempt antitrust law expressly or by necessary implication?[104] Where the conflict is between antitrust and another federal law, the usual cannons of statutory construction apply and the analysis is cast in terms of preemption of one form or another.[105] The key question is the scope of the preemption. Thus, the constitutional rights to petition government and to litigate have boundaries such that abuse of those rights can result in antitrust liability because the conduct falls outside the scope of the preemption.[106]

States have the authority to authorize some kinds of anticompetitive conduct.[107] For the state action exemption to apply, the courts must decide whether the statute does in fact have the objective of displacing competition with regulation. For example, the Court has rejected the claim that general authorization for ordinary corporate rights, such as a buying property, constitutes an implied right to monopolize the market.[108] However, the Court has also determined that Wisconsin's

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102. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 2, 110 Stat. 775, 775 (1996) (codified at 15 U.S.C. § 272 and 63 Fed. Reg. 8545 (Feb. 10, 1998)) (adopting rules through essentially formal delegations of federal regulatory authority).

103. Standards Development Organizations Advancement Act of 2004, 15 U.S.C. §§ 4301–4306 (2012).

104. *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007) (giving an expansive interpretation of the scope of preemption which some find troubling)*; see also* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004) (rejecting antitrust law application of exclusionary monopolistic conduct because state and federal regulators were better able to control the conduct).

105. *See, e.g.*, Oneok v. Learjet, 135 S. Ct. 1591, 1603 (2015) (rejecting claim that antitrust exemption for wholesale prices of natural gas preempts state antitrust claims on behalf of retail customers where the prices were fixed through the wholesale market).

106. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513–14 (1972) (holding that it is immaterial how an antitrust violation is demonstrated if the facts establish massive, concerted, and purposeful group activity to deter individuals from accessing the courts); Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993) (holding that litigation cannot be deprived of immunity as a sham unless it is objectively baseless); E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–40 (1961) (discussing why the Sherman Act does not forbid associations from trying to influence the passage or enforcement of laws).

107. *See. e.g.*, Parker v. Brown, 317 U.S. 341, 368 (1943) (upholding state regulation of the production of raisins).

108. FTC. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 233–35 (2013).

failure explicitly to confer antitrust exemption when allowing localities to refuse to provide water and sewer services to adjacent areas that refused annexation did not preclude the conclusion that the legislature must have contemplated and accepted the anticompetitive consequences.[109]

In contrast, the determination of the scope of an authorization drawn directly from public policy without any express constitutional or statutory basis is more challenging. The opinions rarely recognize the need to define the scope of a de facto grant of regulatory authority. As a result, the analysis is muddled and obscure, as the dentists' cases examined below will demonstrate. The core, but implicit, analysis at this stage starts with the public interest justification for the regulation which in turn implies the limits of its preemptive power. Such analysis is most transparent in the Supreme Court's *NCAA* decision where it rejected the right of the NCAA to regulate access to televising college football, but then went to some lengths in dicta to identify the areas that were within the scope of the NCAA's authority.[110] Lower courts have followed that demarcation in rejecting some NCAA regulations, such as restraints on coaches' salaries, but recognizing its authority to set compensation levels for student athletes.[111] In other contexts, however, the lower courts have not been very clear about the scope of the authority that public policy has conferred.[112] Indeed, the Supreme Court itself failed to ask about the scope of the California Dental Association's authority to regulate advertising by dentists.[113]

The first two steps are closely interrelated. Indeed, in the context of the state action doctrine, the two elements are fused in the single question of whether the state intends to preempt the competitive market.[114]

109. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 41–46 (1985); *see also* S. Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 61–62 (1985) ("[A] state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' . . . .").

110. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 113–15 (1984).

111. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA has authority to determine whether and how college athletes can be compensated); Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. 1998) (prohibiting restraints on pay for assistant basketball coaches).

112. *See, e.g.*, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327–35 (5th Cir. 2015) (avoiding the question of whether the conspiracy among animal breed registry organizations by determining there was insufficient evidence of a conspiracy); Elite Rodeo Ass'n v. Prof'l Rodeo Cowboys Ass'n, 159 F. Supp. 3d 738, 748–50 (N.D. Tex. 2016) (finding that there was insufficient evidence that the movant would succeed on its claim for Section 1 conspiracy under the Sherman Act).

113. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999). *See infra* Section III.B (discussing the *California Dental* case).

114. *See* Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97, 105–06 (1980) (whether the state policy "clearly articulate[s] and affirmatively expresse[s]" the challenged restraint combines the questions of authorization and the scope of that authorization. The second step is to determine whether the policy is actively supervised by the state itself).

Preemption decisions involving federal law tend to recognize the distinction at least by implication because they look explicitly at the scope of the preemption as well as whether Congress intended to preempt.[115]

The third step is to ask whether the parties have employed an appropriate process. Because the restraints directly or indirectly reflect an authorized regulation of competition, a standard akin to due process applies, but only to the extent that the underlying regulatory authority requires an appropriate process.[116] Hence, constitutionally protected rights to petition are largely free from any antitrust constraints because of the scope of the underlying First Amendment right involved.[117] But even then, antitrust law imposes some limits on the manner and means of petitioning.[118]

When a private entity is carrying out a public regulatory process neutral oversight of its decisions is essential. Perhaps the most obvious cases where process is central are in the state action domain when the actor is a private group.[119] States wishing to preempt competition by this means must provide active supervision to ensure appropriate process in

115. For example, in *United States v. Radio Corporation of America*, 358 U.S. 344, 346–53 (1959), both the FCC and the Justice Department had jurisdiction over acquisitions of television stations. Similarly, in *United States v. Philadelphia National Bank*, 374 U.S. 321, 354–55 (1964), the Court rejected arguments that would have denied Clayton Act application to bank mergers which were also subject to review and approval by bank regulators. *See also* Oneok v. Learjet, 135 S. Ct. 1591, 1596 (2015) (describing how preemption of antitrust by the National Gas Act with respect to wholesale prices does not preempt antitrust claims with respect to retail sales of gas).

116. This requirement is clearest in *Silver v. New York Stock Exchange*, 373 U.S. 341, 361–63 (1963). In *Silver*, the Exchange had statutory authority to regulate its members' relationships with third parties even when those parties were not trading through the Exchange, but the Exchange was still required to provide an appropriate process including notice and explanation for an order requiring members to refuse to deal with a third party. *Id.*

117. *See* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135–38 (1961) (finding the Sherman Act does not prohibit assembly for the purpose of attempting to persuade the legislature or executive from taking a certain action, even if that action would produce a trade restraint or monopoly); *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669–70 (1965) (clarifying *Noerr* to stand for the proposition that attempts to influence public officials are shielded from the Sherman Act, "regardless of intent or purpose").

118. *See* Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1298 (5th Cir. 1966) (holding the submission of false information to a state agency to manipulate prices violates antitrust law). *See also In re* Union Oil Co. of Cal., 138 FTC 1 (2004), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commissionopinion.pdf [https://perma.cc/9PNU-RSH8] (holding that a firm offering expert advice on a regulatory matter violates the FTC Act if it misleads the agency to gain an economic advantage); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511–13 (1972) (explaining variations of conduct that could result in anticompetitive scrutiny, including barring competitors from access to adjudicatory processes, fraud, conspiracy with a licensing authority, and bribery of a public purchasing agent).

119. *See* Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97, 106 (1980) (condemning state authorized price fixing when no state supervision is provided); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (condemning state authorized price fixing when agency charged with oversight failed in fact to review prices fixed).

both the adoption and enforcement of private regulations. The risk of bias is manifest when self-regulation addresses competitive issues, whether that involves competition among participants or with third parties. The *Patrick* decision provides an illustrative example of a private regulatory regime. There, restrictions on doctors based on poor performance explicitly satisfied the first two steps of this framework.[120] Indeed, state and federal law authorized such regulation, and the putative reason for excluding the doctor fell within the scope of that authority. But Oregon's failure to provide disinterested review on the merits of the exclusionary decision resulted in a condemnation of the process and awarding damages to the excluded doctor.[121]

The same standard applies when the source of authority was a de facto authorization. Starting with the *Silver* decision,[122] this emphasis on appropriate process has been a consistent theme for judicial review of private regulatory decisions. The outcomes in *Allied Tube* and *Hydrolevel* demonstrate this, as does the older decision in *Radiant Burners*.[123] The Court focused on the inappropriate process that lead to exclusion by rule in the case of *Allied Tube* and by false statements in both *Radiant Burners* and *Hydrolevel*. To be sure, these entities lack some of the powers that expressly authorized regulatory bodies have,[124] but this does not exclude the expectation of an appropriate process within the capacity of the entity.

This three-step framework makes it possible to understand and explain the issues that the courts have to address in these cases. It also demonstrates that the issues are identical whether the source of regulatory authority is statutory, constitutional, or based on a de facto delegation of authority to some self-regulatory organization. Another important implication is that if the regulation at issue is within the scope of the

120. Patrick v. Burget, 486 U.S. 94, 100 (1988).

121. *See id.* at 101–06 (discussing the lack of active supervision over peer-review decisions, through state action or direct judicial review).

122. Silver v. N.Y. Stock Exch., 373 U.S. 341, 352 (1963). Many scholars believe that *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Supply Co.*, 472 U.S. 284 (1985), overruled *Silver*. This is incorrect. *Northwest* involved a rule internal to a joint venture (a buying cooperative) where the restraint was ancillary to legitimate needs of that venture. In *Silver*, the exclusionary conduct involved a party that had no dealings with or on the New York Stock Exchange. The only reason the Exchange could lawfully compel its members to refuse to deal was because it had the authority to police (regulate) the overall integrity of the public capital market. Subsequent cases involving standard setting organizations demonstrate that process remains central to the legality of such regulatory entities. *See* cases cited *infra* note 123.

123. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501–02 (1988); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel, Corp., 456 U.S. 556, 569–72 (1982); *see also* Radiant Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658–60 (1961) (upholding complaint that gas utilities standard setting to ensure safety in gas furnaces was allegedly used to exclude plaintiff without justification).

124. *See* NCAA v. Miller, 10 F.3d 633, 638–39 (9th Cir. 1993) (holding state law created an unconstitutional burden on interstate commerce by requiring specific due process).

authority of the actors and they adhered to appropriate process, a court enforcing the antitrust laws should recognize that the resulting regulation is exempt from antitrust review even if the court believes there are persuasive arguments that the regulation is in some sense unreasonable.[125] Just as courts have no basis for saying whether or not a particular cartel restraint is or is not reasonable (the sea of doubt) so too the antitrust laws do not provide any standard by which to judge the correctness of any specific lawful regulation.[126] The three-step framework applies to the full range of exemptions from antitrust law, creating a more consistent standard for the courts to use. It also avoids the open-ended balancing that comes from reliance on an overly broad "rule of reason" and so eliminates the tension between the general rule of per se illegality for naked restraints and the putative "reasonableness" of few such restraints. This in turn facilitates an overall better focus for the evaluation of all restraints because it restores the central importance of the naked-ancillary dichotomy to that analysis.

III. ANTITRUST LAW AND PROFESSIONAL SELF-REGULATION IN DENTISTRY

The series of cases involving regulation of the business practices of dentists provides an illustration of the utility of the framework laid out in the preceding section. In addition, it demonstrates the problems the courts have in articulating a coherent legal model when they misuse the rule of reason category and search for procompetitive justifications or explanations for regulatory restraints. But it also highlights the challenges, especially in determining when a general public interest can authorize private groups to engage in regulatory control over market conduct.

125. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA is not exempt from Sherman Act liability but its cartelistic agreement to refuse to allow players to benefit from the commercial use of their images was lawful; this makes sense only if such a regulation was within the scope of the NCAA's delegated regulatory authority as the majority opinion implicitly decides).

126. There are, of course, other legal regimes that might apply. Substantive due process was once a basis, such as in *Lochner v. New York*, 198 U.S. 45, 64 (1905), but courts have largely abandoned that framework in significant part because of the ambiguity inherent in reviewing legislative decisions. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 543 (1934) (discussing the narrow circumstances where judicial review of a legislative decision is proper). This leaves a serious problem of limiting anticompetitive regulations and laws. *See* Carstensen, *Where Is Attorney General Waldo*, *supra* note 28, at 775 (discussing the anticompetitive judicial landscape); *see also* Allensworth, *supra* note 25, at 1588 (discussing the anticompetitive problem in relation to private board licensing).

A. The First Dental Case: Indiana Federation of Dentists

The Indiana Federation of Dentists (IFD) was a group of dentists primarily in northern Indiana who agreed to refuse to provide x-rays to insurers of their patients. This plan was a continuation of an agreement to deny insurers access to x-rays that the Indiana Dental Association (IDA), the dominant professional association of dentists in Indiana, had initiated in 1972. The IDA abandoned that plan in 1979 after the FTC had challenged its legality.[127]

The FTC challenged the IFD agreement as a group boycott, but took the position that it was illegal because it violated the rule of reason.[128] Presumably the FTC misinterpreted the reference to the legality of "ethical" regulations in *Professional Engineers* and its repetition in *Goldfarb*, as teaching that only "unreasonable" cartelistic conduct was unlawful.[129] Hence, the FTC accepted the IFD's claim that its naked restraint had a lawful motive or purpose.[130] The putative "good thing" that this restraint accomplished was blocking the unauthorized practice of dentistry and the potential harm to patients resulting from insurance company use of non-dentist claim reviewers to "evaluate" x-rays. Basically, the IFD was asserting the right to regulate who could practice dentistry. The FTC opinion does not articulate any sort of a standard for determining when collective self-regulatory action by professionals might be reasonable. Without explicitly recognizing that the IFD was claiming the right to agree to enforce its interpretation of state law about the practice of dentistry, the Commission opinion simply questioned the validity of claimed unauthorized practice based on the state of the law in Indiana.[131] It appears that the non-dentist reviewers could authorize payment of claims, but if they had any questions or concerns, the file was referred to a licensed dentist to evaluate.[132]

Further complicating the case, the state of Indiana had intervened.[133] This led to a claim of state action. The Commission rejected this claim, finding that the state had not authorized the elimination of competition in the provision of dental services.[134] There is no real suggestion that the IFD had state authority to regulate dentistry or to impose requirements on

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127. *In re* Ind. Dental Ass'n, 93 F.T.C. 392, 398 (1979) (describing how the association consented to an order requiring it to cease pressuring dentists to refuse to provide x-rays).

128. *In re* Ind. Fed'n of Dentists, 101 F.T.C. 57, 168–69, 175 (1983). Such an approach to a naked cartelistic restraint is inconsistent with basic antitrust jurisprudence.

129. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978); Goldfarb v. Va. State Bar, 421 U.S. 773, 779–80 (1975).

130. *Ind. Fed'n of Dentists*, 101 F.T.C. at 168.

131. *Id.* at 181.

132. *Id.* at 177.

133. *Id.* at 184.

134. *Id.* at 182–84.

dentists.[135] To the extent that any such regulation would or could exist, it would have to emanate from the state dental board, a state agency distinct from the IDA or the IFD.

The FTC found that the boycott was a violation of Section 5 because it was an "unreasonable" violation of the Sherman Act.[136] The analysis involved some curious positions. The targets of the boycott were dental insurers, particularly those providing insurance under employer group plans. The opinion treats the relationship of insurer to dentist as ambiguous because the insurer is not the "customer" of the dentist.[137] The better economic analysis would have been that the insurer is either the customer or a joint purchaser with the insured. Further confusing the analysis, the opinion identified the competitive issue in terms of dentists competing for the business of such insureds rather than as a collective action by most of the dentists in the relevant area to exploit insurers by denying them the capacity to review the decisions of the dentists. These ambiguities, along with FTC's ambiguous analysis of the "good things" excuse for the boycott, resulted in a less than clear articulation of the basis for its negative conclusion.[138]

On appeal to the Seventh Circuit, the IFD prevailed.[139] The opinion endorsed by two of the judges is a model of misapplication of antitrust law. It noted that Indiana, subsequent to the events at issue in the case, adopted some additional statutes governing the practice of dentistry that arguably forbade the providing of x-rays to non-dentists.[140] It also took the view that: "This policy of quality and proper dental care comports with the Indiana dentists' code of professional conduct, . . . [and the American Dental Association's position]," that dentists should provide "quality care."[141] Hence, "the collective refusal . . . to comply with the insurers' x-ray directive resulted from the dentists' adherence to a legal, moral, and ethical policy of quality dental care . . . ."[142] Employing a very narrow definition of group boycott ("a group of competitors banning [sic] together to protect themselves from non-group competitors"),[143] the opinion took the position that the refusal to provide x-rays did not involve

135. At some points IFD sought to claim that it was a union and so exempt from antitrust on that basis. *Id.* at 171.

136. *Id.* at 179–80 n.24.

137. *See id.* at 173 (differentiating between the effects of economic coercion and market competition).

138. *See id.* at 177–80 (discussing the lack of clarity from the Court and the specific facts of the present case which lead to the conclusion that a full analysis is not required).

139. Ind. Fed'n of Dentists v. FTC, 745 F.2d 1124, 1144 (7th Cir. 1984).

140. *Id.* at 1127 n.4.

141. *Id.* at 1134.

142. *Id.* at 1135.

143. *Id.* at 1136.

a refusal to deal with either customers or competitors![144] Further, since the insurers could have their dental reviewers visit the offices of the dentists to review the medical records, "the IFD member dentists did not engage in a *complete* refusal to deal with the . . . insurers."[145] Under the majority's conception of the rule of reason, there was no violation because the dentists only sought to ensure quality care and not to drive competing dentists from the market.[146] Essentially, the majority assumed that the IFD had authority to regulate the provision of dental care even though Indiana had a state agency charged with that obligation. Finally, the opinion asserted that the FTC had failed to show any adverse competitive effects because the record did not show "an anticompetitive effect among dentists as to . . . dealing[s] with group dental health care insurers."[147]

The concurring opinion from Senior Judge Fairchild rejected the majority characterization of the conduct as benign. He pointed out that the record showed that "IFD [had] the power to frustrate to a significant extent the insurers' need to review x-rays . . . without going to exorbitant expense."[148] Because the FTC's decision claimed the anticompetitive effect was among dentists affecting their competition to serve insured patients, the judge agreed with his colleagues that the Commission had erred. Thus, the failure of the FTC to explain clearly that the boycott sought to protect from review the ability of dentists to determine what procedures they would perform—thereby creating significant risks of excessive costs to insurers—resulted in a concurrence rather than a dissent.

On petition of the FTC, the Supreme Court reviewed and reversed the Seventh Circuit's decision.[149] The opinion, like the concurrence in the court of appeals, focused on the explicit economic character of the restraint. Like the FTC, the opinion invoked the "rule of reason" as the basis for decision although it did not provide a definition of that rule. It applied the rule in part because the IFD was a professional organization and in part because the economic impact of the restraint might not be

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144. *Id.*

145. *Id.* at 1137.

146. *Id.* at 1139.

147. *Id.* at 1143–44.

148. *Id.* at 1145 (Fairchild, J., concurring). Further, he observed that there were "clearly and adequately supported finding[s] of . . . an economic motive" for the refusals to provide x-rays. *Id.* at 1146.

149. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 466 (1986). The FTC itself alone petitioned for review, which it has a right to do. The Solicitor General apparently refused to support the petition which may imply again that those charged with enforcing the antitrust laws were uncertain about the analysis of the kind of restraints at issue in this case.

"immediately obvious."[150] What is not explained is why either of those facts should require a balancing of competitive effects of a naked restraint on competition. Once the record showed that there was no productive joint venture or transaction that could justify the restraints, their character as naked restraints was manifest. The invocation of the IFD's professional status suggests that some naked restraints are entitled to some further analysis when the organization imposing such restraints has a particular status. But even then, what criteria would govern the validity of any restraint imposed? The Court's opinion failed to clarify which cartels can make a claim of reasonableness or what criteria courts should employ to determine the legality of the restraint.

In the Court's view, however, the application of the rule of reason was "not a matter of any great difficulty."[151] The restraint was essentially equivalent to a price fixing arrangement (i.e., a cartel) that impaired the ordinary market functions. Moreover, the IFD had the burden of demonstrating a procompetitive justification for the restraint. Of course, IFD was arguing that it needed to restrain unlawful conduct by third parties rather than the kind of efficiency enhancing (procompetitive) benefits that legitimate joint ventures and transactions can confer on the economy. Not surprisingly, the Court found that "[n]o credible argument has been advanced for the position that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect."[152] Thus, the analysis showed that this was essentially a naked restraint among competing suppliers of dentistry.[153] Moreover, the absence of proof of market power was not relevant and the burden rested on the IFD to provide a procompetitive justification. The opinion also rejected the quality of care argument stressing its factual and legal flaws.[154]

The IFD had also argued that Indiana's law on the unauthorized practice of dentistry justified its regulatory restraints and that, therefore, the state action doctrine protected it. While rejecting the claim that state law prohibited providing x-rays for review, the opinion added:

> Even if the Commission were incorrect . . . , the Federation's argument would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. . . . Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only

150. *Id.* at 458–59.
151. *Id.* at 459.
152. *Id.*
153. *Id.* at 460–61.
154. *Id.* at 462–63.

> when its actively supervised by the State. . . . There is no suggestion of any such active supervision here . . . .[155]

Some fifteen years later, the Court seems to have forgotten this admonition when it upheld the right of California dentists to establish ethical standards regulating competition and enforcing them without any system of disinterested oversight and supervision.

B. California Dental Association

The California Dental Association (CDA) is an organization of regional dental groups. Dentists must belong to a regional group to be able to be members of CDA. The CDA included more than 70 percent of all dentists licensed to practice in California and in some regions its membership exceeded 90 percent.[156] The CDA in turn is part of the American Dental Association (ADA) and a dentist can belong to the ADA only if he or she is a member of the CDA. The CDA imposed on its members a set of "ethical" rules that regulated the kinds of advertising and solicitations in which members might engage. Effectively, these regulations forbade most kinds of price and discount advertising as well as advertising based on the quality of care.[157] The CDA had various sanctions it imposed on members, including exclusion from membership, for violating its regulations.

The FTC's opinion and the subsequent judicial analyses reported that membership was worth as a much as $65,000 to a dentist because of various insurance and equipment deals that the CDA provided to its members.[158] In addition, there is some suggestion that patients are attentive to whether a dentist is a CDA-ADA member and prefer such individuals.[159] For these reasons, the threat of exclusion from the CDA was powerful and allowed it to compel deviant dentists to adhere to its regulations.

The FTC had a long-standing program of challenging such restraints on advertising by professional associations.[160] Its basic theory was that

155. *Id.* at 465.

156. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 788 (1999).

157. *In re* Cal. Dental Ass'n, 121 F.T.C. 190, 192 (1996).

158. *Cal. Dental Ass'n*, 526 U.S. at 762; *Cal. Dental Ass'n*, 121 F.T.C. at 207.

159. Assuming CDA membership is a certification of enhanced skill, that would have no relationship to whether or how a dentist advertised his or her skills. Hence, certification cannot justify regulating member advertising.

160. *See, e.g.*, Complaint, Music Teachers Nat'l Ass'n, Inc., F.T.C (2014) (C-4448), *available at* https://www.ftc.gov/system/files/documents/cases/140404musicteacherscmpt.pdf [https://perma.cc/7UL4-3YRA] (alleging the Music Teachers National Association Code of Ethics restrains trade by disallowing teachers from recruiting students from other studios); Complaint, Cal. Ass'n of Legal Support Prof'ls, F.T.C. (2014) (C-4447), *available at* https://www.ftc.gov/system/

such conduct increased the cost of professional services. Less explicit was a related concern that the lack of advertising affected demand for the services. Hence, less restrictive rules were likely to result in both lower prices to existing consumers and increased consumption as potential consumers learned about the location, cost, and benefits of the professional service involved.

Rather than settle the case, CDA choose to litigate in an administrative proceeding that took several years to wind its way to the commission. CDA's primary argument was that the FTC lacked jurisdiction over it because it was a not-for-profit entity and the language of the act arguably denied coverage. The CDA also defended its regulations on their merits. It contended that its rules were intended to avoid misleading consumers who had limited capacity to understand or shop for dental services. The CDA also argued that its rules had no effect on the market and, alternatively, that they were "procompetitive" because they eliminated false and misleading advertising from the market. The FTC on the merits determined that there was no efficiency or pro-competitive virtue in the kind of categorical commands that the CDA imposed. The trial staff had chosen not to put on an economist who would have testified to the price and demand effects of these restraints.[161] Hence, the commission's majority opinion had to rely on a generalized assumption that the restraints had adverse effects.[162]

Chairman Pitofsky, a distinguished antitrust scholar and practitioner, wrote the decision and applied both the per se rule and the rule of reason.[163] The per se part of the decision focuses on the indisputable fact that a private group had agreed to limit their competition with each other through restrictions on advertising that were enforced against any member who deviated.[164] This sets forth a classic cartel story.[165] The opinion draws that connection and essentially points out that the conspiring dentists were not engaged in any collective productive activity or transaction to which the restraint was ancillary.[166] It omits any

files/documents/cases/140404californiaassoccmpt.pdf [https://perma.cc/X2PQ-JN42] (alleging the California Association of Legal Support Professionals Code of Ethics restrains trade by disallowing members from lowering prices to compete with other members of the association, and from speaking negatively about other members).

161. *See* Stephen Calkins, California Dental Association*: Not the Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 537 n.214 (2000) (citing CDA's brief that reported that the FTC had decided not to put its economic expert on the stand).

162. *Cal. Dental Ass'n*, 121 F.T.C. at 308–16.

163. *Id.* at 296–97.

164. *Id.* at 303–07.

165. *See* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 946 (describing how cartels can focus on any relevant dimension of competition in order to facilitate exploitation of the market).

166. *Cal. Dental Ass'n*, 121 F.T.C. at 306–07.

reference to the subsequent discussion of CDA's claimed right to enforce state law. The failure to highlight the subsequent analysis that the CDA lacked authority to create or enforce regulations and that the state had created a state agency with exactly that responsibility may explain why, as the case moved through the courts, these issues gradually disappeared.

But the fact that this was a "professional" organization led to a confusing limit to this per se analysis. Hence, the opinion also reviewed the restraints under a rule of reason. Based on a footnote in the *Goldfarb* decision[167] and its elaboration in *Professional Engineers*,[168] the FTC opinion acknowledged that an exception apparently exists for professional organizations to adopt and enforce rules that affect competition.[169] The FTC decision does not suggest what kinds of practices might be in this privileged group, nor does it distinguish between regulating competition and some other types of ethical issues which professional groups might address.

Applying this ill-defined standard, the Commission held the restraints themselves were unreasonable with respect to the prohibition on members adverting prices and non-price advertising such as quality claims. But it asserted with respect to the latter, "we cannot say with . . . confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession."[170] This implies that this private group, without any showing of authority, somehow had the right to regulate competition in the market without any disinterested supervision so long as it could assert a public service justification. This would mean that some cartelistic restraint on competition was lawful, but the FTC opinion went on to find that these restraints had or were likely to have an adverse effect on competition and so were inherently suspect. Still, if the public service justification were valid, then the expected result would be some regulation or restriction of competition. The opinion seems to regard the fact that the CDA had market power because "dentists place a high value on the benefit of membership in CDA because of its insurance

167. Goldfarb v. Va. State Bar Ass'n, 421 U.S. 773, 788–89 n.17 (1975) ("The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.").

168. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).

169. *Cal. Dental Ass'n*, 121 F.T.C. at 306 ("To be sure, the 'public service aspect, and other features of the professions, may require that a particular practice, which could properly be view as a violation of the Sherman Act in another context, be treated differently.'" (quoting Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 348–49 (1982))).

170. *Id.* at 307.

and educational programs"[171] as a basis to reject the public service claim. The analytic logic is unclear, but it might mean that if the restraint affected the market, then it lacked a public service justification. But that would imply that any effective regulation would be unlawful.

Finally, there were no efficiencies to justify the restraint. The CDA contended that either its restraints had no effect on competition (a claim that is inconsistent with the entire idea of regulating advertising) or that they were procompetitive because they challenged only "advertising that is false or misleading."[172] The Commission rejected the assertion that these rules only excluded false or misleading advertising, pointing out that they prohibited "truthful offers of discounts" and sought to eliminate all quality claims even when those claims were no more than "personal opinion."[173]

What is missing from this analysis is a positive explanation of why the CDA and its members might desire excessive and unreasonable regulation of advertising. By severely limiting advertising, dentists could assure each other that they would not poach each other's customers, and they would reduce the risk of price cutting affecting their income. The FTC opinion on the merits only suggests that the "ethical" claims were a pretext for reducing the risks of competition without elaborating on the potential gains. Moreover, because the CDA was a professional association, the opinion is deferential to the putative expertise or disinterestedness of the parties. As a result, the opinion fails to make a compelling case against the self-interested restraints that it was challenging.

The final part of the decision addresses "CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on advertising by the state of California."[174] The decision treated this as a claim of state action exemption and rejected it. California had neither authorized CDA to enforce its rules on dental advertising nor did it supervise CDA's conduct.[175] CDA's position was somewhat more nuanced in that it claimed that because its rules prohibited conduct that was also prohibited by state law, its conduct was lawful.[176] It pointed to its right under California law to challenge prohibited conduct.[177] Further, CDA contended that "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is

171. *Id.* at 313.
172. *Id.* at 323.
173. *Id.* at 316–18.
174. *Id.* at 322.
175. *Id.* at 324–25.
176. *Id.* at 323.
177. *Id.*

deemed to have violated the association's code of ethics."[178] Thus, CDA tried to position itself as merely enforcing state law and, indeed, as having authority to do so via the means of a challenge before the State Board of Dental Examiners. The FTC found that while some of CDA's rules paralleled the state's, others were more expansive. In addition, it observed that "our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own."[179] The Supreme Court had rejected a similar argument in the *IFD* case.[180]

Indeed, the state dental board's staff had prepared a "discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising."[181] That paper concluded that the commercial speech decisions of the Supreme Court had "probably invalidate[d] the present California statutes and regulations prohibiting dentists from advertising 'superiority'" as well as pointing out that the extensive limitation on advertising may have "harmed . . . segments of the public who do not use dental services because they are not conscious of their availability or cost."[182] These requirements of the First Amendment did not apply to CDA as a private organization. But by ignoring these concerns, the CDA arguably exceeded the scope of any regulatory authority it may have possessed. Moreover, its perspective on the balance of consumer interests and its own members' economic interests involved an inherent structural bias.[183]

Finally, the FTC decision concluded that the record did not reveal a single instance "in which the State enforced its advertising proscriptions against a dentist."[184] As a result, "the CDA perceived itself as filling an enforcement void."[185] Even if the CDA had some authority to enforce the state rules, it claimed only the right to initiate proceedings before the state dental board to enforce the advertising regulations. Such proceedings would have allowed the challenged dentist to assert constitutional rights as well as forced the regulators to confront the question of whether such

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178. *Id.*

179. *Id.* at 325.

180. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 465 (1986) (rejecting the idea that private actors, acting independent of the State, can claim antitrust immunity even when their goal is consistent with state goals).

181. *Cal. Dental Ass'n*, 121 F.T.C. at 325.

182. *Id.* at 325–26.

183. *Cf.* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008) (finding the dual role companies play—determining both which benefits their employees are eligible to receive and which benefits the company will pay themselves—is a factor that must be considered when determining whether a plan administrator has abused its discretion).

184. *Cal. Dental Ass'n*, 121 F.T.C. at 328.

185. *Id.*

draconian restrictions served the public interest. Like the North Carolina dental case to be examined next,[186] the CDA had chosen a path that avoided the active, disinterested state supervision that is the hallmark of the state action doctrine.

While the FTC decision strongly rejects the CDA claim that its conduct was lawful because it was enforcing state law, the placement of the analysis at the end of the decision made the issue marginal to the overall result. The issue is characterized, correctly, as an affirmative defense, but it would seem to be central to the case if one looks at the CDA as a regulator. As such, absent some authorization, it is essentially a cartel imposing its will on its participants. Moreover, as in some other situations, the restraints were "add-ons" to a bundle of valuable services so that the CDA had the capacity to compel adherence by the threat of denying those benefits.[187]

The CDA appealed to the Ninth Circuit where again it focused on its primary contention that the FTC lacked jurisdiction over it because it was a not-for-profit entity. The description of the CDA's activities highlighted the fact that the state did not enforce the advertising rules and that the CDA "attempted to fill in the gap with its own enforcement efforts."[188] But the opinion then characterizes the restraints as "a set of ethical [sic] guidelines promulgated by a professional organization for the apparent purpose of preventing false and misleading advertising."[189] For this reason the opinion rejected per se characterization of the restraints. "The value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly."[190]

Hence, the court undertook a "further inquiry" into the effect of the restraints "on competition." It agreed that the price advertising restraints "amounted in practice to a fairly 'naked' restraint on price competition itself."[191] Such restraints "make it more difficult for consumers to find a

186. *See* discussion *infra* Section III.C

187. Such cartelistic add-ons to legitimate ventures have occurred in a variety of circumstances. *See, e.g.*, Peter C. Carstensen & Harry First, *Rambling Through Economic Theory:* Topco*'s Closer Look*, *in* ANTITRUST STORIES 171, 201–03 (Dan Crane & Eleanor Fox eds., 2007) (arguing that the territorial restraints at issue in that case were not necessary for the joint venture of producing house brands, but rather served the discrete interest of the participants in limiting competition among themselves); United States v. E.I. Du Pont De Nemours, 351 U.S. 377, 383 (1956) (two major global chemical companies used a joint venture in Latin America as the basis for an agreement limiting competition in various chemicals around the world); PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 38 (D.C. Cir. 2005) (joint venture unlawfully agreed to restrict price competition from products that were potential substitutes for the joint venture product).

188. Cal. Dental Ass'n v. FTC, 128 F.3d 720, 724 (9th Cir. 1997).

189. *Id.* at 727.

190. *Id.*

191. *Id.*

lower price and for dentists to compete on the basis of price."[192] The analysis proceeded to consider the claim that preventing false and misleading advertising was "procompetitive." This is an odd use of the term because this is regulation to suppress disfavored marketing practices. Moreover, this is a justification that any cartel might advance for its self-imposed regulations. The court's opinion compared the CDA's regulations on advertising discounts with those the FTC's rules prohibited to show that the CDA included excessive restrictions making such price promotions "infeasible," and the record offered no evidence that the rules had improved disclosure rather than suppressing it.[193] Thus, the court focused on the merits of these regulations and concluded that they were substantively unreasonable. This implied that the CDA could lawfully impose less restrictive advertising regulations.

The analysis of the non-price advertising restraints is similar. The decision acknowledged that such restraints can "affect output" and so are "sufficiently naked . . . to justify quick look analysis."[194] In support of its use of a form of the rule of reason, the opinion cites the *Indiana Federation of Dentists* and *Professional Engineers* decisions.[195] Finding the specific regulations excessive, the conclusion followed that they were unreasonable.[196] Here again the implication was that some less restrictive regulation of such advertising would be lawful even though it was a naked restraint on competition. This analysis assumes that the CDA had both general and specific authority to regulate advertising by its members.

CDA also contented that it did not "intend" to restrain competition but rather the purpose of its code was to ensure that dentists "compl[ied] with state law."[197] This defense might have supported a conclusion that the CDA did not have independent authority to regulate advertising because the state already had such regulations and the capacity to enforce them. Moreover, it would have followed clearly from the rejection of the comparable claim in the *IFD* decision.[198]

Indeed, the decision did point out that the CDA intended to restrain competition because the "point of the advertising policy was clearly to limit the types of advertising in which dentists could engage."[199] Moreover, loss of membership "appears to present a significant hardship

192. *Id.*
193. *Id.* at 728.
194. *Id.*
195. *Id.* at 727.
196. *Id.* at 730.
197. *Id.* at 729.
198. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462–63 (1986) (rejecting all three of the Indiana Federation of Dentists' arguments, specifically the rule of reason defense).
199. *Cal. Dental Ass'n*, 128 F.3d at 728.

for some dentists."[200] While the proof of economic power—the capacity to coerce individual dentists—was not overwhelming, given the inherently anticompetitive character of the restraints that the CDA enforced, the majority found that the FTC had sustained its claim that the restraints were "unreasonable" under an abbreviated rule of reason analysis. What is lost in this decision is any focus on the question of the CDA's authority to enforce the state law regulations under the guise that it was only enforcing "ethical" rules governing its members.[201]

Supreme Court review followed with a five to four reversal of the court of appeals decision, and by implication, the FTC's approach to the analysis of professional restraints.[202] Neither the majority nor dissent refers to CDA's defense that it was enforcing the state law on dental advertising. At the same time, the majority quantified the value of CDA membership at between $22,000 and $65,000.[203] The Court was unanimous that the FTC Act applied to nonprofit entities.[204] But it split on the question of whether the record established that the CDA's restraints violated antitrust law.

The majority recognized that the CDA's restraints were "naked" restraints on competition, but still were subject to a rule of reason: "we [have] held that a 'naked restraint on price and output requires some competitive justification.'"[205] But because the "likelihood of anticompetitive effects" was not obvious, the use of a quick look rule of reason was inappropriate.[206] The restraints "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[207] This declaration stood in stark contrast to the foundational decision creating the per se rule which rejected all efforts to excuse or justify a naked restraint.[208]

The analysis then focused on the difficulties consumers might experience in assessing advertisements for dental services. This makes a

200. *Id.* at 730.

201. *Id.* at 730 (Real, J., dissenting) (stating the FTC lacked jurisdiction over the CDA because the operation was not commercial in nature, but instead only provided services to its members). Additionally, the dissent argued that there was no evidence of restraint on price competition because the CDA was only trying to ensure that its members did not engage in "misleading or unrealizable advertising." *Id.* at 731.

202. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 758 (1999).

203. *Id.* at 762.

204. *Id.* at 768–69.

205. *Id.* at 769–70 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984)).

206. *Id.* at 771.

207. *Id.*

208. United States v. Socony-Vacuum Oil, 310 U.S. 150, 223–24 (1940) (rejecting the defendants attempt to justify their restraints on environmental and resource conservation grounds).

case for regulating advertising by all dentists.[209] The majority rejected the conclusion that barring discount advertising would have a "net anticompetitive effect" and indeed such advertising itself might be "anticompetitive" because it misleads consumers.[210] Similarly, the majority expressed concern that quality advertising would induce "some patients to obtain more care than they would in its absence . . . ."[211] Aside from the remarkable assertion that consumers would buy excessive quantities of dental care in response to advertising as opposed to misleading pitches by dentists, the basic implication of this point is again that there is a case to be made for regulation of dental advertising.

The majority asserted that the rule of reason required proof of anticompetitive effect.[212] Hence, the Court of Appeals had misapplied the rule of reason and was obliged to decide whether the record the FTC had made showed that these regulations had actual anticompetitive effect.[213] This directly conflicts with the *Socony* concept that naked restraints are illegal in and of themselves regardless of effect.[214] The majority remanded the case for further review by the Circuit Court as to whether the record would support such a conclusion.[215] The failure of the FTC to offer expert economic testimony meant that the record lacked specific evidence of adverse effects from these restraints.[216]

On its merits, without some qualification, this decision would have undermined all cases using per se standards to challenge cartels and other similar naked restraints on competition. Outside of the professional context, the only defenses on the merits open to the parties to an admitted agreement restraining some element of competition is that restraint is a legitimate incident to a joint venture or other transaction involving the parties. This is the core of the ancillary restraint concept, and it is central to the explanation of when and how the rule of reason applies generally.

The opinion rejects the application of the quick look standard for condemning these restraints as unreasonable. The reasoning was that the restraints might be "pro-consumer" because they eliminated false advertising harmful to consumers. Hence, a more searching evaluation

209. *Cal. Dental Ass'n*, 526 U.S. at 772–75 (recognizing that regulators might address many of its concerns, the Court makes no reference to the regulatory regime in place in California).

210. *Id.* at 775.

211. *Id.* at 776–77.

212. *Id.* at 776–81.

213. *Id.* at 779–80.

214. United States v. Socony-Vacuum Oil, 310 U.S. 150, 223–24 (1940).

215. Cal. Dental Ass'n v. FTC, 224 F.3d 942, 958 (9th Cir. 2000) (explaining that the FTC chose to dismiss the case once the Court of Appeals concluded there was insufficient proof of actual effects in the record).

216. Calkins, *supra* note 161, at 537 n.214 (noting that the CDA's reply brief summarized some of the shortfalls of the complaint counsel, such as failing to call an expert economist prior to trial).

was required.[217] As shown earlier, some quick look cases involve situations in which the naked restraint hypothesis is very strong, despite the presence of a joint venture or transaction to which it might be ancillary, and so the burden shifts to the parties to justify their restraint.[218] In such cases, the defender must show that the restraint is more than reasonable.[219] The second strand of quick look decisions involve cases such as *IFD* and *NCAA*, where there is either manifestly no authority to regulate a market or the regulation at issue is clearly outside whatever authority the regulator has. Applying this model, what makes CDA different—such that more than a "quick look" is required—is that it was not manifest that the CDA lacked the authority to regulate the business practices of its members. The restraints themselves specify and restrict how CDA members may compete and are within the scope of what a lawful regulator might attempt to impose. To be sure, First Amendment requirements might impose non-antitrust limits to such regulation.

Neither the majority nor the dissenting opinion has an explanation of how or why the CDA received permission to regulate dental advertising. CDA's claimed authority to enforce state law on dental advertising is never mentioned. Indeed, there is no reference to those laws nor is there any discussion of the authority granted to CDA to challenge alleged violations made by complaint to the state's Dental Board. Thus, the decision and, essentially, the dissent assumed that the CDA had authority as a professional association to regulate competition. Further, the opinion does not address the question of how the CDA, given its economic self-interest, could disinterestedly balance the interest of consumers in having good information (more advertising inciting price and service competition) with their interest in not being misled.

C. North Carolina Dental Board Examiners

The North Carolina Dental Board is an official agency of the state charged with regulating the practice of dentistry. Dentists licensed in the state elect all but two of its eight members who themselves must be

217. *Cal. Dental Ass'n*, 526 U.S. at 771–74, 776–78.

218. *See, e.g.*, Poylgram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005) (noting that the evidentiary burden shifts to the defendant to show the restraint is not harmful to customers).

219. *Compare* Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 17 (1979) (defendant is required to show the necessity of the restraint as well as the restraint's efficiency) *with* Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("For the sake of business certainty and litigation efficiency, [the Court] has tolerated the invalidation of some agreements that a full-blown inquiry might prove to be reasonable."). *See generally* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 557 (E.D. Pa. 1960) (stating that the party gaining an advantage is a new entrant or failing firm), *aff'd*, Jerrold Elecs. Corp. v. United States, 365 U.S. 567 (1961); Rothery Van Lines v. Atlas Van Lines, 792 F.2d. 210, 210 (D.C. Cir. 1986).

practicing dentists.[220] In addition, dental hygienists elect one member and the governor of the state appoints a member. The Board's direct authority is over dentists and not non-dentists. But it has the authority to initiate suit to enjoin the unlicensed practice of dentistry.

Various types of teeth whitening services emerged in North Carolina in the 1990s. These included in-office services and take-home kits provided by dentists, over-the counter products, and services offered by non-dentists, often located in shopping centers. By the early 2000s, North Carolina dentists were complaining to the Board about the non-dentist services. The FTC's review of those complaints suggested that they focused on the low prices being charged and rarely on any possible consumer harm.[221] The Board discussed the issue and advised complaining dentists that it was investigating and "attempting to shut down these providers."[222] The Board could have initiated litigation to challenge these activities as the unlawful practice of dentistry, but then the courts would have been the final arbiter of the question of whether this practice fit within the ambiguous statutory definitions.[223] Alternatively, the Board could have proposed a rule interpreting the statute to forbid non-dentists from engaging in whitening.[224] Such a rule would have required review and approval by a legislative committee.[225] Instead, the board's leadership issued a series of cease and desist letters to offending individuals, landlords, and suppliers. The effect was to limit or eliminate competition from non-dentist whiteners.

In 2010, the FTC challenged this conduct. The FTC's claim was narrowly framed around the specific procedure that the Board had employed to implement its conclusion. Implicit in the claim and explicit in the ultimate order is the acceptance of the right of the Board to employ other methods to establish and enforce its position.[226] Thus, the FTC did not dispute the right of a state regulator to adopt an expansive definition of the practice of dentistry and seek to enforce it in permissible ways. The focus of concern was that the Board was acting unilaterally in issuing

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220. *In re* N.C. Bd. of Dental Exam'rs, 152 F.T.C. 640, 641 (2011).

221. *Id.* at 645–46.

222. *Id.* at 646.

223. *Id.* at 682–83 (stating that the Board of Dental Examiners would have likely had the burden of proving that whitening constituted the practice of dentistry as set forth in the statutes). Hence, this would have ensured plenary review of the sort that *Patrick v. Burget* required. *See* Patrick v. Burget, 486 U.S. 94, 100–02 (1988) (rejecting the claim that the state provided active supervision of the peer review process).

224. Such a rule would have had to differentiate among the different methods of whitening that included systems that individuals could buy at retail and use as well as ones that dentists provided to patients for home use. Hence, such a rule making process would require some complex drafting and justification.

225. *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. at 648.

226. *Id.* at 684.

these notices without any oversight or review by any disinterested state agent.

The Board's primary defense was that it was exempt from antitrust claims based on the state action doctrine.[227] It also contended that there was no concert of action, that the product market was wrongly defined, that the letters were not orders, and that the letters had no adverse competitive effects.[228] The FTC rejected the claim of a state action exemption in 2011 because practicing dentists dominated the Board's membership and so some other state entity had to actively supervise the Board's actions.[229]

After a fruitless round of appeal to the federal courts,[230] the case proceeded to decision on the merits. The ALJ found collusion among board members to exclude non-dentists from teeth whitening services and that the letters had in fact caused non-dentist whiteners to leave the market, deterred manufacturers from supplying such competitors, and caused mall-owners to stop leasing space to such services.[231] The Board argued that even if it was not exempt, the public safety and welfare that its efforts sought to protect justified its conduct. The ALJ rejected this defense.

The Board appealed, emphasizing three major issues.[232] First, it disputed the existence of a conspiracy. It claimed that its members were not independent economic actors capable of a conspiracy as defined in antitrust law and also that the evidence did not show conspiracy even if the members were independent actors.[233] Second, the Board contended that there were "procompetitive" justifications for its conduct that outweighed any adverse harm. This argument invoked the Board's status as a state agency intended to promote public welfare through "enhanced legal competition."[234] Third, the Board challenged the scope of the relief. It contended that the proposed order would prevent it from investigating and challenging the unlawful practice of dentistry.[235] In addition, it

227. *Id.* at 649–50.

228. *Id.* at 649.

229. *See id.* at 626 (granting partial summary judgement denying the state action defense).

230. *Id.* at 650. *See* N.C. State Bd. Dental Exam'rs v. FTC, 768 F. Supp. 2d 818, 820 (E.D.N.C. 2011) (stating the plaintiffs do not have the right to challenge FTC administrative proceeding under the collateral order doctrine).

231. *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. at 651. This finding reflects, no doubt, the need to establish effect from a naked restraint on competition because of the use of the "rule of reason" approach.

232. *Id.* at 653.

233. *Id.* at 653–60 (the FTC had little trouble in rejecting these claims).

234. *Id.* at 653.

235. *Id.*

sought reconsideration of the earlier decision that it was not exempt as a state actor.[236]

The FTC decision did not invoke the per se label and instead continued to articulate a form of the rule of reason that would uphold cartelistic conduct. The decision framed three alternative versions of this standard. The first, drawn from horizontal joint ventures that significantly restrain direct competition, reflects a presumption of illegality where the anticompetitive attribute is manifest, and the prima facie justification is weak. In such cases, the restraint requires some competitive justification.[237] The cases cited in support of this standard, however, mixed joint venture cases such as *Realcomp* and *Polygram* where the restraint was inconsistent with the legitimate goals of the venture, with regulatory cartel cases such as *Indiana Federation of Dentists*, *NCAA*, and *Professional Engineers*.[238] The resulting citations show the confusion of functional categories.

In the second category were cases where the "restriction in question was 'not sufficiently naked'" to call for a presumption of illegality.[239] But direct evidence of the adverse effects overcomes the lack of proof of market power. The distinction between these first two categories is elusive. Both essentially rely on an assessment of the impact of the restraint, including the lack of a sufficient justification to create a presumption that it is illegal.

The third category requires that the challenger have proof of actual detrimental effect on competition. This standard actually requires proof of "market power" based on "market definition" which demonstrates "the potential for genuine adverse effects on competition."[240] In its explication of this standard, the opinion does not provide any benchmarks to assist in determining when a restraint on competition will have "genuine effects" or even whether those effects must have occurred or need only be "potential" ones. Moreover, at least implicit is a claim that antitrust law can assess the reasonableness of regulatory restraints on their merits.

The opinion applied all three of these standards to the facts of the case and found the restraints unlawful under all three.[241] The conduct fitted

236. *Id.*

237. *Id.* at 656.

238. *Id.* at 656 (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); NCAA v. Bd. of Regents, 468 U.S. 85, 109–10 (1984); Nat'l Soc. Prof. Eng'rs v. United States, 435 U.S. 679, 692 (1978); RealComp II, v. FTC, 635 F.3d 815, 815 (6th Cir. 2011); Polygram Holding v. FTC, 416 F.3d 29, 34 (D.C. Cir. 2005)).

239. *Id.* at 656–57 (quoting *Ind. Fed'n of Dentists*, 476 U.S.at 460).

240. *Id.* at 657 (citing *Ind. Fed'n of Dentists*, 476 U.S. at 460).

241. *Id.* at 658.

the "inherently suspect" category because "[t]he challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors."[242] In essence then, this was cartelistic conduct that protected incumbents from competition by imposing a putative regulation eliminating a class of competitor. In any other context, it would be per se illegal.

Nevertheless, the FTC undertook to consider the purported justifications for this conduct but also observed: "A cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation."[243] This approach conflates ancillary restraint analysis where the expected outcome is economically positive with claims that a specific cartel results in some socially desirable result.[244]

The decision rejected "public health and welfare" as a justification for such restraints despite the apparent acceptance of the analogous argument in *CDA*.[245] This seems incorrect as a statement of regulatory authority. Certainly, the Dental Board was charged with implementing exactly that kind of regulation. More relevantly, the FTC decision rejected the Board's effort to justify its entitlement to consider health and welfare based on its status as a state agency. Here the decision pointed out that the conduct at issue was "not consistent with its enforcement mandates" which implies that, if the Board brought suit in state court, this would have been a "way the board is authorized to enforce the Act."[246] Moreover, the FTC concluded that the record did not support these justifications on their merits. Teeth whitening does not present serious health risks and the record did not support the claim that the Board was responding to evidence of risk as opposed to concern about economic competition. Thus, the FTC undertook to make a decision about the

242. *Id.* at 667–74.

243. *Id.* at 674–75. Two of the three cases cited for this proposition involved transactions or ventures to which the restraints were arguably ancillary. Only the open-ended text of *IFD* involved a case of comparable purely cartelistic conduct.

244. Many commentators believe that the Court's decision in *Board Of Trade of the City of Chicago v. United States*, 246 U.S. 231, 241 (1918), justifies this conflation because of the assumption that the restraints at issue in the case were naked limits on competition. Such an assumption is false. The restraints were functionally ancillary to the legitimate needs of the exchange. *See* Carstensen, *The Hollow Core of Antitrust*, *supra* note 40, at 50–52 (demonstrating, based on records from the Board and the Department of Justice, the restraints were ancillary to the legitimate interests of the joint venture which was the board of trade and sought to control opportunistic behavior of a class of integrated traders).

245. *See N.C. Bd. of Dental Exam'rs*, 152 F.T.C. at 642, 652 (noting that the ALJ found that "antitrust laws do not permit defense based on social welfare or public safety concerns").

246. *Id.* at 678. Even such enforcement might be objectionable in light of *Patrick v. Burget*, 486 U.S. 94, 94 (1988), which rejected the exclusion of competing doctors based on claimed dangerous practices where the only potential supervision of the conduct was through a court challenge.

merits of the underlying regulations, thereby apparently conceding that if there were merit to the justifications, the Board could use its cease-and-desist approach to stop this form of competition. Of course, if the state had provided "active supervision," even unreasonable regulations would be exempt from antitrust challenge.[247]

The Commission made shorter work of the other two justifications. The claim that the exclusion was in furtherance of legal competition was the same defense that the Supreme Court had rejected in its *IFD* opinion.[248] Similarly, the claim that the Board had acted in good faith and so should not be held liable conflicted with holdings running back 100 years.[249]

The FTC proceeded to do a full "rule of reason" analysis.[250] Its starting point was the determination that the Board possessed market power in the broadly defined teeth whitening business. It used its state-conferred power to create a perception among non-dentist teeth whiteners, their landlords, and their suppliers that it could and would ban all non-dentist whitening. This conduct had adverse effects on the market by eliminating lower-cost alternatives. Moreover, there were no acceptable justifications for this conduct. Thus, basically, the rule of reason analysis was a repetition of the inherently suspect analysis which was itself effectively an application of the per se rule, given the initial conclusion that the Board was neither authorized to engage in the specific restraints nor subject to active supervision.

Not surprisingly, the Board sought review in the Fourth Circuit and received an outpouring of support from professional associations.[251] The court, however, sustained the FTC's result. It recognized at the outset that the Board lacked statutory authority to engage in the specific conduct (process) of issuing cease and desist orders to non-dentists. The Board's legal arguments were three-fold: it claimed a state action exemption, denied that there was concerted action, and contended that its activities did not unreasonably restrain trade.[252]

247. But this would not necessarily exclude other challenges based on state law or state or federal constitutional requirements. *See* Carstensen, *Where Is Attorney General Waldo*, *supra* note 28, at 808–20 (identifying the ways in which state law can provide oversight of otherwise exempt regulations); Allensworth, *supra* note 25, at 1586 (summarizing the conclusions reached by the Court in similar cases).

248. *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. at 676.

249. *Id.* at 681–82 (citing Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912)).

250. *Id.* at 682–83.

251. More than twenty associations and boards filed amicus briefs in support of the Board, while only the American Antitrust Institute (AAI) filed a brief in support of the F.T.C. This author was among those who signed the AAI brief. N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 363 (4th Cir. 2013).

252. *Id.* at 366.

Because the majority of the dental board were practicing dentists, they were elected by dentists, and there was no active state supervision of the cease-and-desist notice campaign, the opinion rejected application of the state action exemption.[253] Despite the Board's reference to generic oversight of its conduct, the opinion upheld the FTC's determination that it was inadequate. The court cited *Patrick* emphasizing the need for review of the "particular anticompetitive acts."[254]

Second, the decision easily concluded that there was collusion because the board members had individual economic interests that required collective action to exclude competition. Thus, the focus here was on the board as a collusive group and not some larger set of dentists. Indeed, individual dentists had the constitutional right to lobby the board to take action against non-dentists engaged in teeth whitening. Thus, the decision limited the conspiracy to the board itself. In contrast, both *IDF* and *CDA* were not public agencies and so it was plausible to recognize all participants as part of the conspiracy.

The most problematic element of the decision was its review of the FTC's determination that the Board's conduct on its merits was unlawful. Reciting the three levels of scrutiny from per se through quick look to full rule of reason, the opinion embraced the FTC's quick look analysis: "We affirm . . . its conclusion that the Board's behavior was likely to cause significant anticompetitive harms."[255] The citations in the opinion's discussion mix naked restraint cases such as *Fashion Originators Guild* and *National Professional Engineers* with references to *Northwest Wholesale Stationers* and *PolyGram*—all cases involving restraints arguably ancillary to legitimate joint ventures.[256] A paragraph summarized the confusing dicta from *Goldfarb* and *Professional Engineers* that courts "should be hesitant to quickly condemn the actions of professional organizations"[257] But in this case, the court had no problem seeing the unjustified anticompetitive aspect of the conduct.[258]

Because this decision created a circuit split, the Supreme Court granted review.[259] The primary focus at this stage was again on whether the active supervision requirement applied to a state authorized board whose members had an inherent conflict of interest. Once again, the majority decision highlighted the path that the Board could have taken that would

253. *Id.* at 368–70.
254. *Id.* at 370 (quoting Interlocutory Order, N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 630 (2011)).
255. *Id.* at 374.
256. *Id.* at 373–75.
257. *Id.* at 375.
258. *Id.*
259. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015).

have been subject to such supervision: "The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature."[260] Accepting that the state had conferred on the Board authority to suppress competition by defining the scope of dental services, the majority focused on the Board's specific steps to implement it, for which there was no "active supervision" from the state. The policy rationale for requiring oversight treated as comparable conduct both private market regulation by standard setting groups and state authorized regulation by self-interested regulators.[261] This analogy was stressed later in the opinion where the court observed that "[t]he similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the state, vested with a measure of government power, and required to follow some procedural rules."[262]

The relation of professional ethics to regulatory authority also received attention. "[T]hose who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State."[263] "[T]here is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules."[264] This paragraph does not provide a definition of "ethical standards" as distinct from "self-regulation." The paragraph does not cite to *CDA* although its implication is that the CDA regulations on advertising were "ethical" and so reflective of a "duty separate from the dictates of the state." Yet from a functional perspective, it is impossible to distinguish between the regulations at issue in *CDA* and *NCDB*.

The broad impact of this decision is to call into question actions by regulatory boards where self-interested members of the profession or activity being regulated dominate the decision process. States must either fashion oversight for such agencies or not create them.[265]

Unlike either IFD or CDA, the Board had at least apparent access to the powers of the state to coerce non-members into conformity with its

260. *Id.* at 1108 (stressing that "the Board's concern [with non-dentist teeth whitening] did not result in a formal rule or regulation reviewable by the independent Rules Review Commission").

261. *Id.* at 1111 ("[S]tandards may blend with private anticompetitive motives in way difficult even for market participants to discern.").

262. *Id.* at 1114.

263. *Id.* at 1115.

264. *Id.*

265. The majority opinion emphasized that "the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision." *Id.* at 1116.

commands. In *IFD*, the only restraint arose from mutual commitment to the goal of denying x-rays to insurers. CDA, in contrast, had substantial economic power over its members because there were no apparent alternative ways to obtain the same cost savings. Hence CDA, like the Board, had a capacity to compel obedience to its mandates, and like the Board its determinations of what were reasonable regulations were not subject to any active supervision.

IV. THE EXPLANATORY POWER OF THE PER SE LEGALITY FRAMEWORK AND THE ROLES OF ETHICS AND COMPETITIVE EFFECTS

A. Per Se Legal Framework

The three dental cases illustrate the applicability of the Carstensen-Roth per se legal framework. It identifies the central issues in these regulatory cases, the specific questions to be resolved, and provides consistent and generally applicable standards for determining the appropriate outcome. Further, it avoids open-ended balancing and so avoids creating an inherent conflict with the general rule of per se illegality for naked restraints. As a result, the framework also provides a coherent basis to critique decisions where courts have failed sufficiently to address the relevant issues.

The IFD claimed it had authority to regulate the market for dental services to protect patients from the unauthorized practice of dentistry. But there was no basis in law or custom for this claim. Hence, the analysis in the case is best understood as an inquiry into IFD's authorization to regulate the practices of dentists and dental insurers. The poverty of doctrinal language in antitrust meant that this inquiry was cast in terms of an application of the rule of reason although the restraint was without doubt a naked agreement among independent businesses to restrain competition—functionally a cartel. Once the Court found that the IFD lacked any authority to regulate dental practice, there was no basis to exempt its cartelistic conduct from that which is per se illegal. This was true even if the laws of Indiana made the reading of x-rays by non-dentists an unlawful practice of dentistry. The state had, after all, a public agency empowered to enforce any such rule.

The NCDB, in contrast, had the authority to regulate the practice of dentistry in North Carolina. Moreover, given ambiguous statutory language defining what constituted practicing dentistry, it was within its substantive authority to propose a definition that included some or all forms of teeth whitening as falling within the scope of dental practice. None of the decisions from the FTC to the Supreme Court disputed this right.

Rather, the case turns on the third element of the framework: the process by which the decision was made and implemented. The Board's process of sending cease and desist letters to non-dentists avoided necessary disinterested supervision. Hence, its conduct—which, again, otherwise constituted a naked restraint of competition—was not exempt and so unlawful because it had used an unacceptable process. The focus on "active supervision" is thus a little misleading. There was no way to provide supervision of any kind over the specific method employed under the circumstances in North Carolina.[266] What the Court ultimately decided was the definition and enforcement decisions of a self-interested professional regulatory body require such supervision. The state's failure to establish sufficient oversight means that the agency has used an unacceptable process to define and/or enforce regulations that would otherwise be within the scope of its authority.[267]

The CDA provided economically valuable services to its members. Hence, there might have been an argument that its restraints were ancillary to those services. But in fact, there was no connection between those services and the regulation of advertising by dentists. Access to those benefits did not create any "free riding" potential nor did access provide the kind of interdependent competitive advantage that might make some restraint on how the members compete ancillary to such controls.[268] In short, those restraints were not ancillary and therefore not amenable to the standard rule of reason analysis.

Instead, the CDA used the threat of denial of these services as a weapon to compel any potentially deviant member to adhere to its regulatory policies. It acted coercively to enforce cartelistic restraints on advertising. To justify this conduct, its argument was essentially that it had authority to regulate competition among its members, which also directly affected CDA member competition with other dentists.

Advertising regulation restricting false and misleading advertisements has general social and economic utility by facilitating competition on the merits. This can be particularly desirable when many consumers have limited capacity to appreciate price-quality interaction. Dental care may

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266. Conceivably, if some disinterested supervising authority reviewed and approved such letters, that might have sufficed as active supervision.

267. The implication to be drawn later is that when there is state licensure of a profession, the state has the obligation to provide active supervision of whatever means maybe employed to restrain or restrict competition within the profession or between the profession and other potential providers of related services.

268. There is an argument that the CDA promoted the use of dentists and had some concern for how its members presented themselves. But so far as it appears, any such promotion was distinct from the services provided to dentists. Moreover, accurate offers of discounts or general statements about quality would not appear directly to exploit any broader communication about the skills of members of the CDA.

fit within that category. But such claims are irrelevant in a conventional antitrust analysis as the Supreme Court had declared in *IFD*: "Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when its actively supervised by the State."[269]

To exempt its cartelistic regulation of competition, CDA had to establish that it had authority to regulate dental advertising. Its position before the FTC and the Court of Appeals was that, like IFD, it was only enforcing California's laws governing such advertising. Indeed, before the FTC, it pointed to its right to challenge dentists who violated state law before the state's dental board. The CDA, unlike IFD, was the state affiliate of the national association of dentists and so had the appearance of being in some way entrusted with an independent right to regulate the practice of dentistry, at least by its members. As a result, the implicit assumption in the Supreme Court's *CDA* decision was that the CDA had authority to regulate how its members competed with each other and with non-members.

Neither side in the Supreme Court litigation raised the issue of CDA's authority to regulate the practice of dentistry. Rather, the briefing focused on whether the FTC had jurisdiction over such a not-for-profit entity and whether the record justified a quick look at the reasonableness of the underlying regulations. Because the court inferred that the CDA had authority to regulate advertising and manifestly the regulations focused only on advertising, the first two steps of the framework were satisfied. Moreover, the FTC did not challenge in any way the CDA's process for developing or enforcing its regulations. Thus, the CDA's regulations were exempt from antitrust law. The remand implicitly asked the lower court to focus on whether the FTC's record showed that the regulations exceeded the bounds of what was authorized. If the regulations had denied consumers sufficient access to the market—the kind of evidence that would come from economic analysis of the actual impact of the regulations—then arguably there was either bad process or the regulations themselves had an ulterior motive (market exploitation) rather than protecting consumers. On remand, the circuit court decided that the evidence did not show the regulations to be "unreasonable."[270] A better way to explain this result would have been to declare that there was no evidence in the record that the CDA's regulations exceeded its regulatory authority. Hence, they were exempt from antitrust law.

Looked at through the per se legal framework, the Court's *CDA* decision reflects two questionable conclusions. The more significant was

269. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 465 (1986).
270. Cal. Dental Ass'n. v. FTC, 224 F.3d 942, 946 (9th Cir. 2000).

the assumption that CDA had authority to regulate competition in the market. Had that question been a focus of decision, the Court should have found that the State of California has a comprehensive regulatory scheme for the practice of dentistry, including advertising regulations, and that the CDA had standing to challenge violations by any dentist, member, or non-member. Additionally, the CDA could advocate for new or revised rules based on protecting consumers. Hence, the Court ought to have concluded that CDA lacked authority to enforce directly the state law. Second, even if the initial assumption were accepted because of the independent historical record of self-regulation, the CDA used an improper procedure because it acted unilaterally in a way similar to the NCDB, and had not sought disinterested agency review. That agency, which itself was aware of the problems with some of the advertising regulations, would have acted as the required neutral reviewer of the competitively important decisions to ensure that they served the public interest that justified the regulatory authority in the first place.

B. Avoiding the "Sea of Doubt"

The overt approach of the courts and the FTC to determine the merits of specific regulations imposed by self-regulatory entities results in setting sail on the "sea of doubt" and purporting to say how much and what kind of public interest regulation makes otherwise per se unlawful restraints "reasonable" as a matter of antitrust, and therefore lawful. Since the purpose of any regulation is to limit the freedom of action of the parties regulated, it should be tautological to conclude that any regulation restrains competition. But the public interest justification for such restraints is that, on balance, they result in a more socially desirable marketplace. For example, Edlin and Haw argue that courts should allow regulations that serve some public interest even if it harms competition, provided the court, on balance, concludes that the harm to consumers is outweighed by the benefits they receive.[271] Hence, a court enforcing antitrust law must decide whether the regulation is itself reasonable in terms of the permitted objectives of the regulatory authorization. Such balancing is distinct from the potentially complex analysis required to determine whether regulatory authorization exists, specific restraints are within the scope of some authorization, or appropriate process was employed. These latter analyses often will involve balancing inferences, but those determinations all involve the resolution of an underlying defined factual-legal question.

271. Edlin & Haw, *supra* note 18, at 1111 (describing how "[r]egulation was [originally] justified by the idea that the public benefits outweighed the costs of higher prices and reduced economic liberty," however, licensing boards became dominated by practitioners themselves, and therefore, self-dealing is inevitable "when the regulated act as regulators").

Litigation is not well suited to the broad participation or fact intensive inquiry required by the regulatory process. There can be no hard and fast rules for the scope of prophylactic regulations. This is a legislative and policy judgment that is not appropriate for courts.[272] Antitrust law and the courts enforcing that law are badly positioned to review the merits of specific regulations. Antitrust law does not provide standards or criteria that can provide a rational or consistent basis to determine whether a regulation is substantively reasonable. The result will be ad hoc decision making reflecting the preferences of the decision maker: "the vague and varying opinion[s] . . . as to how much [restraint of competition], on principles of political economy . . . ought to be allowed."[273]

The per se legal approach limits courts applying antitrust law to determining whether the regulator has authority, acted within that authority, and employed appropriate process. If those elements are established, the regulation is exempt from antitrust law. There should be no review of the merits of the ultimate regulation. This would more align the review of all regulatory restraints with the standards used for state action exemptions as well as those employed to determine whether there is a constitutional or federal statutory basis to preempt antitrust jurisdiction.

Such abstinence by antitrust law does not mean that the underlying regulation is exempt from all legal review. The *Bates* case provides a good illustration of this proposition in the context of professional regulation.[274] The Arizona bar had prohibited lawyers from advertising and the state supreme court, the overseer of such regulations, had approved. This meant that the state action requirements were satisfied and there was no antitrust liability.[275] But because this restraint affected commercial speech, it was subject to constitutional challenge and found to be an unconstitutional infringement.[276] Going further, a finding that a regulation is arbitrary and capricious goes beyond any antitrust concern and would reject irrational regulations even if they had no anticompetitive implication. Another state law strategy is to impose a somewhat stricter standard on those regulations that have competitive effect by requiring

272. *See* NEIL KOMESAR, IMPERFECT ALTERNATIVES 30 (1994) (noting that alternative systems of control, i.e., courts, legislatures, and markets, all have imperfections, and the crucial policy issue is which is the least problematic to address regulatory need); *see also* Allensworth, *supra* note 25, at 1609 (describing how legislative and policy judgments of this sort are not appropriate for the courts).

273. United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898).

274. *See generally* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

275. *See id.* at 357 (finding that the regulation was shielded from the Sherman Act).

276. *Id.* at 358.

that the regulation be no more intrusive than reasonably necessary for the legitimate regulatory goal.[277]

An important conclusion from this analysis is that whenever the state has determined that a profession should be regulated, it must undertake the active supervision of that regulation. A history of self-regulation should be irrelevant once the state has determined that the public interest requires licensure and other oversight of professional conduct. This means that any claim of de facto regulatory authority to exempt such entities from antitrust should fail at the first step of the analysis.

There are very few if any professions that are not subject to state supervision.[278] Hence, the assertion of authority to regulate business and economic practices by professional self-regulatory organizations is highly questionable. If they lack authority to regulate, then any restraint on competition among the members of the profession or with other professions is indistinguishable from ordinary cartel activity.

The harder cases involve entities that are not subject to state supervision because of their interstate character, but are also not subject to direct federal supervision. For example, standard setting organizations, as well as the NCAA, are not and should not be subject to state oversight even when the states may make use of the resulting standards.[279] However, Congress has specified—as a condition of limiting antitrust liability—that all the elements of the per se legal framework exist including some form of disinterested review.[280] The Supreme Court hinted at this requirement in the *Allied Tube* decision.[281]

The same considerations should apply to sports regulators and other similar self-regulatory organizations (SROs). The *Tarkanian* litigation is an example of the incapacity of states to regulate interstate college

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277. *See* Carstensen, *Where Is Attorney General Waldo*, *supra* note 28, at 808–10 (discussing state statutes and court interpretations that support a stricter review).

278. *See generally* Allensworth, *supra* note 25.

279. *See* NCAA v. Miller, 10 F.3d 633, 638–39 (9th Cir. 1993) (rejecting Nevada's effort to regulate the NCAA's processes because it would unduly burden the NCAA's interstate regulatory efforts). This is not to deny that some oversight is essential to ensuring that these entities perform in the public interest. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 495 (1988) (standard-setting process wrongfully manipulated to exclude competing technology).

280. *See* Standards Development Organizations Advancement Act of 2004, 15 U.S.C. §§ 4301–4306 (2012) (requiring for modified antitrust liability when a standard setting organization operates in such a way that all stakeholders participate, and the decisions are made by a consensus of all participants).

281. *See Allied Tube*, 486 U.S. at 509–10 (noting how immunity and antitrust liability are intertwined; thus, when a party has an economic interest and also exercises decision making authority in formulating a product standard, the party is left without immunity from antitrust liability).

athletics.[282] As a result, absent a federal regulatory agency,[283] any regulation must come from an SRO—the NCAA in that case. But such an SRO should not be free to impose regulations outside the scope of its implied authority.[284] Courts can apply the framework to focus on the justification for such regulatory efforts, and then consider whether the restraints at issue are within the scope of that authority and whether their implementation is subject to some disinterested reviewer with sufficient resources and capacity.[285]

Courts, because of their experience in reviewing administrative procedure and other similar issues, are better able to evaluate whether the process of rulemaking and enforcement is done fairly and with necessary disinterested review than they are to deal with focused review of the merits of specific regulatory decisions. This avoids the "sea of doubt" and puts the direct control of the regulatory process back in the hands of the delegated regulators with appropriate oversight and review of their actions. It is hard to see how even the FTC could fulfill this role even with greatly enhanced resources. The resulting network of regulations is too complex for any one national agency to oversee. Hence, the SRO that is not subject to state or federal oversight itself must provide for its own oversight or be subject to some explicit statutory scheme that creates a relevant disinterested overseer.[286]

C. The Irrelevance of Exclusion Versus Exploitation

Some scholars have sought to emphasize the distinction between exploitive agreements, such as standard cartels, and exclusionary ones that focus on removing or restricting a competitor, customer or supplier's

282. NCAA v. Tarkanian, 488 U.S. 179, 199 (1988) (holding that in excluding an individual from the profession of coaching the NCAA did not engage in "state action" for purposes of triggering constitutionally protected rights). *See also Miller*, 10 F.3d at 640 (holding state law unconstitutionally burdened interstate commerce by requiring due process before college coaches could be sanctioned).

283. *See generally,* Mathew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 850–51 (2014) (proposing a regulatory agency solution to the control of college athletics).

284. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 119 (1984) (condemning NCAA restrictions on the televising of football games as being beyond the scope of its authority); *see also* Carstensen & Olzowka, *supra* note 89, at 594–95 (examining how the *Tarkanian* lawsuits did not invoke antitrust law, but the invocation of antitrust law might have provided a route to review the lawfulness of the NCAA's procedures).

285. As noted earlier, the *O'Bannon* decision highlights the NCAA's regulatory role as well as its inherent conflicts of interest that are not subject to any oversight. *See generally* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

286. The analysis of these issues can only be suggested here and will require fuller elaboration in another article.

capacity to compete.[287] Exploitive agreements among competitors are generally considered to be more likely to be illegal[288] while exclusionary agreements are expected to be more likely to have legitimate justifications.[289] In *IFD* and *CDA* the agreements involved exploitive collusion. The parties limited their competition among themselves by use of refusals to deal with insurers in *IFD*, or threatened exclusion from valuable benefits in *CDA*. Yet despite the similarity of the conduct, the courts' decisions resulted in contradictory outcomes.

Neither organization limited the ability of third parties to compete although such competition was unlikely to be significant. In the case of the IFD, even if other dentists would deliver x-rays to insurers, that was unlikely to affect competitors because patients were unlikely to move from one dentist to another absent strong compulsion from the insurer. In *CDA*, the agreement probably did require the adherence of most practicing dentists, assuming advertising of quality or discounts would move patients. If there was any significant competition from such providers, it is unlikely that the CDA could or would have insisted on the prohibitions. Hence, some measure of dominance or other economic analysis showing the restraint's likely effect might seem relevant.

But the general rule governing naked restraints established in the *Socony* case is that effect is irrelevant because the violation is the agreement itself.[290] Moreover, as the Court framed the issue in *IFD*, the fact of the agreement created a presumption that the parties expected and intended to affect competition.[291] Thus, unless either law or other public policy authorized an agreement among competing professionals to limit their competition, per se, the agreement should be condemned despite any claim that it had minimal or no actual effect. Any other result would threaten the core of the per se rule against cartels.

287. *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE CASE, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 47–51 (3d ed. 2017) (setting forth the distinction between collusive (i.e., exploitive) and exclusionary conduct as a central organizing principle of the text); *see generally* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

288. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980) (per curiam) (showing an example of an exploitive agreement deemed illegal); *see also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 47–48 (1990) (per curiam).

289. GAVIL ET AL., *supra* note 287, at 166, 601. *Compare* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 419 (1990) (condemning a naked refusal of a deal to obtain higher compensation) *with* Nw. Wholesale Stationers v. Pac. Stationary & Printing, 472 U.S. 284, 293 (1985) (exclusion from joint venture was valid incident to membership rules and so could only be unlawful only if it had unreasonable anticompetitive effect).

290. United States v. Socony-Vacuum Oil, 310 U.S. 150, 218 (1940).

291. *See* Ind. Fed'n of Dentists v. FTC, 476 U.S. 447, 457–59 (1986) (stating that an agreement limiting consumer choices cannot be allowed under the rule of reason).

Yet *CDA* reached an opposite result. Indeed, on its face the decision would seem to reverse *Socony* and reinstate the open-ended balancing test advocated by the dissent in *Trans-Missouri*.[292] Because the opinion emphasized the salience of professional self-regulation, the decision has not had the negative impact that it might have had. Nevertheless, these two cases both involved the same kind of collusive exploitation, but the Court made no effort to reconcile the results.[293]

In contrast, the NCBD sought to define specific activities as the practice of dentistry thereby excluding those who engaged in unauthorized competition. Its effort was exclusionary by use of powers conferred by the state and, unlike CDA or IFD, not directly exploitive. Should this distinction make a difference legally? This is a naked exclusion created by collusive action of those with control over access to the market.[294] Consequently, the ultimate function of such an agreement is to ensure protection for incumbents from an innovative form of competition. Unless the conspirators have the authority to impose such a market regulation—like a purely exploitive cartel—this agreement should be unlawful on its face.

In sum, the distinction between collusive exploitation and exclusion is not helpful in explaining the results in these cases or in restraint of trade cases generally.

D. Ethics, Substantive Standards, and Certifications

The professional regulation cases frequently cast such restraints as ethical standards. As the earlier discussion pointed out, this is a misnomer. The restraints at issue in these and related cases involve conventional limits on economic competition. They do not pertain to the actual practice of the profession nor do they address the resolution of particular dilemmas where the professional must make a choice among courses of action having significant impact on others. There are no significant cases involving actual professional standards of practice. This is the case, in significant part, because adherence to a standard is a

292. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343 (1897) (White, J., dissenting) (advocating a reasonableness test for cartels); *see also* Carstensen, *Lost in (Doctrinal) Translation*, *supra* note 34, at 533–34 (stating that the dissent rejected the approach of interpreting antitrust law on a basis of the function of a restraint and instead proposed a balancing test based on the merits and demerits of the particular restraint).

293. One possible reconciliation is that *IFD* involved an effort to exploit otherwise sophisticated insurers who presumably needed no protection while *CDA* involved protecting consumers from deception. For all the reasons discussed earlier, this may provide a plausible rationale for regulation in one area and not another, but it does not explain why one cartel is potentially lawful and the other is not.

294. *See generally* Baker, *supra* note 287.

decision by the professional and the standard relates to the practice of the profession itself.

Standards can create competitive issues if a professional standard setting group uses its dominance over certification or other related professional requirements to exclude or exploit qualified individuals.[295] Such certification requires a different functional analysis as it involves the production and dissemination of economically relevant information. A certification or accreditation provides information to the customers or suppliers, and it takes on competitive significance when customers collectively prefer only one provider of such a service. That confers economic power on such an entity. The recent litigation involving osteopathic certification is an example.[296] The certifiers required that all those seeking certification must also take costly memberships in the organization. This tying requirement was anticompetitive and unjustified under a standard ancillary analysis.

Only if some consensus were to emerge that a particular source of substantive standards should dominate some dimension of professional practice would an analysis like the one developed here be the appropriate model. The central concern should remain essentially whether the standard setter has authorization, its standards implement that authorization, and it employs relevant process in determining the substantive dimensions of the practice or procedure. Further, there would have to be some impact on the market. If the facts were similar to those in the case of the osteopathic doctors, the analysis would be reasonably straightforward. On the other hand, if the standard setting system satisfies the per se legal criteria, it would be unwise for courts, under the guise of enforcing antitrust law, to revise specific standards or undertake de novo review. This does not preclude critical analysis of the validity of the regulatory authorization itself—either on constitutional grounds, e.g., burden on interstate commerce, or conflict with federal law. Nor would

295. The American Osteopathic Association (AOA) tied certification for this type of medical practice to the doctor joining the association. In connection with an antitrust class action, the association rescinded that tying requirement. *See* AOA Staff, *AOA Settles Class-Action Lawsuit*, DO (July 27, 2018), https://thedo.osteopathic.org/2018/07/aoa-settles-class-action-lawsuit/ [https://perma.cc/DU5M-ALXL].

296. *See id.* (explaining the recent litigation between AOA and board-certified physicians in requiring membership in the association). In approving the settlement which foreclosed individual opt outs, the judge rejected the views of five state attorney generals. *See $84M Settlement Approved in American Osteopathic Association Antitrust Class Action*, YAHOO! FIN. (Dec. 4, 2018), https://finance.yahoo.com/news/84m-settlement-approved-american-osteopathic-080538710.html [https://perma.cc/BD6R-YBA2].

it preclude a more critical analysis than courts often give of the validity of specific regulations.[297]

V. A PATH FORWARD TO GOVERN PRIVATE REGULATION

Given the reluctance of the American political process to impose new direct regulation, as well as the practical consideration that public regulation is often poorly designed and inefficient, a primary goal of competition law should be to oversee private regulatory efforts to ensure that they serve public interest goals as well as possible. Initially this requires careful application of the first two steps of this framework to ensure both that there is a legitimate authorization for the regulatory process, and that the specific regulations are within the scope of that authorization. There needs to be much more explicit recognition and acknowledgement of these elements. The present mushy rule of reason language in opinions obscures the dual inquiry in the case of de facto regulatory authorization.

Such recognition also requires the creation of standards for determining the validity of the authorization. While a variety of evidence is available, a court should always put the burden of persuasion on the advocate of de facto regulatory authority to establish the justification for and acknowledgment of the delegation of authority. In some contexts, such as standard setting, the social need for, and reliance by, units of government on the standards to implement safety or other requirements will provide a good justification.

In the case of professional self-regulatory associations, the analysis should focus on the relationship of the association to the state. Where the state has decided to impose licensure requirements, it must provide direct supervision of the profession. This will provide the forum for review of any regulations imposed on such professionals that are likely to have any competitive effect. Essentially, any private association of members of that profession can advocate for specific controls or standards with the state agency adopting and enforcing such limits as are in the public interest.[298] This also provides a forum for public comment and response to any such proposal. Where the profession lacks any state licensure or regulation, it seems very unlikely that there is a good case to respect its

297. There is a real concern with unwise and excessive grants by states of authority to regulate leading to anticompetitive exploitation and exclusion. Control over such legislative grants requires a different legal strategy. *See* Carstensen, *Where Is Attorney General Waldo*, *supra* note 28, at 773 ("Unchecked, these kinds of statutes, ordinances, and regulations undermine the welfare of the general public by both facilitating exploitation and by deterring entry by more efficient or innovative alternatives.").

298. Such regulations in fact are often excessive and unreasonable, but the solution to that problem lies in other legal doctrines. *See id.* at 813 (explaining that the state AGs should be the ones to survey judicial doctrines that could help avoid anticompetitive regulations).

efforts to control competition among its adherents or with other professions. Hence, absent very rare circumstances, it should be impossible for such groups to claim any right to regulate the practice of their activity.[299]

The more difficult cases involve regulatory entities such as the NCAA and standard setting organizations that are national in character such that no state should have effective control and where Congress has not stepped forward with a regulatory scheme.[300] These gaps in oversight do not remove the need for the development and enforcement of regulations. But they certainly complicate the process. In the standard setting context, OMB Circular A-119 provides concrete guidance about the process for creating regulations.[301] All stakeholders must be able to participate, and the decisions require a consensus. This creates an open process, which should be both transparent and result in a balanced regulatory result. Moreover, there must be a means to have a disinterested review of both regulations and their implementation.

Finally, it is important to separate out true ethical issues. These are not regulations, but difficult choices among permissible courses of conduct. In many situations, there can be various institutional participants as well as individual professionals who must collectively decide what course to pursue. In rejecting some courses and favoring others, there is a "restraint" on the freedom of the actor. In medicine or law, and perhaps even dentistry, these can be very difficult and morally wrenching choices. These are basically one-off decisions about specific challenges. They are not regulatory in character and should not be confused with the kinds of regulation at issue in the three dental cases.

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299. This is a context where certification may be more relevant. Customers may rely on that to select appropriate providers of a service. In such situations the question should be whether the denial of certification has competitive impact and, if so, whether it being denied without a valid justification. *Cf.* Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 604 (7th Cir. 1984) (allowing the society to regulate the appraiser's fees their members set).

300. California has recently adopted legislation that would invalidate the NCAA's prohibitions on compensation upheld in the *O'Bannon* case. Other state legislatures appear likely to join this revolt. The NCAA has signaled that it is prepared to retreat on this issue which would avoid a conflict over its regulatory rights, but this creates a serious risk that the states will eclipse its basic regulatory authority in ways that are likely to result in a "race to the bottom."

301. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119: FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES 4 (Jan. 27, 2016), *available at* https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf (stating adherence to the standards of the circular is essential to the grant of a limited statutory protection for such organizations from antitrust treble damage liability provided by 15 U.S.C. § 4302 (2018)).

CONCLUSION

These cases all involve claims of the right of private groups to restrain and "regulate" competition. The *CDA* result conflicts with *NCDB*. Both entities sought to regulate competitive conduct affecting the dental profession. *CDA* was an SRO and got away with it. *NCDB* was a "state agency" and did not. But when *IFD* sought to protect the profession by denying non-dentists the right to review dentists' decisions, this SRO was found to violate antitrust law. The decisions do not themselves provide a coherent framework to determine when and under what circumstances antitrust law will recognize authority to regulate competition in a profession. Worse, they confound the distinction between naked and ancillary restraints that is the foundation of a coherent antitrust framework. Absent some identifiable exemption for such cartelistic conduct, there is no rational way to explain the difference between these restraints and the ones that merit jail time! The open-ended "balancing" rhetoric of the standard description of the rule of reason leads to chaos. The rule provides no rule or even a predictable standard. It implies that any cartel can be lawful if it serves some ill-defined public interest. The fact that the courts have not adopted this balancing approach for cartel cases generally demonstrates that it is not a helpful framework for assessing naked restraints to determine when they might be exempt from antitrust law.

The Carstensen-Roth framework of per se legality, in contrast, provides an explanation for the implicit model the FTC and courts have employed. This framework looks for (1) some form, tacit or express, of public authorization to regulate; (2) the consistency of this specific regulation with that authorization; and (3) whether the regulatory decision-making and implementation was consistent with appropriate process. This framework provides a principled and consistent method for assessing the validity of any claim for exemption from antitrust. Moreover, the cases are consistent with this model. Unfortunately, these decisions have not articulated that framework, and instead obfuscated the analysis with vague references to ethics and the special standing of the professions. As a result, contemporary antitrust does not provide useful guidance to any group seeking to establish its authority to regulate competition. The Carstensen-Roth framework, on the other hand, provides a method of analysis that will produce consistent, rational, and explicable results that serve the public interest in legitimate regulation.

Since neither courts nor lawyers like novelty, it is understandable if advocates call the initial inquiry into whether a naked restraint has any authorization a "quick look" which would put the burden on the party defending the restraint to demonstrate such authorization. Where there is plausible authorization to regulate outside of conventional state action, federal preemption, or constitutional bar—the resulting analysis can be cast as a determination of the "reasonableness" of the merits of the claims of regulatory authority, its application, and related process. Such an approach, consistent with the Carstensen-Roth per se legal approach, would focus on the validity of the regulatory claim. This "rule of reason" must not be conflated with that based on ancillary restraints or courts will again "set sail on the sea of doubt."