The Sherman Antitrust Act and the Profession of Architecture
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I. Introduction

This is a report on how antitrust laws have affected the architectural profession. This research was motivated by the thought that the American Institute of Architects (AIA) and the profession of architecture in general have been more negatively affected by antitrust law than the other professions. It seemed that large law firms, for example, agree on a certain salary for associates, ostensibly wage collusion under antitrust law; and realtors seemed to have an “understood” 6% fee structure, ostensibly fee collusion.¹ Was it the case that the two antitrust proceedings against the AIA in 1972 and 1990 - which penalized the AIA for inhibiting competition among member architects - had made the profession more conservative with regard to discussion of fees and wages than had other proceedings affecting other professions? Having learned from Robert Ivy, CEO of AIA National, that these consent decrees were the reason that the AIA could not be more aggressive in advocating for higher architectural fees, this was a pertinent question. Was there evidence in antitrust cases indicating as yet undetected options open to architecture to discuss fees and wages without violating antitrust laws?

Clearly the motivation behind these questions was the assumption that architectural fees and wages were undervalued and out of step with the other professions; that if architecture could only have an open discussion about fees and wages, we, as a profession, could address a systemic problem.

The research, conducted over 8 months, was a lesson not only in antitrust law but in the legal system's capacity to address economic stability through guaranteeing competition in all forms of trade, be it goods or services. In short, we learned that competition is unchallengeable in antitrust cases and the only thing to be argued in a case is whether competition is being best served by behaviors or regulations.² The cases involving antitrust law follow, historically, changes in the American economy as different sectors and actors emerge as powerful players in economic growth; following antitrust laws bears witness to the government’s evolving interpretation of capitalism’s evolving dynamic.³ Studying antitrust law was nothing more nor less than following their rhizomatic evolution and often contradictory logic.

Inasmuch as consent decrees have been the Department of Justice’s (DOJ’s) method of directing the AIA away from any form of fee or wage discussion, it also was a focus of this research: What authority

¹ We have since learned why these practices are indeed (obviously) legal, but they looked suspicious from an architects point of view, where both of these procedures would be helpful but seem impossible to enact.
³ For example, the 1932 Swift and Co. ruling established what was quickly seen to be a too-restrictive and too-industry-manipulating decree. Swift Company v United States. 196 US 375. 25 S.Ct 275. 49. L.Ed 518. 1905. Fastcase. Web. 17 April 2016.
underlies the application of antitrust law? Could these authorities be argued against more vigorously? How is architecture faring compared to other professions with its history of consent decrees?

To come to the conclusion quickly, the research indicates that architecture is not “unfairly” or unevenly treated by antitrust law. Indeed, it became clear that this was a naïve framing of the problem. Law doesn’t behave in any wholistic fashion. The Sherman Act enacted only broad, general antitrust principles that make subsequent and specific judicial decisions in different spheres key elements of the legal environment. Architectural cases arise as do others in other professions; some cases affect professions in general and others are specific to a given discipline. But coming from the bottom up, there is no top-down approach for identifying or rectifying comparative cases. In this, architecture is a minor player, and, I believe, a weaker player than professions like law and medicine, but it is not a “victimized” player. Nor are the courts the place to redress any inequities.

The desire to find inconsistencies in antitrust laws that could be exploited by architecture thus began to feel old fashioned. On the one hand, it put this research in alliance with free-trade libertarians for whom antitrust laws were governmental interference with the market. On the other, if the antitrust laws were increasingly treating architecture and the other professions like business, who was I to insist that we go back in time to a profession that was gentlemanly, unsullied by economics, and self-protective? The problem perhaps is less the antitrust laws preventing open discussions of fees and wages as it is architecture’s cut-throat internal competition, one that is encouraged by antitrust law but that plays out differently in other professions like law and medicine which seem to have greater respect for the common goals set forth by their professional organizations. And finally, antitrust decisions consistently said one thing: no industry or pair of individuals in an industry can discuss fees with the aim of fixing them. This meant that whatever else this research hoped to accomplish (strategies for better relevance and power in our economy), organized advocacy for higher fees was not one of them.

Nevertheless, there is evidence that the DOJ does consider, when examining proceedings against potential offenders, those professions and organizations that make easy cases (read: without resources to fight an extended legal case) (See Section IIIC). And the highly interpretive nature of antitrust law, evidenced by appellate reversals of lower court decisions, as well as changes in the laws themselves – indicates an uncertainty about what, within or beyond competition, is fair. While these facts

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4 A free-trade libertarian’s doctrine might depend upon an efficient marketplace that antitrust enforces. But hardcore libertarians who believe that all antitrust laws are governmental interference are very evident in articles and blogs regarding antitrust.

5 This is not a scientific observation, but we did look at membership information for both the ABA and AMA and there are in each a higher percentage of lawyers and doctors who are members of these professional organizations than is the case with architects and the AIA. In addition, we just asked lawyers and doctors about their respect for their professional organizations and there was overall respect for the ABA and the AMA and the work these organizations did to for the overall welfare of their practitioners.
do not help to fight inequities, it does alert architects to structural disadvantages that should mobilize the profession to represent itself more aggressively in other legal ways. Section V discusses tactics – 3rd party surveys leading to legal (implicit) price leadership and lobbying for legislation (which can authorize seemingly “anticompetitive” behavior) change – that other professions have used. In addition, unionization, as something exempt from antitrust laws, is worth consideration although it is complex in a profession like architecture.

It is assumed that this document will be read by non-lawyers who need the fundamentals explained. For this reason, there is a fair amount of description – the laying out of the antitrust arena. This is especially true of Section II, which looks at the history of antitrust laws as they relate to the professions in general and to architecture in particular. It also examines the effects of consent decrees on professional architectural behavior. Section III probes antitrust concepts that are of particular interest the professions and architecture. Section IV examines the conditions that struck us as “proof” that there were hitherto unexploited possibilities for repositioning architecture in the context of antitrust laws. These probes divide into 2 sorts: the exemptions to antitrust laws that might be mined for architecture – the learned profession exemption and the state exemption - and the inequities that could possibly be exposed and rectified – the differences between various professions in responding to antitrust rulings and the political nature of antitrust laws. These “deep dives” did yield a great deal of knowledge; they did not, however, yield, solutions. Section V, the most speculative, therefore looks at alternative, legal approaches outside the realm of antitrust to address architectural fees and wages. Section IV offers observations by way of a conclusion. The Appendix gives access to a timeline of antitrust rulings that most affect our profession. It also makes available material pertinent to architecture’s response to antitrust proceedings so that the reader can form an independent opinion about the relationship of antitrust to architecture.

This paper was supported by the 2015 Arnold W. Brunner Grant given by the Center for Architecture in New York City. I am indebted to them for this opportunity to better understand how the profession of architecture is inserted in our laws and economic regulations. The research was conducted with the essential contribution of my assistant, Vittorio Lovato, who certainly now knows more about antitrust law than he ever wanted and made it fun for both of us. It was greatly aided by numerous discussions with Professor Alvin Klevorick of the Yale Law School as well as telephone interviews with AIA National Counsel, Jay Stephens. I am indebted to these three individuals, although any misrepresentation of the law found in this document is strictly my responsibility. While this paper attempts to be as comprehensive as one year of inquiry by a non-lawyer allows (I am an architectural educator and practicing architect, with no legal training), it is, I know, scratching the surface of a systemic problem that I hope is picked up by other architects or lawyers.
II. Antitrust Laws: History

A. General

The Sherman Antitrust Act was named for its author, Senator John Sherman of Ohio, and was enacted in 1890 to limit monopolies and other restraints on commerce. The Act declares illegal and a felony any restraint on trade in the United States. The legislation was the result of intense public opposition to the concentration of economic power in corporations and trusts following the Civil War, particularly those that monopolized the cost of rail transportation of farm goods.\(^6\)

Section 1 of the Act, its most frequently cited portion Act says:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony…

Section 2, also important, states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…\(^7\)

The Act puts responsibility upon government attorneys to investigate organizations suspected of violating the act. The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) have primary responsibility for enforcing antitrust laws. (The determination of what the DOJ versus the FTC takes under their purview is not clearly established but they have developed different areas of expertise and different procedural methods. The DOJ goes immediately to court; the FTC issues complaints.) While the DOJ and FCT are the primary regulators of antitrust, legal cases can be brought as well by state attorneys general and private plaintiffs.

Five years after the passage of the Sherman Act, it was effectively disempowered as a tool against business behavior in United States v. E.C. Knight Co. (1895), when the Supreme Court ruled that the American Sugar Co., one of the defendants in the case, had not violated the Act despite controlling 98% of all sugar refining in the US, determining that the company’s control of manufacturing did not


constitute control of trade. It was only after President McKinley appointed several senators to the US Industrial Commission and the Commission’s subsequent report to President Theodore Roosevelt that the groundwork was laid for Roosevelt’s attack on trusts and the successful employment of the Act against anticompetitive business behavior. In Swift & Co. v. United States (1905), then, President Theodore Roosevelt directed his Attorney General Philander Knox to bring a lawsuit against the "Big Six" leading meatpackers that were engaged in a conspiracy to fix prices and divide the market for livestock and meat. They blacklisted competitors who failed to go along, used false bids, and accepted rebates from the railroads. When they were hit with federal injunctions in 1902, the Big Six agreed to merge into one National Packing Company in 1903 so they could continue to control the trade internally. The case was then heard by the Supreme Court in 1905 and, in broadening the definition of "interstate commerce," ruled that this "stream of commerce" (or "current of commerce") was to be ruled by Congress. It was a victory for Roosevelt to break a much-decried monopoly. Swift also issued the first consent decree, is a judgment that allows the defendant to avoid trial and admission of guilt and insures that the antitrust activity and its causes, from the government’s point of view, are remedied. They are now the most common outcomes of antitrust proceedings. (Consent decrees are covered more fully in Section III.)

Twenty-five years after enacting the Sherman Act, Congress passed the Clayton Antitrust Act of 1914, which prohibited certain types of price discrimination, limited mergers and acquisitions that aid in creating monopolies, and targeted "exclusive dealings" and tying agreements. These prohibitions were meant to stop monopolies at their inception.

Early in the history of the Sherman Act, the only effective use of the law was against labor unions. A portion of the Clayton Act indicated that unions should be exempt from antitrust laws because they were not monopolies. It stated:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor... organizations, ... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.¹⁰

But Congress officially exempted unions from antitrust laws in 1932 with the Norris-LaGuardia Act and unions are now one of the few entities exempt from antitrust laws. The Act banned

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so-called “yellow-dog” contracts, under which workers agree as a condition of employment to not join a labor union.

The reach of the Sherman Act arose in litigation over state economic regulation. In *Parker v. Brown* (1943), a raisin producer challenged a California law stating that only 30% of their crops could be sold through ordinary commercial channels. The Supreme Court declared that the actions of state governments are exempt from the Sherman Act if the state acts as a sovereign and not in conspiracy to restrain trade or establish a monopoly. “A state cannot give immunity to those who violate the Sherman Antitrust Act by authorizing them to violate it or by declaring that an action is lawful...[But the state] as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.” That is, the state must not just be a participant in a private agreement with antitrust implications, it must be the creator of that law; if so, every state has sovereignty over its own matters. This principle is known as the Parker immunity doctrine.

The Noerr-Pennington of 1965 doctrine made it legal to lobby against antitrust law. The doctrine states that private entities are immune from liability under the antitrust laws for attempts to influence the passage of laws that have anticompetitive effects. The doctrine is grounded in the First Amendment protection of political speech and recognizes that antitrust laws, geared toward business, are not applicable to the political arena. The doctrine stems from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (U.S., 1961) that concluded that grassroots lobbying against a union is not in violation of the Sherman Act despite it being a campaign against the union and involving a restraint on trade; and from *United Mine Workers v. Pennington* (U.S. 1965) that further concluded that joint activity lobbying as an industry for new regulations does not violate the act although agreements between large companies for the purpose of setting industry-wide standards does.

Many cases, some of which are examined more closely in the following sections, have tested the boundaries of collusion and the reach of antitrust laws. But these described here are the ones that form the backbone of antitrust proceedings. As Justice Stevens says quoting Justice Brandeis, “read literally,
Section 1 [of the Sherman Act] would outlaw the entire body of private contracts.\textsuperscript{14} They constrain free trade. Instead, Congress meant for the Courts to “give shape to the statute’s broad mandate by drawing on the common-law tradition.” The rhizomatic nature of this tradition - which in contrast to the civil law tradition, is uncodified and give significant power to the presiding judge - appears to us non-lawyers as unstable.\textsuperscript{15} Antitrust law, operating in this nexus, has the particular difficulty, as pointed out by Justice Stevens, of being in constant tension between limiting organizational contracts - such as architectural associations, professional groupings, and individual architect-owner contracts – and allowing organizational clarity. This already stretched tension of antitrust law then becomes more stressed when addressing professional organizations, which themselves zigzag between their business and their ethico-social aims. As we will see, all the precedents dealing with antitrust are migrating efforts to get the balance right.

B. Professions

The “rule of reason” for many years was the basis for courts to exempt the professions from antitrust laws. For example, \textit{FTC v. Raladam Co.} (1931) ruled that medical practitioners “follow a profession and not a trade” and thus, as a “learned profession,” were exempt from antitrust laws; this was a “reasonable” exception to the Act.\textsuperscript{16} A learned profession is recognized by the government as requiring extensive educational requirements and, most commonly, state licensing requirements. Professions such as law, medicine, engineering, and architecture early on were considered to be exempt from antitrust; Raladim merely certified the favored-child view the courts had traditionally held for the professions.

Then in 1943, in \textit{American Medical Association v. United States}, the Supreme Court upheld the conviction of the medical defendants for conspiring to restrain the business of Group Health Insurance in the District of Columbia. The indictment charged that, to prevent Group from carrying out its aims, the doctors coerced practicing physicians from accepting employment under Group Health. Their conviction did hold the doctors accountable for restraint of trade.

\textit{We think...that, upon analysis, it appears that petitioners' activities are not within the exemptions granted by the [Clayton and Norris-LaGuardia] statutes. Although the Government asserts the contrary, we shall assume that the doctors having contracts with Group Health were employees of that corporation. The petitioners did not represent present...
or prospective employes.  

But the Court found it unnecessary to decide upon whether or not a physician's practice constituted trade within the meaning of Section 3 of the Sherman Act. It said, "...the fact that the defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints." The Court did leave a small out, however, noting that ethical rules that were not designed to but incidentally did restrain trade were legal.

In United States v. Oregon State Medical Society (1952), the DOJ brought suit against eight county medical societies charged with conspiring to restrain competition between doctor-sponsored prepaid medical plans in the US. In this case, the DOJ lost. In rejecting the DOJ's claims, the district court said that in some instances the State might decide that "forms of competition usual in the business world" might be “demoralizing” to the ethical standards of a profession. The Supreme Court upheld this verdict.

In the early 1970's, however, the DOJ began directing serious attention towards the professions. The Corp of Engineers and General Services Administration were particularly vocal about the fees demanded by architects and engineers they employed. In 1971, the DOJ in a consent decree ordered the American Society of Civil Engineers (ASCE) to remove “Canon 4” of their Code of Ethics, a canon stipulating that "it shall be considered unprofessional and inconsistent with honorable and dignified bearing for any member of the ASCE to participate in uncompetitive bidding on a price basis to secure a professional engagement." After this, the suit against the AIA leading to the 1972 consent decree further attacked price-fixing in the professions.

In the midst of this, in 1972, the Brooks Act, also known as the Selection of Architects and Engineers statute, required that the Federal Government select engineering and architecture based on their competency, qualifications, and experience rather than by price. While this can be seen as supportive of these two professions for not expecting competition on fees, they were motivated to insure that all "competent and qualified" architects and engineers not be expensive.

However, the most important change in the status of state-regulated professions under the Sherman Act arose in private litigation. Goldfarb v. Virginia State Bar (1975), a landmark Supreme Court

22 This is not to mention the question raised about how their need for quality over price should be different than that of a private client.
decision, ended the “learned” professions exemption from the Sherman Act while also limiting the reach of the Parker immunity doctrine. In this case, Lewis Goldfarb and his wife, wanting to buy a house and needing title insurance that could only be written by a member of the Virginia State Bar, found that none would examine a title for less than a 1% fee. Indeed, this was an advisory fee-schedule given by the Bar. Frustrated in their attempt to find a lower-priced lawyer, Goldfarb - himself a lawyer - filed a class action suit against both the Fairfax County Bar (a voluntary association) and the Virginia State Bar (a state agency) alleging price fixing in violation of Section 1 of the Sherman Act. The district court found the County bar but not the State bar (exempt under the Parker immunity doctrine) guilty of such violation, stating that “minimum fee schedules are a form of price fixing.” As for the “learned profession” exemption,

    The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of ‘trade’ [Indeed, the Court has some questions whether the adoption of a minimum fee schedule is itself ‘professional.’ … [That term] properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule… Certainly fee setting is the least ‘learned’ part of the profession.

On appeal, the Supreme Court and it was determined that the Virginia State Bar was also guilty of price fixing. The state exemption earlier used to protect the Virginia State Bar was not applicable, the Court said, because the Virginia Supreme Court (the body authorized under Virginia law to approve State Bar rules) had not required the promulgation of fee schedules. In order to qualify for state exemption, the State would need to mandate and not merely suggest or tolerate the “anti-competitive” behavior.

    The Court, however, did acknowledge that the states had a particular interest in the professions:

    "We recognize that the States have a compelling interest in the practice of professions with their boundaries, and that … they have broad power to establish standards for licensing practitioners and regulating the practice of professions," and they did, in footnote 17, determined the guidelines for the “rule of reason” as they relate to the professions going forward:

    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 the 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

24 Morgan, “The Impact of Antitrust Law on the Legal Profession,”
http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3509&context=flr.
25 Ibid., 427.
violation of the Sherman Act in another context, be treated very differently. We intimate no view on any other situation than the one with which we are confronted today.  

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) goes on to help differentiate between professional and purely commercial regulations. In this case, the state pharmacist board argued that price competition resulting from advertising would lower the professional caliber of pharmacists and jeopardize the health and safety of the public. The Supreme Court rejected the latter argument: price advertising could not significantly lower the level of competency because if a cheap product was linked to poor quality, the state pharmacy board could revoke the pharmacist’s license. The court specifically took offense to the “paternalistic” attitude the board showed toward consumers and stated its confidence that customers are capable of making informed choices with respect to price and service if they have the facts.  

A year later in *Boddicker v. the Arizona State Dental Association* (1977), Boddicker and other dentists claimed that two Arizona dental associations and the American Dental Association (ADA) illegally demanded membership in the ADA as a condition of membership in their local association, thus “creating an anticompetitive tying arrangement” in violation of the Sherman Act. Recognizing that *Goldfarb* had done little to define the extent of the learned profession exemption (LPE), the court held that “to survive the Sherman Act challenge a particular practice, rule or regulation of a profession… must serve the purpose for which the profession exists, viz. to serve the public. Those which only suppress competition between practitioners will fail to survive the challenge.” In other words, whatever else might serve the public, setting fees does not.

One year later, the decision in *National Society of Professional Engineers v. United States* (1978) further restricted the LPE. The civil engineers’ code of ethics stipulated that price could not be a part of the initial criteria of selection. The quality of the engineers’ past work should be the principle factor in choosing the firm and only if the price offered by the best engineer was unsatisfactory could the client negotiate with the next best engineer. Selection based on price would not only reduce the safety and inflate the cost of the project - since “it would be cheaper and easier for the engineer "to design and specify inefficient and unnecessarily expensive structures and methods of construction” - but would, the code inferred, adversely affect the quality of engineering. The Supreme Court rejected this argument

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holding that, while the ethical rule did not constitute price fixing, it was a restriction on "the ordinary give and take of the marketplace." "No elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." But while the Supreme Court held that it clearly recognized collusion when it saw it, it rejected judgment on what constitutes legitimate professional ethics. Only "the competitive significance" of the restraint is to be considered. The Court “[may not] decide whether a policy favoring competition is in the public interest…[T]hat policy decision has been made by Congress.”

The view that professional work like commercial activity was subject to antitrust scrutiny is brought to medicine, and by implication other professions, in a 1984 Supreme Court opinion in Arizona v. Maricopa County Medical Society. Doctors in Phoenix working outside HMO’s got together with health insurance companies to establish one-price, full-service care competitive with the HMO’s. Patients could choose without restrictions amongst those physicians. The Court held this to be illegal. “[T]he claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.” Indeed, the Court was scornful of the fact that the doctors didn’t even claim, as had the defendants in Goldfarb and Professional Engineers, that the price restraints provided better service.

In 1986, dentists were targeted for trying to organize against insurance companies. In FTC v. Indiana Federation of Dentists (U.S.), dentists had formed a “union” to resist demands of insurers for copies of X-rays to determine if a procedure was necessary; the dentists claimed that cost accountants should not intrude on patient care decisions. The FTC successfully challenged this joint action on the grounds that they were primarily trying to increase their fees. Quality of care arguments did not convince the Court, which ordered them to terminate their actions.

Likewise, lawyers organizing a strike for higher fees were also caught. In FTC v. Superior Court Trial Lawyers Ass’n (1990), 100 lawyers in the District of Columbia who accepted appointments to represent indigent defendants in the criminal courts, and whose pay was capped at $30 an hour for in-court time and $20 per hour for out-of-court time, sought an increase pay to $35 an hour for both. Opposed by the Mayor who claimed the city could not afford it, the lawyers in the Association voted to “strike” and didn’t show up to accept new assignments. With the justice system “on the brink of collapse”, the Mayor found the money and the lawyers went back to work. When the FTC heard about the strike via the news, they accused strike organizers of a “conspiracy to fix prices and conduct [group] boycott,”


31 Ibid.
32 Ibid., 429.
violations of Section 1 of the Sherman Act and Section 5 of the FTC Act (prohibiting “unfair or deceptive acts or practices in or affecting commerce”). The administrative law judge let the issue go since everyone agreed that there was no harm done, but the FTC disagreed and demanded a cease and desist order. The Court of Appeals, to which the public defenders appealed, took a “middle ground:” the antitrust application depended, it said, on the market power of the strikers; with market power, their conduct is per se illegal; if they do not have power, their success is due to proper lobbying skills and not illegal. Having thus sent the case back to the FTC to determine if the lawyers had market power under the "rule of reason," the FTC disagreed and appealed the case to the Supreme Court. The Supreme Court, worried that such an example might encourage government contractors to use similar boycott tactics, ruled that the strike was per se illegal.35

Many more recent antitrust cases have helped define the scope of antitrust and the professions. Some will be discussed in the Sections III and IV. But those described here give a sense of the debates that affect subsequent interpretations. The application of antitrust laws to the professions is in a constant state of adjustment as codes of ethics nudge collusion. But for the layperson, two sorts of ambiguity seem to add to the difficulty the courts have in providing clear directives to the professions. One is refusal to determine what constitutes “social value.” Leaving the viability of an ethical code out of the deliberation denies its logic from being considered. The second relates to market power, a difficult criterion in general but as related to the professions, particularly problematic. The FTC is unable to make the market power determination, who is in the better position? The result implies that professional organizations are privileged but can’t claim social relevance; and they are “monopolizing” organizations that have little market power within the overall economy. Architecture, the least powerful of these professional organizations, experiences these tensions in its own particular way.

C. Architecture

Inserted into the above landmark antitrust cases affecting antitrust and the professions are the two proceedings brought against the AIA in 1972 and 1990. The 1972 proceeding was initiated by the AIA’s suggested fee schedules, by prohibitions of members from discounting fees and competitive bidding, and by strict guidelines for advertising. In the agreed-upon consent decree, the AIA had to amend its Standard of Ethical Practice and submit annually over the next five years a report detailing the steps taken to comply with the judgment.36 (See Appendix C) The 1990 proceedings cited the president of the Chicago Chapter of the AIA for distributing in 1984 documents proposing a limit to competition based on fees. AIA National, held responsible for its components, was forced into a consent decree that,

36 United States v The American Institute of Architects, Civil Action No. 992-72. 1972. See Appendix C.
among other things, said that the AIA must review its Code of Ethics, must pay $50,000 to the United States, and for the next 10 years, guarantee that every component at every meeting view a video delineating antitrust behavior.\(^{37}\) (See Appendix D; samples of guidelines are included in Appendixes E and F.)

The 1972 and 1990 suits were against the AIA, but the consent decrees govern all architects, whether AIA members or not. The 1990 consent decree stipulates that nothing “shall prohibit any individual architect or architectural firm, acting alone” from expressing an opinion about architectural prices or competition, reflecting the goal of the original Sherman Act to let individuals set prices as they want. The illegal aspect is architects - even just two - acting in unison. Even if those acts are not overt attempts to price fix, the possibility of collusion subjects it to antitrust attack. Architects can also be implicated for banding together to resist unfair pricing practices. As made evident in the judgment against the Washington DC lawyers who boycotted taking their low-paying assignments, these "joint boycotts" are illegal. For example, two architects’ agreement to boycott an architectural competition is illegal.

In addition to these two proceedings, the most significant case to affect architecture is *Mardirosian v. American Institute of Architects* (1979), a case which transfixed the profession partly because it was a private suit brought by one of the AIA’s own members rather than the DOC or FTC, and partly because of its implications for an architectural code of ethics.\(^{38}\)

Aram H. Mardirosian was a professional architect stripped of his AIA membership when he was determined to have illegally stolen a project from another architect, Seymour Auerbach, also a member of the AIA. The dispute emerged over the architectural services for the alteration and refurbishment of the historic Union Station in Washington D.C. and the National Visitors Center. Auerbach was contracted to prepare design and contract documents for the Visitor’s Center and new station while Mardirosian was responsible for consultations on design and construction. Auerbach’s contract with the railroads consisted of two termination methods. The first was based on failure to fulfill architectural obligations; the second was for the “owner’s convenience.” When in April 1975 the owners terminated Auerbach’s contract for the visitors’ center and asked Mardirosian to take over, Auerbach sued, stating it violated Standard 9 of the AIA code of Ethics. (Auerbach learned unofficially of his termination in mid April 1975; his contract was officially terminated in July.) Standard 9 of the AIA code of ethics, states:

An architect shall not attempt to obtain, offer to undertake or accept a commission for which the architect knows another legally qualified individual or firm has been selected or employed, until

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the architect has evidence that the latter’s agreement has been terminated and the architect gives the latter written notice that the architect is so doing. Under Standard 9, the AIA stripped Mardirosian of AIA membership - although on appeal by Mardirosian, the termination was changed to a one-year membership suspension that stripped him of the rights offered by AIA membership but forced him to pay dues. Mardirosian charged the AIA for wrongful suspension of his AIA membership and sought treble damages against the AIA and Auerbach. He charged that Standard 9 of the AIA’s Code of Ethics constitutes an unreasonable restraint on trade in violation of the Sherman Act and that in defending it, both Auerbach and the AIA were in the wrong; he demanded its removal. Auerbach filed a counterclaim for defamation, interference with contractual relations, and "conspiracy to deprive counterclaimant of his livelihood".

The court determined that a professional architecture association’s enforcement of ethical standards prohibiting the submission of competitive fee quotations to obtain a commission when another legally qualified architect has been selected is not a “classic” group boycott which would be per se illegal. But in applying the “rule of reason,” and referencing the landmark precedent, National Society of Professional Engineers (NSAP) the prior year, the court insisted that it could not support a defense based on the premise that competition itself is unreasonable. (There was some dissent regarding this claim, fearing that a broad opinion that all ethical standards with anticompetitive effects is forbidden by the Sherman Act.) The District Court held that a) an ethical standard prohibiting an architect from seeking a commission for which another architect has been selected was essentially anticompetitive; and b) the anticompetitive effects of the standard cannot be justified to promote integrity. Mardirosian, they concluded, had suffered injury to his business because being a member of the AIA has significant advantages; he won the case against both Auerbach and the AIA and was entitled to damages from the AIA under Section 4 of the Clayton Act. More significantly, the Court found that Standard 9 was illegal, its purpose and necessary effect being the suppression of competition. “[T]he AIA no doubt intended that its Code of Ethics and, in particular, Standard 9 would serve to prevent what it regards as unfair and deceptive competition….But the means the AIA has chosen to address these legitimate concerns is the imposition of a broad and direct restriction of competition.”

Architecture has been buffeted by these three seminal rulings - the two consent decrees and Mardirosian. The consent decrees were indications of the vigilance with which the DOJ watched for collusion in the

39 Ibid.
40 Treble damages is a term that indicates that a statute permits a court to triple the amount of the actual/compensatory damages to be awarded to a prevailing plaintiff. They are peculiar to antitrust litigation, the reason they are attractive to private litigation.
43 Ibid.
professions. The fear it instilled came from the above. The sting was made more intense when Mardirosian instilled fear of attack from within. The smart was acuter still as architecture watched the engineers battle their proposed consent decree, go to trial, and lose. The message was clear: there was nothing to be gained by fighting what the government determined to be legitimate or illegitimate professional ethics, standards, or guidelines.
III. Antitrust Concepts: Consent Decrees and Codes of Ethics

Consent decrees are the normal way of resolving antitrust suits brought by the DOJ and FTC. They have the advantage of avoiding the expense of a trial and any admission of guilt. They set rules of behavior meant to stop the perceived illegal behavior and prevent possible recurrence. In other words, they move away from a litigation-oriented approach toward a regulatory one.

As we have seen, in establishing a party’s culpability in illegally limiting competition, the courts will usually determine whether the offending act was “per se” illegal or subject to a more flexible “rule of reason;” the first is automatically illegal without regard to market impact or alleged justification, the second demands review of the underlying facts and interpretation. Every judgment must indicate whether it was determined by per se or "rule of reason." Per se versus “rule of reason” illegality, while not affecting the outcome and implementation of a consent decree, does indicate the government’s level of tolerance for such an action; the per se designation, usually applied to horizontal agreements (those between competitors) or arrangements to fix prices or allocate markets, identifies blatant collusion.44

The distinction between what is per se illegal and “rule of reason” illegal – the latter used almost exclusively with the professions since they are granted larger forms of professional exemption – has not always been easy to determine. It has recently been made fuzzier, however, with the “quick look”. Within the "rule of reason," the "quick look" offers the Court a way to move quickly on a judgment. It initially screens the evidence to determine whether pro-competitive effects are "plausible" and, if not, the practice can be condemned without further analysis. The "quick look" sits between per se and outright “rule of reason” illegality.

Consent decrees are an option when the issue involves public interest and comes up when there is public enforcement of the law.45 In consent decrees, both parties discuss and lay out the appropriate response and then the judgment is issued. Since consent decrees aren’t necessarily an admission of guilt, they cannot be used as admissions of violation by private parties seeking treble damages.46

44 Frances H. Miller and Thomas H. Greaney write in “The National Resident Matching Program and Antitrust," in The Journal of the American Medical Association, “The distinction between per se and rule of reason categorization generally determines the legal outcome of a specific case. Per se classification essentially guarantees the plaintiffs victory, while, on the other hand, plaintiffs can rarely meet the stringent proof requirements to win a straight The Journal of the Medical Association rule of reason case. As a general matter, collective action by professionals that inhibits competitive bidding has been condemned under the per se rubric without elaborate scrutiny, even when styled as adhering to ethical norms or as safeguarding the public interest. In contrast, courts almost never apply the per se standard if the restriction involves medical judgments, accreditation, or professional standards." http://jama.jamanetwork.com/article.aspx?articleid=195997&resultclick=1.
45 Settling out of court, on the other hand, happens when the suit is private.
Consent decrees differ from contracts because they are largely standards for an entire industry, and interpretation of their content must take into consideration their objectives. By the 1950’s, 87% of all civil antitrust cases brought by the Antitrust Division of the DOJ resulted in consent decrees; today, nearly all of them are resolved this way. The FTC also has increasingly used consent decrees, now settling 93% in this manner.

The first consent decree issued under the Sherman Act was *Swift & Co. v. United States* (1905), but it wasn't until the Clayton Act (1914) - which expressly authorized the use of consent decrees to resolve antitrust litigation - that the right of the Attorney General to control legal proceedings was modified. Further to this, in 1974, the Tunney Act, also known as the Antitrust Procedures and Penalties Act, required federal courts to review each DOJ-issued consent decree to ensure that the remedy proposed is really in the public interest. Courts, often perceived as simply “rubber-stamping” DOJ settlements, were instructed to be more discriminating by Congress. The Tunney Act was instigated by the DOJ’s lenient settlement of antitrust suits challenging International Telephone & Telegraph Corp.’s mergers with several other corporations during the Nixon Administration, a settlement that was controversial because it came on the heels of a $400,000 donation by ITT to the Republican National Committee. In 2004, following two Microsoft decisions that went the company’s way, Congress amended the Tunney Act to strengthen it further. While the amendments were relatively minor - stipulating that courts “shall” instead of “may” take the enumerated factors into account and directing a judge to consider the impact of the entry of such judgment upon competition in the relevant market - they indicate Congress’s desire to provide more effective oversight of antitrust consent decrees.

Consent decrees are controversial. Large corporations contend that consent decrees, or even the threat of them, discourages their ambitions to enter new lines of business or expand their presence in old ones. Professional and other businesses also can be subject to much harsher concessions than might lawfully be attained through litigation. Consumer welfare can be jeopardized by settlement provisions imposing restrictions upon the merging firms’ employment decisions, requiring the settling firm to make

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47 See Wikipedia; another source says that it was the following year, 1906, with United States v. Otis Elevator Company.
charitable contributions unrelated to compensating victims of the antitrust violation. And finally, organizations without the funds to go to court upon refusal to accept a consent decree are at greater mercy of the DOJ’s and FTC’s consent decree “offer.” As scholars have made clear, “a more thorough investigation of the sort anticipated by litigation can be substantially truncates….insofar as the agency is able to find easy cases, that is, cases almost certain to be settled” if for no other reason than “the defendant’s resources [are] sufficiently limited.\textsuperscript{51} In \textit{US v. Brown University}, (1992; discussed in greater detail in the Conclusion) a suit was brought against eight Ivy League universities and MIT for supposed collusion to agree on standards for granting scholarships, Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton and Yale signed a consent decree that settled the action against them despite their belief that the standard setting was lawful; they wanted to avoid a costly legal battle. (MIT alone did not agree to sign and later lost at trial.)\textsuperscript{52}

As leveraged against the professions, the heart of the consent decrees, most often, is a revision of the various Codes of Ethics. Codes put in place guarantees of professional ethical behavior that sometimes, in the name of public good, limit competition to preserve the integrity of professional standards. Codes of Ethics are necessary in any profession to provide a measure of professional competence. By the same token, limiting professional practice to the professionally competent necessarily involves the exclusion of some from practice; standards of care for the public or a client can involve limiting access to information and ensuring that low-fees are not the only or the primary factor in choosing among practitioners.\textsuperscript{53} Professional standards can counter pure economic competition.

In architecture, codes of ethics have existed from the early years of the AIA’s formation. Prior to Mardirosian, the AIA Code of Ethics had modified issues of architectural competition procedures (1969), political contribution policies (1970), recommended fee schedules (1971), the rules governing the architect as developer (1974), and design-build rules (1978). After Mardirosian, the architectural Code of Ethics was withdrawn in 1980 and replaced with a Statement of Voluntary Ethical Principles. Because this did not appeal to a profession that values professional esteem, these principles were replaced by a new

\textsuperscript{51} I rely heavily on Douglas H. Ginsburg and Joshua D. Wright, “\textit{Antitrust Settlements: The Culture of Consent},” October 2012. https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf. The paper by Ginsburg and Wright goes on to point to cases, such as \textit{Nevada v. UnitedHealth Group}, where the concession served only to finance another government agency. In that case, the agreement was that the merged companies would “donate” $15 million to state health-related activities, including the nursing program at the state university and funding a position within the Governor’s Consumer Healthcare Assistance program for five years.

\textsuperscript{52} \textit{The New York Times}, on May 3, in an editorial headlined "US vs. Needy Students," said, "The anti-trust laws are designed to stop price-fixing by commercial enterprises that exploit consumers. They are not intended to stop non-profit organizations from cooperating in charitable endeavors. Giving scholarship aid to needy students is surely a charitable activity." The headline on the \textit{Los Angeles Times} editorial of May 24 said, "Can This Be Serious? Justice Department Picks Silly Fight with Top Schools."

Code of Ethics in 1987. This Code, reviewed by AIA legal counsel and an appointed regulatory board, reflected issues affecting the profession as viewed from the perspective of third-party business clients. The most recent Code of Ethics (2012) is organized around 3 tiers: Canons, which are six broad principles of conduct (obligations to colleagues, clients, the discipline, the public, the environment and the profession); Ethical Standards, which are goals towards which members should aspire in professional performance and behavior; and Rules of Conduct, violation of which are grounds for disciplinary action by the Institute.\(^{54}\)

The 1972 consent decree against the AIA was the result of informal inquiries by the DOJ concerning the Institute’s Anti-Competitive Bidding Standard. Inquiries began in 1967, but it was not until June 1971 that the Institute received a Civil Investigative Demand from the DOJ requiring the AIA to furnish certain files. On December 7 of that year, the DOJ informed the AIA that it wanted to discuss alleged violations of the Sherman Act. At stake were the AIA’s suggested fee schedules, prohibition of members from discounting fees, strict guidelines for advertising, and prohibited competitive bidding through the mandatory code governing its members. In May 1972, the DOJ “ordered, adjudged and decreed” the following:

The AIA must refrain from adopting any course of action which prohibits members from submitting price quotations for architectural services; is ordered to amend its Standard of Ethical Practice and any other policy statement prohibiting the submission of price quotations for architectural services; must send every member of a copy of this decree; must submit annually for the next 5 years a report setting forth the steps it was taking to comply with the provisions of the judgment.\(^{55}\)

After much debate, with many members arguing to oppose consent - insisting that competitive bidding would harm architecture’s obligation to the public - the AIA accepted its terms.

The National Society of Professional Engineers (NSPE), also hit with a suit by the DOJ in 1978, decided to fight the offered consent decree. As indicated above, the NSPE lost time and money pursuing the challenge; its loss is perhaps the single largest warning for architecture and other professions against fighting the DOJ on its proposed consent decrees. After nearly a decade of Society challenges, the courts ruled against the Engineers, holding that while engineering was a “learned profession” and subject to its own code of ethics, they could not prohibit individual engineers from competing on the basis of price.\(^{56}\)

\(^{55}\) See Appendix C.
For all intents and purposes, this closed the door on any arguments, not just from engineering but from architecture, linking unfettered competition based on fee pricing to diminished quality of service.

The 1990 consent decree was the result of a suit against the AIA that stemmed from an investigation begun in the Reagan administration; it represented a much broader complaint of anti-competitive behavior than the previous suit. The DOJ’s complaint against the AIA cited the president of the Chicago Chapter of the AIA, Thomas J. Eyerman, for distributing in 1984 6,000 copies of a document prohibiting price competition regarding fees and compensation. Despite the claim by the Institute that the Chicago policy was rescinded within a few months and was not intended to violate the antitrust act (or the 1972 consent decree), AIA National was held responsible for its Chicago component’s indiscretion. The decree stipulated the following:

The AIA must refrain from prohibiting competitive bids, providing discounts, or providing free services; must refrain from seeking adherence to any code of ethics that has the purpose of prohibiting or restraining AIA members from engaging in competitive practices; must review its code of ethics to eliminate any provision prohibiting competition; must submit and have all components submit for review each proposed code of ethics; must publish the Final Judgment in three consecutive issues of the AIA Memo; must, for a period to 10 years following the Final Judgment, send a copy of the Final Judgment to each new AIA member and every officer of every component with written certification that these have been distributed; must provide programs at each annual membership meeting of components that specify the rulings of the Final Judgment; must establish a Decree Committee within the General Counsel’s office to institute the actions set forth in the Final Judgment and certify its ongoing compliance for the next 10 years; must disallow the 1984 president of the Chicago Chapter to hold office or be on any AIA committees; and must pay $50,000 to the United States for the cost of investigation. The Final Judgment would expire in 2000, 10 years from the date of entry.57

The emphasis on competition in architecture that is imposed by the consent decrees (impositions from the government “above”) as well as that inserted by members against each other (insertions from within and “below”) is perhaps not particular to architecture. But the manner in which it is absorbed into a profession that already emphasizes aesthetic individuality and strives for relevance in a culture that can function perfectly well without its expertise is unique. (See Sections IV: Overview and V: Conclusion) In this, the consent decrees, functioning in a seemingly benign manner allowing a professional organization to rectify itself without going to trial or being found guilty, in fact operates as something more insidious. As a governmental determination that lingers more abstractly and infiltrates the profession more psychologically, its effect is powerful.

Fifteen years after the end of the 1990 AIA consent decree, the AIA and the profession of architecture has absorbed and internalized its lesson. The AIA is unwilling to broach the subject of fees and wages and has made internal competition of firms against one another a particular point of celebration. At the 2014 National Convention, speakers celebrating their ability to charge lower fees for more services were put before the audience as keynotes offering positive examples for the profession. Individual architects who have never heard or seen the recording played at every component and national meeting that described the purview of the DOJ or the felony that breaking antitrust laws would lead to "know" that their destiny is to compete and accepts the fact that discussing fees and wages (or complaining about overtime, benefits, work-life balance or labor rights) is unseemly. The long shadow of the two consent decrees between the DOJ and the AIA has done their job.
IV Probes

Section II summarizing antitrust cases and Section III exploring their underlying concepts expose the vulnerability of architecture under antitrust laws. The fact that various antitrust acts, judicial decisions, and consent decrees vary with time and political climate lead one to think that "proof" of injustice could find redress and a new "fairness." This sentiment, which as indicated earlier proved to be naïve, led to inconclusive explorations that nevertheless provided deeper understanding of the workings of antitrust law, the professions, and architecture. The first two are exemptions from the Sherman Act – the learned profession exemption (LPE) and the state exemption; two others are the seeming injustices that put architecture at a disadvantage in the marketplace – differences in the treatment of various professions and the (one might think blatant) political nature of antitrust law. These probes offer insight into antitrust mechanics even if they do not offer remedies.

A. The learned professions exemption (LPE)

The LPE is based on the theory that activities that are presumed to be harmful in a free market context because of anticompetitive effects might in fact not be harmful in a professional context. Public interest might be served by cooperation within an industry. The Goldfarb case explicitly preserved the trade versus profession distinction, the "learned profession" designation being less as an “exemption” than as a rule for the special treatment under antitrust laws. The Court did not explicate the characteristics that would trigger the application of this special rule. While indicating that fee control activities would never be exempt under any circumstances (a per se violation), all professional activities would be eligible for rule of reason treatment if they don't restrain “commercial” activity or stabilize prices.

In architecture, as in other professions, there is a long history of setting fees. Richard Morris Hunt, co-founder of the AIA, inadvertently established a standard working rate when he sued a client for non-payment of his 5% architectural fee; when he won the case, the 5% fee became the norm and was published as such in a subsequent AIA document. Despite this, competition for scarce jobs meant architects still charged less and competed on fees charged. The AIA responded and individual AIA chapters developed fee schedules for various jobs. As a “learned profession,” this seemed to be its right; the dignity of the profession rested on its united front of expertise, not the cheapness of its competing members.

Fee setting is so clearly illegal in antitrust rulings that it seems quaint to think that architects might expect it as a learned profession benefit. And yet many architects today are either surprised that we don't have one (and they just didn't know what it is) or surprised that it is illegal. Even at the extreme edge of what might constitute allowable learned profession exemption, it appears as a natural right for the professional club. And while we might, with awareness of how much we actually do cut fees to get jobs, eventually give this assumption up, we still have faith that as a learned profession, our "brotherhood" is
honored by the Courts. This is the reason for this probe. But an analysis of those cases in which individual/consumer rights prevail over professional ethics indicates that the Supreme Court is not receptive to claims of antitrust exemption based primarily on the protection of professional integrity, standing, or other special status. Courts have allowed the professions to justify on other grounds - promoting the professions mission, limiting access to the profession through licensing, setting of industry fees - restraints that would be per se illegal outside a professional context. However, the courts are very alert to the fine line between legitimate professional qualifications and unfair exclusionary practices. As those watching FTC behavior remark,

[A]ssociations must be particularly vigilant, given the FTC’s penchant for questioning the intent and effect of such provisions, and the consequences—in terms of the costs of defense and compliance with remedial requirements—of getting in the agency’s cross-hairs.

Thus, seemingly legal and ethical professional codes from the layman’s point of view are also found to be illegal. An unlawful use of standards is exemplified in The American Society of Mechanical Engineers v. Hydrolevel Corp (1982). In this case, ASME was held liable for an agent who (merely) pointed out that a competitor was non-compliant with ASME’s “BPV” code. Lacking the code compliance, the competitor was at a disadvantage and sued. This ruling primarily affects the responsibility of the association over its members, but it also prevents the use of industry standards and certificates to exclude legitimate competition.

The limits of professional exclusionary practices was recently highlighted in North Carolina State Board of Dental Examiners v. FTC (2015), in which the FTC alleged that the North Carolina State Board of Dental Examiners was excluding non-dentists from the market of teeth whitening and was therefore engaged in anticompetitive and unfair methods under the Federal Trade Commission Act. The FTC successfully maintained that, because the North Carolina Board included practicing dentists, there was a potential conflict of interest that diminished the Board’s state immunity claims. This conflicted composition of the Board was itself not protected by the Parker Immunity Doctrine because it hadn’t been legislated by the state.

Likewise, seemingly benign “don’t poach” professional ethics was struck down in FTC v. Music Teachers National Association, Inc. (2014). Here, the Commission alleged that the association, a non-profit representing

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58 The Learned Professionals Exemption also exempts professionals from labor laws regulating minimum wage and overtime. For the requirements to be exempt from the Fair Labor Standards Act, see United States Department of Labor, “Wage and Hour Division,” http://www.dol.gov/whd/overtime/fs17d_professional.htm.


60 Burt Braverman (writing for Davis Wright Tremaine LLP), “Professional and Trade Association Codes of Ethics Can Lead to Antitrust Trouble,” 01/23/14, http://www.dwt.com/Professional-and-Trade-Association-Codes-of-Ethics-Can-Lead-To-Antitrust-Trouble-01-23-2014/. The quote goes on: “…In the FTC’s view, ‘[c]ompeting for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition,’ and restrictions on such competition—even if articulated in professional associations’ ethics codes—can be unlawful absent a demonstrated procompetitive justification.”

more than 20,000 music teachers nationwide, restrained competition by requiring members, among other things, to “respect the integrity of other teachers' studios”, and thereby “not actively recruit students [i.e., customers] from another studio.” MTNA, with few resources, immediately agreed to not enforce this and other questionable ethics codes in the hope of avoiding a costly investigation. Nonetheless, the FTC imposed a consent decree similar to the 1990 AIA one – with every meeting beginning with antitrust videos - only its duration was 20, not 10 years.

These harsh decisions indicate the extent to which the DOJ and FTC will go to insure that private practices within a learned profession do not get cozy with each other. The decisions that point to a substantive difference between a learned profession and a business - footnote 17 of Goldfarb and Boddicker - determine barely more than the fact that there are professions. There is little indication that any test case would yield a more sympathetic reading of architecture as it tries to prove its ethical as opposed to business mission. All professions suffer under the schism between the ethical mission that the public associates with "professionalism" and the pecuniary role the courts thrust upon them. But architecture in particular, one suspects, suffers most from the distance between its assumed (mystical, aesthetic) "learnedness" and its need to be cheap.

B. State Exemption

The LPE overlaps with state exemptions because states and state boards individually regulate professional activity; they are the overseers of the various codes of ethics. Goldberg combined pronouncements of learned professions with rights to state exemptions. But it is Parker that is most associated with states rights, stating “[the state] as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.” Parker gave broad jurisdiction to the states to interpret whether seemingly anticompetitive behavior was ultimately beneficial to state needs and business efficiency. This is known as the State Action Doctrine.

Might there be hope for the profession of architecture to take advantage of the State Action Doctrine in order to escape the need for firms to compete with each other based on fees? The fact that the insurance industry, for example, is entirely exempt from antitrust law on the basis of state sovereignty incites this possibility. The McCarran-Ferguson Act of 1945, also known as Public Law 15, which created this exemption, argued that sharing “risk” information is necessary to produce socially accurate pricing; standardized policies allow for easier price comparison and the sharing of information allows more participants to have equal access to the market and hence, preserves competition. The insurance industry has thus been the envy of other industries and professions that see insurance companies exploit its political and economic advantages. And it has withstood many attempts to repeal it in part or in whole. Most recently, addressing the 2010 Affordable Care Act, Congress tried to repeal the

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health insurance portion of the McCarran-Ferguson Act. The House voted 406-19 for repeal but after stalls and delays, the senate finally invoked "cloture" and defeated the proposed changes. As one insurance industry publication headline proudly put it, "McCarron-Ferguson Acts' Antitrust Exemption Dodges Another Attempt at Repeal." As another journal from the Center for Justice and Democracy agitated,

[The insurance industry] is one of the least regulated, and most influential, profitable and unaccountable industries in the nation, answering to no federal agency and regulated by a nation of mostly weak state agencies.... With few exceptions, [the state insurance] departments have neither the funding nor political will to exercise proper control over this industry, save its main regulatory job - to prevent a company's insolvency. Policyholders have very little protection otherwise. The result is an industry that can make extraordinary claims and demands on lawmakers that go nearly unchallenged.

The desirability of the insurance model for architecture, given the antagonism it has invoked, is questionable, and yet, architecture, like other industries, can't help but look enviously. But the applicability of insurance, selling a product and hence connected to "product liability," to architecture (a promise to do something based on a "standard of care") is limited.

Beyond the special exemption for insurance, rulings subsequent to Parker have further defined the criteria the states much adhere to in order for their industries to be protected by the State Action Doctrine. Primary among these is California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. (1980). In Midcal, a wine distributor, Midcal Aluminum, presented a successful antitrust challenge to California's wholesaler resale price maintenance and wholesale price posting statutes. After being charged with selling wine for less than the prices set by California price schedules and also for selling wines for which no fair trade contract or schedule had been filed, Midcal Aluminum asked for an injunction against the State's wine pricing scheme. The Court of Appeal ruled that the state restrained trade in violation of the Sherman Act and rejected claims that the scheme was immune from liability under Parker and was also protected by Section 2 of the Twenty-First Amendment, which prohibits the transportation or importation of intoxicating liquors into any State "for delivery or use therein in violation of the State's laws." After Midcal, the inquiry was no longer whether a state agency had required the private action, but rather: 1) whether the challenged restraint had been "clearly articulated and affirmatively expressed as state policy," and 2) whether the policy was "actively supervised by the State itself." Midcal modified Goldfarb by no

longer requiring a rule and merely approving it; it also modified both *Goldfarb* and *Parker* by requiring active supervision by the state.

The State Action Doctrine thus, with regard to architecture, is not an easy way for architecture to move around competition. The strict qualification imposed by *Midcal* mean that states have to actively believe that a profession like architecture is central to its mission and economic viability - something unlikely to happen. However, aspects of this immunity that could work for the profession will be discussed in Section IV B.

C. The Differing Professions

When Jay Stevens, general counsel to National AIA, was asked if architecture was treated in a discriminatory fashion by antitrust laws, he said, “No.” Likewise, Alvin Klevorick, the law professor advising this research, thought this an ill-conceived question and he was convincing in persuading us that “law” doesn’t “care” about these things. (He was, however, finally convinced that architecture as a profession is particularly poorly paid and inadequate in its discourse of relevance.) But there is still evidence that law and medicine are professions that, for various reasons, are handled differently from architecture under the law.

While the restrictions of *Goldfarb* for the “learned” profession of law might make it appear to suffer uniquely under antitrust laws, the Court in that decision goes on to indicate how law, in reality, is the profession of choice. The Court states:

> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.” In holding that certain anticompetitive conducts by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its profession.66

Indeed, the article that cites this quote, “The Impact of Antitrust Law on the Legal Profession,” says, with regard to *Goldfarb*: “Ironically, the principal impact of Goldfarb has been on the other professionals, not lawyers.”67 We should not be surprised, given what the above quote states: those making the rulings in the courts are all lawyers. The article also points out that *Parker* has especially helped lawyers. In *Bates v. State Bar* (U.S., 1977) in which the Arizona State board was exempt from antitrust laws because the Arizona Supreme Court had prohibited lawyer advertising; in *Hoover v. Ronwin* (U.S., 1984) in which Ronwin, who had failed the Arizona State Bar and protested that the exam artificially restricted access to


67 Ibid.
the profession; in *Lawline v. ABA* (United States District Court, N.D. Illinois, E.D., 1992), in which an unincorporated group of lawyers and paralegals answering legal questions over the phone fought an injunction demanding that they stop practicing law and lost; and in *Massachusetts School of Law at Andover, Inc v. ABA* (United States Court of Appeals, Third Circuit, 1997) in which the Massachusetts School of Law filed suit after being barred by the ABA for proposing to deliver a cheaper law education that did not meet ABA accreditation requirements and lost – in all of these law-related proceedings, antitrust claims were denied with appeal to Parker, protecting law practices that were otherwise questionable.

The idiosyncrasies of medicine make it also a particular subject with regard to antitrust. Medicine does not have a single constituent structure. Instead, regulated by a number of levels of state and private operatives made more complicated by Medicare and Medicaid (which further require both state and private organizational involvement), medicine shields itself from direct attack. Frank P. Grad in his “The Antitrust Laws and Professional Discipline of Medicine” writes, “[T]hese separate layers of professional discipline overlap at many points and provide opportunities not only for ethical self-regulation but also self-protective economic restraint and abuse.” Grad goes on to point out that the medical profession, regulated at the state level, uses the fact that the states have minimal enforcement capacity to protect “the inside group of licensees” rather than the public. As an article in the *Journal of American Medical Association* says,

> [A]ntitrust law has proved quite solicitous to the professional judgments of physicians and their associations. Cases...challenging accreditation by medical societies and boards and questioning hospital staff privilege determinations have been almost uniformly unsuccessful. In addition, the US Supreme Court has occasionally given the signal...that where market imperfections are present in a business sector such as health care, restraints of trade involving professionals might warrant somewhat greater leniency.

In comparison to law, which makes antitrust laws, and medicine, which is too complicated for the legal system to control, architecture has a minor role to play in shaping or fending off

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antitrust proceedings. It does, however, as a client of the government, not escape its attention. The fact that it was the General Service Administration (GSA), the Corps of Engineers, and other government agencies that resented the fixed fee schedules of architectural and engineering societies as far back as the 1960's⁷² should not be overlooked in the power dynamics shaping the DOJ and FTC attitudes toward the professions. However, this observation can't lead to any conceivable redress for architecture. It might feel unfair, but the inequality exists at a level unreachable by antitrust proceedings.

D. The Political Nature of Antitrust Rulings

The Sherman Act argues for the essential need for competition in US democracy. As Justice Stevens says, in National Society of Professional Engineers v. United States) and quoting from a prior antitrust case, “The heart of our national economy long has been faith in the value of competition.” Competition is a complex and abstract concept; it helps the strong emerge – any organization can pop-up - at the same time that it helps the strongest continue to compete effectively – the already strong organizations survive. Antitrust laws meant to guarantee competition need to be flexible in order to manage the pros and cons of that truth.

The flexible application of antitrust laws, as we have said, is set in relation to the government’s learning lessons about how the economy functions best. What is considered “best” is linked to emerging and politically motivated judgments. For example, unions, initially the main focus of the Sherman Act, eventually were excluded from its reach; tie-ins were originally but are not now per se illegal, their viability dependent on not having market control. The government's victory over the six meat packing companies in Swift was later determined to be overly aggressive and harmful to business growth and the specifics of that ruling were later overturned.⁷³

Beyond this, attitudes regarding governmental interference in the economy change. The Theodore Roosevelt era, ushering in aggressive monopoly busting, followed one of lax oversight. The 1970's, when the courts came after the professions, was an era of economic “liberalization.” Nixon's termination the Bretton Woods agreement - decoupling the dollar from gold and effectively allowing international monetary values to float freely - and Jimmy Carter’s presidency -marked by stagflation (high inflation coupled with high unemployment) and diminished belief in strong governmental regulation - contributed to a pro-competition approach to antitrust. In the 80s, with the election of Ronald Reagan, the rise of the Chicago School of economics, and subsequent supply side economic policies, professional

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societies in particular came under attack for fostering anti-competitive activities. Forms of “self-regulation” that were embodied in codes of ethics, and justified as protective of the public, were the target of the DOJ.

When the DOJ filed its antitrust suit against the AIA in 1972, it had, two weeks before, filed a similar suit against the American Society of Civil Engineers. In the two months prior to that, it had filed suits against lawyers and doctors groups. Members of the DOJ’s Antitrust Division in the months of April and May 1972 twice, while not confirming that there was a “crackdown” on professionals, did reiterate the extent of their suits across multiple professions. The 70s alone saw Goldfarb in 1975 (law), Boddicker in 1977 (dentists), Bates in 1977 (law), NSPE in 1978 (engineering), and Mardirosian in 1979 (architecture). Meanwhile, while the professions were being handed suits, large and wealthy corporations were not; they were seen to be the product of successful competition. In 1974, the Tunney Act, as we have seen, required federal courts to review each DOJ issued consent decree to ensure it served the public interest. The Act, it should be remembered, was inspired by the DOJ’s passivity regarding ITT’s mergers with several other corporations during the Nixon Administration after there was a $400,000 donation by ITT to the Republican National Committee.

Reagan’s 80’s were marked by not only the 1990 AIA consent decree (a procedure begun in 1986) but by other landmark antitrust cases such as Arizona v. Maricopa County Medical Society (ruling that establishing maximum fees are per se illegal as price-fixing agreements); and FTC v. Indiana Federation of Dentists (ruling against dentists refusing to share x-rays with insurance companies seen as restraint of trade). It was clear that the increased aggressiveness by the Antitrust Division, then headed by James Rill, was dictated by Reagan’s “free-market” economic theories, a position best remembered for his busting of the Professional Air Traffic Controllers Organization (PATCO) in 1981 and the termination of controllers' contracts, just months after he became president. And yet, as has been described by Paul Krugman, the Reagan Era, while aggressive toward labor organizations, was sympathetic to big business and initiated the era of too-big-to-fail monopolies.

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74 Palm Beach Post, Friday May 19, 1972.
76 President Reagan had the right to bust the union because it represented federal employees, a group exempt from the union exemption by a 1955 Congressional act (such strikes were designated a crime punishable by a fine or one year of incarceration) and upheld by the Supreme Court in 1971. Despite this law, many federal employee unions had struck prior to this and not been fined or busted. The political nature of Reagan's termination of the Flight Controllers is made more intriguing by the fact that Reagan had courted PATCO for union support of his candidacy and had indicated that he would support their demands when president. They were targeted for support because they were made up of many veterans and were a largely conservative group. PATCO were blindsided when Reagan went after them.
77 As Krugman, says, “For Reagan didn’t just cut taxes and deregulate banks; his administration also turned sharply away from the longstanding U.S. tradition of reining in companies that become too dominant in their industries. A new doctrine, emphasizing the supposed efficiency gains from corporate consolidation, led to what those who
The DOJ and FTC in contemporary times vary their antitrust aggressiveness according to what they surmised regarding capitalism’s growing global frontiers. Various judgments in favor of mega-corporations like Apple, Microsoft, Google, Facebook, etc. are witness to the courts’ (and Congress’s) flexibility regarding what makes the American economy strong. American leadership in the “innovation” economy has restrained antitrust fervor. The Tunney Act, it should be remembered, was amended when it wasn’t strong enough to prevent, in 2004, two cases that went Microsoft’s way. As neo-liberalism and sentiments favoring free-market mechanisms enter into a global economy, antitrust laws favoring the strongest within a given American field adjust to those favoring American global dominance period. Specifically, the “innovation” economy, which America leads, requires strong intellectual property laws which traditionally are in tension with antitrust law. As the Second Circuit observed in *SCM Corp. v. Xerox Corp.* (1981), the antitrust and intellectual property laws “necessarily clash . . . the primary purpose of the antitrust laws to preserve competition can be frustrated, albeit temporarily, by a holder’s exercise of the patent's inherent exclusionary power during its term.”

The political nature of antitrust laws, perhaps more than other factors, inspires indignation and the desire for more “objective” oversight - oversight that is sympathetic to a profession like architecture that looks so trivial in the high stakes of a global economy. But such objectivity of course does not exist. One might look forward, in this case, to a political shift that values architecture for the extent of its potential control over the built environment. But for now, the indignation is not going to find redress in the courts.

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V. Legal Forms of Moderating Fees and Wages and Modifying Competition

The preceding chapters have attempted to discover how architecture might learn from other antitrust cases to better maneuver in a system that seems to prevent it as a profession from realizing its full value. Section IV indicates that power dynamics are in play in the antitrust laws and architecture (and other professions) is not always well served; but it also indicates that there isn’t much to be done about this in antitrust court proceedings. This chapter thus examines ways to assert more aggressively architectural values in ways that bypass and run parallel to antitrust mechanisms. These three legal approaches do not assert a new, powerful profession free to manage its own valuation. This will never happen. Rather, they offer vehicles for changing one limiting aspect of the profession that might in turn change a larger dynamic. There are three options: 1. 3rd party surveys and implicit collusion; 2. legislation; and 3. unionization. These areas locate strategies rather than tactics and leave unaddressed the specific actions required to implement the change required for architecture to earn and be recognized for its true value. These are less “recommendations,” since they lack specificity for architectural action, than they are items for further consideration. More research is required for each of these.

A. 3rd Party Surveys and Implicit Collusion

These two entities are different but are being treated together because they both involve recognition that implicit agreements to align on fees and wages can serve an industry and allow it to operate more smoothly. The difference is in how the industry gets the information: the one is via scrutiny of competitor behavior and external indicators determining pricing; the other is via 3rd party surveys.

Implicit collusion (also called tacit collusion or price consensus), which is legal, occurs when there is no discussion between agents, only a consensus (not based on discussion or agreement among competitors) that a certain price helps everyone in the industry. An example of implicit collusion was Richard Morris Hunt’s establishing, inadvertently, the 5% architectural fee adopted by the rest of the profession when this fee of his was published after his suit against a non-paying client. Implicit collusion depends on the mutual interdependence among firms and the intimate knowledge each has of the others. Two forms of implicit collusion are common: conscious parallel actions and price leadership. In the first, each firm or industry business raises its price knowing others in the industry will do the same. Each entity understands that this action will be beneficial to all; contact among competitors is not needed. In the second, one firm or industry business takes the lead in setting a price that will raise profits for the entire industry. Competitors go along with this price knowing that they stand to benefit by doing so.

Implicit collusion explains the historical predominance of the 6% commission for realtors. On the surface, the industry would seem to benefit from competition and would seem to be difficult to collectivize.
But the multiple listing service (MLS) provides efficient information dissemination, and the fact that listings include those of both buyers and sellers listings makes it easy for MLS collective members to exclude rivals: a price-cutting seller can be “boycotted” by a high-price buyer, limiting access to that buyer's customers. All benefit from keeping their commissions the same in a realm where you need, as an agent, cooperation.\textsuperscript{80} Another example of this is retail gas pricing. In a given area, all of the gas prices will usually be the same, be it Amco or BP or Standard Oil. This happens from careful observation of each other's pricing and of course the knowledge that one price works best for all. They do not and need not discuss the established price.

The sentiments about implicit collusion vary. For some, it is the ideal outcome of the free market: competitors will naturally find the operative price of a given commodity and a single price indicates market stability; for others, it indicates an abuse of a system that allows oligopolies that the DOJ and FTC should monitor more closely.

But this dilemma can temporarily be put aside to contemplate its opportunity for architecture. Economists have determined that implicit collusion is most likely and most effective in markets with an intermediate amount of market power. Markets which are either highly competitive or in which one or both of the two generators can exercise considerable market power are also markets in which implicitly collusive outcomes are less likely to arise.\textsuperscript{81} How one measures architecture in these categories – which describe businesses, not professions - is worth exploration. Intermediate market power might be a stretch but not an impossibility for architecture; and in a definition of "highly competitive" that presumes aggressive economic strategies, architecture is clear. But the conditions are not in place for architectural firms to watch, adjust, and implicitly agree to certain fees, either hourly or percentage of construction, absent accessible information. This is why we should turn to the 3\textsuperscript{rd} party survey.

3\textsuperscript{rd} party surveys - shared information about pricing that is merely description, not advocacy - can aid tacit agreement. Antitrust laws determine that organizations conducting their own salary surveys can be seen as practicing illegal price-fixing. But others, following certain rules, are legal: 1. they may be done by a purchaser, a government agency, an academic institution, or a trade association, but not by competitors; 2. the information provided by survey participants must be based on data more than 3 months old; and 3. there must be at least five providers reporting data upon which each disseminated statistic is based; no individual provider’s data represents more than 25% on a weighed basis of that


statistic; and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.\textsuperscript{82}

The 3\textsuperscript{rd} party survey is what explains the known and “agreed upon” salaries for associates in the legal profession. In the 1980’s, when The Legal Times of Washington conducted and published a survey of starting salaries, the large firms rallied around the dominant annual starting salary that emerged; it became the standard.\textsuperscript{83}

Today, the National Association for Law Placement, Inc. (NALP) serves a similar purpose, insisting “we want the lawyers and law students we serve to have an ethical recruiting system, employment data they can trust, and expert advisers to guide and support them in every stage of their careers.” The website goes on to say:

What brings NALP members together is a common belief in three fundamental things. First, all law students and lawyers should benefit from a fair and ethical hiring process. Second, law students and lawyers are more successful when supported by professional development and legal career professionals. Third, a diverse and inclusive legal profession best serves clients and our communities. That’s why NALP members work together every day to collect and publish accurate legal employment data and information, and champion education and standards for recruiting, professional and career development, and diversity and inclusion. For more than forty years, NALP has played an essential role in the success of our members and the lawyers and law students they serve.\textsuperscript{84}

NALP, it needs to be remembered, is not the ABA. It serves a purpose, as a neutral 3\textsuperscript{rd} party, that the ABA could not perform.

The fact that architecture has nothing equivalent to NALP is, I believe, part of architecture’s lack of just pay. The AIA conducts surveys that do not qualify in this regard because they are not a neutral 3\textsuperscript{rd} party; it is an organization among competitors. Nor does it capture the many architectural workers who are not AIA members. A university or ACSA or a new journal that describes but doesn’t advocate for certain financial structures could conduct surveys illuminating both fees and wages as well as other conditions supporting diversity, gender equality and debt relief. But it would take a willingness on architects, emerging architects, and students working in the field to offer information they have

\textsuperscript{83} Jay Stephens, legal counsel to National AIA, described in a phone conversation that Washington law firms “stopped work” the day that the survey came out as offices absorbed (and adjusted) the documented salary information.
\textsuperscript{84} NALP Website, \url{http://www.nalp.org/whatisnalp}. 
traditionally guarded at all cost.\textsuperscript{85} Competition against each other has made us defensive about our monetary practices and how they do or don't make us able to compete better for projects, jobs, and staff. We can legitimately seek to better our lot by setting up surveys that allow, if not encourage, wage and fee transparency. If there is a thin line between transparency and collusion, architecture can tread on the legal side.

B. Legislation

The first amendment allows people to “petition the government for redress of grievances;” in other words, people have the right to work through legislation to address unfairnesses in the law - unfairnesses, for example resulting from antitrust laws. The Noerr-Pennington doctrine of 1961 also protects petitioning activity directed at government agencies even if the desired governmental action adversely effects competition. A defendant's petitioning activity would be protected as long as the injury to competition would (or did) result from government rather than private action. If the Sherman Act and other subsequent antitrust decisions prohibit a debate within the profession about the value of competition, this debate can take place in normal legislative processes: banding together to lobby state or federal officials for changes in the bidding system is legal.

Other professions that architecture likes to compare itself to have more legislative influence. Lawyers make the laws and contribute to 10% of the US GDP\textsuperscript{86}; the healthcare industry accounts for 17.5% of the US GDP. By sheer number in a profession – which relates to both economic power in the form of dues to professional organizations to support lobbying as well as constituents that legislators have to please – doctors and lawyers out number architects: in 2015, there were 1,300,705 lawyers; 908,508 doctors; and 141,200 architects.\textsuperscript{87} One can surmise that this makes architecture weaker than law or medicine in its capacity to initiate or change legislation; congressman and senators pay attention to industries that matter to their constituencies. Not many architecturally related issues would gain or lose a congressman’s vital support for his/her election. But one can nevertheless imagine that legislation not aimed at architecture per se but at the labor issues systemically abused by architecture – no paid

\textsuperscript{85} The Architecture Lobby has conducted 2 surveys: on the first, we did not require survey takers to identify the firms they work for; almost no one did. In the second, we did require that information, and despite the fact that this survey had a much wider range of social media potential participation, there were shockingly few takers. On the one hand, people clearly felt the potential for reprisal for identifying their place of work; on the other, people were afraid that sharing explicit information would either shame them or create unwanted envy.

\textsuperscript{86} See "Lawyers Now Take 10% of US GDP?" 10/18/2013, AgainstCronyCapitalism.org, http://www.againstcronycapitalism.org/2013/10/lawyers-now-take-10-of-us-gdp/.

\textsuperscript{87} The information on engineers is very scares regarding their numbers, economic impact, and ability to negotiate antitrust laws. The data I have collected indicates that there are approximately 420,000 professional engineers with an estimate that 50,000 are structural. Because surveys so not single out types of engineers, this is determined from an Illinois survey that does and applying it to the 420,000 number. It seems, in any case, that after National Engineers, the engineering profession has not want to confront controversy.
overtime, unpaid internships, below minimum wages, no mandatory maternity leave, lack of childcare support – could get national attention. For this to happen, white-collar labor would need to be more aggressively scrutinized by the government.

State boards governing professions are not allowed to pass rules that fix fees or blatantly limit competition. But they are in a position to advocate legislation that would help the profession. In architecture, they could require all construction projects to be signed and overseen by architects or make it more difficult for other actors to sign off on construction drawings. They could change rules that affect the excessive expense of architectural education/licensing and add to the distress of low salaries when entering the profession; that offer architectural licensure upon matriculation from a professional school; that require knowledge of BIM for licensing; that make unpaid architectural competitions illegal; that support a fund for people in the design profession who are laid off for a limited period of time. While avoiding direct anticompetitive discussions, the state boards could work away on the conditions that lead to low fees and wages and illegal labor practices in the architectural profession.\[88\]

C. Unions

The Clayton Antitrust Act of 1914, as we have seen, exempted unions from the Sherman Act saying "that the labor of a human being is not a commodity or article of commerce, and permit[ting] labor organizations to carry out their legitimate objective". It also says “Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor... organizations, ... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof...”\[89\] The Norris-LaGuardia Act of 1932 banned so-called “yellow-dog” contracts, under which workers agree as a condition of employment to not join a labor union. It also barred federal courts from issuing injunctions against nonviolent labor disputes and protected unions from interference by employers.\[90\] The Wagner Act of 1935 - also known as the National Labor Relations Act (NLRA) and creating the National Labor Relations Board (NLRB) - guaranteed the right of private sector employees to organize as unions, engage in collective bargaining, and take collective actions like strikes.\[91\] Unions, in other words, offer mechanisms that protect the architectural worker from many of the vagaries that make employment in the profession of architecture so precarious and financially unrewarding.

\[88\] Architecture could also find a “friend of architecture” judge such as Jonathan Lippman, chief judge of New York State of Appeals who mandated that lawyers donate 10% of their time to pro bono work before being admitted to the New York bar, making New York the only state that requires legal pro bono work. This is not the place to argue whether architecture would be served in being required to do pro bono work. (It would not.) But would that there was architect-judge who could mandate social responsibility in the profession.


\[90\] 29 U.S. Code Sections 151–169.

\[91\] 29 U.S. Chapter 6 Section 101 et seq.
Nevertheless, there are many reasons why professional architects do not think immediately about unionization. The climate of anti-unionism that still lingers after anti-union measures in the wake of the post-WWII communist paranoia is one. The 1947 Taft-Hartley Amendment to the Wagner Act limited the pro-union laws. It made secondary boycotts illegal (disallowing a union that has a primary dispute with one employer to pressure a neutral employer to stop doing business with the first); it banned jurisdictional strikes (making it illegal to strike over disputes of union representation); and it allowed the executive branch of the federal government to obtain legal strikebreaking injunctions if an impending strike imperiled national safety. This Act, also known as the Labor Management Relations Act, was primarily “right to work” legislation. Further restrictions came with Labor Management Reporting and Disclosure Act (1959) which required unions to hold secret elections for local union offices on a regular basis and provides for review by the United States Department of Labor of union members’ claims of improper election activity. Both of these reflect Cold War resistance to labor and American business's desire to regain control of labor after the New Deal and wartime pro-labor legislation. Since these older restrictions that circumscribe unionization, continued resistance to labor organization has followed the busting of the 1981 Air Traffic Controllers Strike, the Wisconsin's "right to work" push, and the anti-teachers union “reform” movement.

White-collar professions, already unable to identify with a blue-collar model of labor organization, have a still harder time accepting unionization. But there are historical examples that prove the exception and indicate the value of collective bargaining. There was the drive by Microsoft contractors to negotiate job classification, pay raise and benefits, through their affiliation with the Communication Workers of America (CWA); there was the 1999 formation by IBM employees after IBM imposed drastic pension changes that threatened the retirement security of thousands of its workers; there was the strike of 17,000 technical workers and engineers at Boeing in Feb 2000, the largest white-collar strike in US history.

Today, in white-collar industries, the Alliance@IBM represents IBM employees, the Washington Alliance of Technical Workers (WashTech) represents a portion of Microsoft employees, the Programmers Guild represents the programmer profession, and the Freelancer's Union represents the technical workers who operate on their own. In the cultural/media disciplines, there is the Screen Actor's Guild, the Directors Guild of America, and the Writers Guild of America. There is the Future Music Coalition and the Performing Rights Organization (PRO's) such as ASCP and BMI. The New York Times and the Washington Post have strong guilds. The newspaper union News Guild-Communications Workers of America (News Guild) represents the staff of The Nation. The National Writers Union acts as a collective voice for freelancers and bloggers. Gawker employees voted 75-25 to form a union with the Writers Guild of America East. In the professions, there is the June 1999 vote to form a medical union by the 290,000 members of the AMA who were worried about losing autonomy and providing inferior service to patients by HMO’s. There is currently the Institute of Electrical and Electronics Engineers (IEEE) that

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92 29 U.S. Code Section 401 et seq.
has some union-like characteristics.\textsuperscript{93}

If the resistance of white collar, creative, and professional unionization has prove to be surmountable, architecture as a profession has other obstacles. The ambiguous labor/management divisions in our discipline are caused by staff identifying with the firm owners in the assumption that they are soon to be "one of them;" indeed, as an employee moves up the ranks has responsibilities for managing workers under her while needing to satisfy the employers above her, one is both management and labor. Embedded in this is the history of a profession identifying with the aristocracy. The idea of a "gentleman's profession" is much more acute in architecture than it is in acting, writing, technology work or blogging.

Nevertheless, unionization in architecture is imaginable and has a precedent. The Federation of Architects, Engineers, Chemists and Technicians (FAECT) was a depression era union of architects and other technicians who, in the early 30's, were 95% unemployed. It was borne out of dissatisfaction with the AIA's response to Franklin Roosevelt's call, through his National Industrial Recovery Act (NIRA), for each profession to make hourly fee determinations. When the AIA suggested one flat hourly fee of 50c, just 10c above minimal wage, the FAECT formed to argue for higher and graded wages based on experience. The union was open to all technical workers regardless of race, gender, or rank; only employers were excluded. While only 10-15% of the union was architects, they proved to be, at least in the earliest stages, the unions most active leaders. Despite the exclusion of "employers," the union attracted a number of famous architects who sympathized with the larger mission of insuring that government employers address the right issues and pay fairly. Percival Goodman, Simon Breis, Henry Churchill, James Marston Fitch, Norman Rae, Sam Ratensky (the first Director of the NYC Housing Authority), Frederick Ackerman (the first Technical Director of the NYC Housing Authority) were all members, as was Tom Creighton, the editor of \textit{Progressive Architecture}. In just a year after its forming in New York in June 1933, it had 6,500 members in 15 national chapters. In 1937, it joined with the newly formed Congress of Industrial Organizations (CIO) as its first professional group. By 1945, it had 10,000 members. Before the union dissipated in 1946 when the Taft-Hartley Act expelled communist sympathizers from all unions, it started the FAECT Technical School (reacting to the restrictions it felt the examination prerequisites imposed on those who were vocationally trained and saw professional licensing as a mechanism to keep pay rates artificially low), and responded to the shortcomings of the New Deal

\textsuperscript{93} I reference a number of articles in this list. "Can Unions Save the Arts and Other 'Creative' Professions?" \textit{Alternet (Labor)}, March 20, 2013. http://www.alternet.org/comments/labor/can-unions-save-arts-and-other-creative-professions".
Public Works projects by proposing a national Integrated Public Works Program for the construction of housing hospitals, schools, and infrastructure.⁹⁴

FAECT offers both a positive example - unions can exist in the profession and address issues ignored by a professional organization like the AIA - and a negative example - it did not survive the less-than-extreme circumstances of the profession after the end of the Depression and WWII. Today, an architectural union would have to overcome the belief that the AIA alone serves the needs of the profession. If the AIA serves the firm owners and not the staff, another type of organization could perhaps serve both. A union that is defined not along a labor/management divide but on a common fight against precarity is possible. It would concentrate on building a safety net for laid off workers, would demand wage transparency in the workplace, and allow the employed architect to have more say about the hours and benefits of work. Such unions exist. They are not a dream.

VI. Conclusion

This research has not yielded what I had hoped it would: legal ways for architecture to plead its (sad, undervalued, and precarious) case to antitrust lawyers or government officials. As indicated in the introduction, this hope sounds, now, naïve. However, the research has been helpful in directing attention to the areas that can produce change in architectural patterns – those outlined in Section IV. But the legal ways outlined are only the mechanisms for change; they have no value if there is no will for change.

Two things have been the most striking during this year of research (besides my limits as a legal scholar and the extent to which cultural theory differs from legal logic; lawyers are not Foucauldians). The first is the evidence that architecture more than the other professions has absorbed the competition directive so thoroughly. I started by thinking we were unfairly victimized by antitrust law; I now believe that we have victimized ourselves via an ethos of individuality and self-protection. But this self-imposed ethos is linked to a dearth of organizational mechanisms that counteract individualism and offer the benefits of cooperation. The NLAP for lawyers not only shares information but argues for the justice achieved for both employers and employees when information is shared. The AMA as well recognizes the shared plight of its doctors in an insurance-dominated era. They have asked the RAND Corporation to identify the factors that lead to physician satisfaction.95 Architecture's lack of similar organizations certainly has to do with the lack of AIA will, but that lack of will reflects the chicken-and-egg problem of its members not expecting it.

This absorption of the competitive ethos has many explanations - the pie is only so big and it's me against the others for a slice; our education process has students compete against students for talent recognition; the aesthetic dimension of our work makes establishing metrics for individual or firm value nearly impossible to determine and hence ever disputed;96 the aesthetic dimension makes individuality itself a marketing ploy. But whatever the cause, it inhibits collective action.

The second is the absolute American faith in competition that is inscribed in the Sherman Act and is unchallengeable in the courts. Where did that come from? Is it the case that our forefathers so equated democracy with competition that this is constitutionally unquestionable? Perhaps legal scholars have

96 Indeed, there is an irony in putting together these last two explanations. The firms of other professions compete against each other to attract the “best and the brightest”, something that offers pride, dignity, and higher salaries to incoming professionals. For the overtness of architecture’s student “star” system, when they look for jobs, there is no clear way for that graduate to identify herself as a “best;” all graduates scramble fairly equally in the job market, based more on who they know than their actual talent.
explored this and the answer is yes; or more likely, it wouldn’t matter since, for all intents and purposes, they go hand in hand in our current definition of democracy. What remains of interest, however, are the instances where competition at one level precludes it at another or prevents a more socially just outcome where all win.97

There are many cases that value competition at one level only to thwart it at another (or vice versa) – an indication of the incompleteness of this term, especially as it applies to higher education and the professions. US v. Brown University (1992) was a civil suit involving an agreement that Brown University and the seven other Ivy League colleges and MIT had to admit students and distribute need; they established common methods to determine what the applicants’ families could afford. The group believed this served a public purpose by assuring students were admitted on merit and given aid by need - thereby serving the largest possible group of eligible students. The Justice Department accused the group of violating the Sherman Antitrust Act "by illegally conspiring to restrain price competition on financial aid" to prospective undergraduate students, objecting to the "collusive establishment of a policy" to exclude merit as a consideration. The principle of competition in this case both reduced the total number of financial assistance awards they all could make because of the cost of administering a bidding war and reduced diversity by insisting that those not needing aid be considered in the same group. Certainly limiting collusion in the admissions process led to fewer entrants being able to compete for places in the university.98

In Jung v. Association of American Medical Colleges (2002), a group of physicians headed by Jung filed a class action lawsuit alleging that the National Resident Matching Program (NRMP) violates antitrust laws, contending that NRMP practices stabilized lower-than-competitive wages by forcing applicants for house officer positions to forfeit their right to negotiate for better wages and conditions and imposed exhausting working conditions on residents. The AAMC won, showing that the NRMP makes the market for residents’ employment more efficient.99 Here, competition is oddly denied when it favors the stronger party - the AAMC - and ignores the fact that the consumer/patient suffers when residents can't function for lack of sleep or are brusk for lack of compensation. Likewise, the AIA’s attempt to insure that firms not abuse employees with bad wages and contracts during down turns in the economy was

97 I had wondered in our discussions with Yale Law Professor Alvin Klevoric whether this “inconsistency” couldn’t be argued against, but he pointed out, what would you argue? The only terms of better or worse is the economic pay off of competition.


rejected by the DOJ, ignoring the fact that those entering the profession are consumers, too, of a commodity known as “professional practice;” access to the profession is limited.100

These two surprises - internalized competition and governmental demand for it - are of course related in a self-fulfilling circle: the top down enforcement of competition that comes with the Sherman Act determines the internally absorbed one of our profession and the personal internalization of competition that is the hallmark of capitalism (in not just architecture but all cultural endeavors) allows “competition” to be an essential definer of American democracy. Be that as it may, working cooperatively and sharing information is an option even if we have been led to believe that it is a utopian dream.

These observations implicate entities at opposite ends of the spectrum and at opposite scales: individual architects on the one hand (bottom up) and the federal institutions on the other (top down). But the middle - occupied by institutions that administer these ideologies also matter. The DOJ and the FTC in this regard can themselves be seen not as mere instruments of the top (the US government) but as institutions in the middle operating according to their own organizational entities. The efficacy of the duality of the DOJ and FTC has been debated as has the general ability of either to properly oversee their vast domain. As Daniel Crane in his "The Institutional Structures of Antitrust Enforcement" says,

[T]he design of the antitrust agencies [is] not the product of a unified draftsman… the structure itself [is] inelegant, redundant, and often problematic. Efforts to change this structure have repeatedly failed…[T]he time will come when political forces transpire to bring the American dual-agency structure into the public spotlight.101

A general sentiment amongst lawyers is not that the law, judgments and acts are arbitrary – they are too broad to be so – but rather that they are so unevenly enforced.

Professional institutions such as the AIA, the ABA, and AMA as well as these professions’ certification boards, NCARB, (ABA), and ABMS – also matter. Their part must be played in furthering fair labor practices and better compensation for difficult knowledge work. The link between a just profession and its ability to produce just solutions for the public must be made by these institutions.

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100 An example of not competing at one level to compete at another is in BMI v. CBS in which the Supreme Court held that the significant cost savings inherent in blanket licensing arrangements for musical compositions performed on radio and television were significant enough to create a whole new product and, thus, justified rule of reason treatment for pricing restraints. Broadcast Music, Inc v. Columbia Broadcasting System, Inc American Society of Composers, Authors and Publishers v. Columbia Broadcasting System, Inc, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).
101 See Daniel Crane's "The Institutional Structures of Antitrust Enforcement," Oxford Scholarship Online, 2011,