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# The Sherman Antitrust Act and the Profession of Architecture

In February of 2014, a colleague and I met with Robert Ivy, CEO of the American Institute of Architects (AIA) to ask why the AIA is so ineffectual in promoting better fees and wages for architects. The answer was direct and unambiguous: two antitrust proceedings against the AIA in 1972 and 1990 were so imprinted on the AIA that such discussions were off-limits. Architects, like other professionals, must compete for fees with no discussion or be charged with collusion. But I wondered why architects seemed to compete more and earn less than other professions. Did we interpret antitrust laws with more paranoia than other professions? Was architecture “unfairly” or unevenly treated in antitrust laws? Hence this research. [1]

To offer the conclusion quickly, the answer is, nominally, “no.” But pursuing these questions offers many other lessons about the ways power and economics weave through antitrust laws, about how professions in general, not just architecture, have been and are still treated by these laws. While it is not the case that these antitrust proceedings caused the AIA to be ineffectual, that weakness, alongside the weakness of architecture as a profession and the evolving history of antitrust law, affect architectural practice in multiple ways.

This essay’s foray into US law is complicated by the fact that the United States operates under “common law,” a juridical system in which case law is of primary significance and published judicial opinions central; this is in contrast to countries, such as the UK, where codified statutes predominate. Understanding the meaning of antitrust law through a review of significant judicial decisions means wading through innumerable cases, each connected to other cases, which serve to qualify the (seemingly) central one. For the reader as well as us researchers, this makes for an exacerbating and technical slog—bear with this, please!—though reviewing case law not only reveals something about the foundations of how professions are conceived today but allows us to imagine spaces of intervention within this formation of law, economy, and architecture.

## Antitrust Laws

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. Its aim was to ensure competition in all forms of busi-

Citation: Peggy Deamer, “The Sherman Antitrust Act and the Profession of Architecture,” in the *Avery Review* 36 (January 2019), <https://www.averyreview.com/issues/36/sherman-antitrust-act>.

[1] 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 affected by our legal 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. 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.

ness. The Act declares illegal and a felony any restraint on trade in the United States through either price fixing or monopolization. It also authorizes private parties injured by conduct violating the Act to bring suits for treble damages (i.e., three times as much money in damages as the violation cost them). [2]

The legislation was the result of intense public opposition to the concentration of economic power within corporations and trusts following the Civil War, particularly those that monopolized the market for transporting farm goods by rail. Section 1 of the Act—its most frequently cited portion—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... [3]

As Justice Stevens says, quoting Justice Brandeis, “read literally, Section 1 [of the Sherman Act] would outlaw the entire body of private contracts since they constrain free trade.” [4] Consequently, the history of antitrust rulings has been a process of determining what constitutes reasonable “restriction of trade” and what does not. In 1920, the Supreme Court first applied the “rule of reason” to interpret the Sherman Act and explained that only “unreasonable” restraint of trade through acquisitions, mergers, exclusionary tactics, and predatory pricing constitutes a violation of the Sherman Act. The indeterminate nature of what would “reasonably” be exempt from enforced competition is part of what drives the history of antitrust laws and their constant “refinement.” The “rule of reason” itself is divided into two types—those that pass the “quick look” and those that don’t. While offering the courts a way to quickly identify those practices that are immediately condemnable from those aren’t, “quick look” merely indicates the level of intolerance different judges have for various business behaviors.

For more than a decade after passage, the Sherman Act was invoked only rarely and never successfully, mainly because of multiple and ambiguous interpretations of what constituted commerce among states. Its only effective use early on was against trade unions. The full thrust of the Act was first felt in *Swift & Co. v. United States* (1905), when President Theodore Roosevelt directed his attorney general to bring a lawsuit against the “Big Six” meatpackers that were engaged in a conspiracy to fix prices and divide the market for livestock and meat—blacklisting competitors who failed to go along, using false bids, and accepting rebates from the railroads. When the meatpacking companies were charged with antitrust federal injunctions in 1902, the Big Six agreed among themselves to merge into one National Packing Company in 1903 so they could continue to control the meatpacking trade. The case was then heard by the Supreme Court in 1905 and, in broadening the definition of “interstate commerce,” ruled that this “current of commerce” was to be ruled by Congress. Congress broke the monopoly up.

*Swift & Co. v. United States* (1905) resulted in the first consent decree under the Sherman Act. Consent decrees are now standard ways of

[2] This convention of treble damages is peculiar to antitrust litigation and is the reason they are especially attractive to private litigation.

[3] 15 US Code Sections 1-2. See “Legal Information Institute,” [link](#) and [link](#).

[4] See the *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 5 L.Ed.2d 637. 1978. Fastcase. Web. June 21, 2015.

resolving antitrust suits brought by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). [5] They have the advantage of avoiding the expense of a trial and any admission of guilt. In lieu of litigation, the parties engage in negotiations to set new rules of behavior in order to stop the perceived illegal behavior and prevent possible recurrence. The consent decree is then submitted to the court and a consent judgment is entered as an agreed-upon order of the court. The parties, it should be noted, are not equal in these deliberations. [6]

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—prohibitions meant to stop monopolies at their inception. In addition, a portion of the Clayton Act stated that unions, originally the target of the Sherman Act, should be exempt from antitrust laws because they were not monopolies and “the labor of a human being is not a commodity or article of commerce.” [7] Congress then officially exempted unions from antitrust laws in 1932 with the Norris-LaGuardia Act, which banned so-called yellow-dog contracts, under which workers agree as a condition of employment to not join a labor union.

The federal reach of the Sherman Act was tested in 1943 with *Parker v. Brown* (1943). In this proceeding, a raisin producer challenged a California law stating that only 30 percent of their crops could be sold through ordinary commercial channels. The Supreme Court, ruling in favor of the state, declared that the actions of a state government are exempt from the Sherman Act if it acts as a sovereign and not as a co-conspirator to restrain trade or establish a monopoly. This became known as the Parker immunity doctrine, or state exemption. [8]

Further limitations on antitrust hegemony came in 1965 with the Noerr-Pennington doctrine, which made it legal to lobby against antitrust law. The doctrine states that private entities are immune from antitrust when lobbying for 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. This means, essentially, that antitrust laws, which are meant to guarantee competition, can be overruled by legislation, and, in effect, only legislation.

### Antitrust Laws and the “Learned Professions”

Early on, professions such as law, medicine, engineering, and architecture were considered to be exempt from antitrust law. In ruling that medical practitioners “follow a profession and not a trade”—and thus exempted doctors from competing on fees—*FTC v. Raladim Co.* (1931) merely certified the favored-child view the courts had traditionally held for the professions. [9] The initial change in status came with *American Medical Association v. United States* (1943), in which the Supreme Court upheld the conviction of doctors for conspiring to restrain the business of Group Health Insurance in the District of Columbia. The indictment charged that, to prevent Group Health from carrying out its business, the doctors coerced practicing physicians from accepting employment under Group Health. But the professions were still understood to

[5] The determination of what the DOJ and the FTC each take under their purview is not clearly established, but they have developed different areas of expertise and different procedural methods. The DOJ undertakes an investigation and notifies the target of the investigation and then attempts to resolve it pre-suit; the FTC issues complaints. While the DOJ and FTC are the primary regulators of antitrust, legal cases can be brought as well by state attorneys general and private plaintiffs.

[6] By the 1950s, 87 percent 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 percent in this manner.

[7] 15 U.S.C. Sections 12, 13, 14–19, 20, 21, 22–27. See “The Clayton Antitrust Act,” [link](#).

[8] The McCarran-Ferguson Act of 1945 further specified the application of the state exemption as applied to the insurance industry. This Act says that “Acts of Congress,” i.e., federal antitrust laws, will not preempt state laws that were deemed to have sufficient care for public interest. The exemption allows the insurance industry to share information on insurance losses so that the industry can better project future losses and thus set viable prices for their products; this in turn allows small insurers access to data that they need in order to compete with the large firms. In other words, this allows “collusion” of shared information that stimulates competition between firms of all sizes. Attempts to repeal McCarran-Ferguson, because the states in the end cannot and do not regulate the industry, are initiated nearly every year, most recently with regard to the Affordable Care Act. Insurance has withstood them all. See Joanne Doroshov, “Time to Reform that Other Insurance Industry,” *Huffpost Politics*, May 25, 2011, [link](#).

be different from regular businesses. The Court noted that ethical rules that were not designed to restrain trade, even if they did have that effect incidentally, were legal. Indeed, in *United States v. Oregon State Medical Society* (1952), the district court, ruling against the government, 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, and the Supreme Court upheld this verdict. [10]

In the early 1970s, however, the DOJ began more direct attacks on the professions. The Corp of Engineers and General Services Administration in particular agitated against the fees charged by the architects and engineers they employed. [11] In 1971, the DOJ obtained a consent decree that required 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...bidding on a price basis to secure a professional engagement.” [12] Professional codes of ethics were increasingly seen as the essence of collusion and became the target of the DOJ.

But the most important changes to state-regulated professions under the Sherman Act arose in private litigation. *Goldfarb v. Virginia State Bar* (1975), a landmark Supreme Court decision, ended the “learned professions exemption” (LPE) while also limiting the reach of the Parker immunity (states’ rights) doctrine. In this case, Lewis Goldfarb and his wife wanted to buy a house and needed title insurance that could only be written by a member of the Virginia State Bar. They found that none would examine a title for less than a 1 percent fee (a figure derived from 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 the Sherman Act. The district court found the County Bar but not the State Bar (exempt under the Parker immunity doctrine) liable for such a violation, stating that “minimum fee schedules are a form of price fixing.” As for the LPE, 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, T]HE 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. [13]

On appeal, the Supreme Court determined the state exemption used to protect the Virginia State Bar was not applicable and found it, too, responsible for price fixing; at the same time, it did acknowledge that states retain particular interests with regard to professions and, in footnote 17, made it clear that the Goldfarb ruling was particular to the Virginia State Bar. [14]

Two years later in *Boddicker v. the Arizona State Dental Association* (1977), Vernon Boddicker and other dentists claimed that two Arizona dental

[10] *United States v. Oregon State Medical Soc*, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978. 1952. Fastcase. Web. June 21, 2015.

[11] See Barry Wasserman, Patrick J. Sullivan, and Gregory Palermo, *Ethics and Practice of Architecture* (New York: John Wiley & Sons, Inc., 2000), 115.

[12] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 5 L.Ed.2d 637. 1978. Fastcase. Web. June 21, 2015.

[13] Thomas D. Morgan, “The Impact of Antitrust Law on the Legal Profession,” *Fordham Law Review*, vol. 67, no. 2, 1998, [link](#).

[14] *Goldfarb v. Virginia State Bar* 8212 70, 44 L.Ed.2d 572, 95 S.Ct. 2004, 421 U.S. 773. 1975. Fastcase. Web. June 21, 2015.

associations along with 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 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.” [15] 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 another. 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, 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.” [16] In addition to the kick this ruling gave to enforced competition, it is significant because the National Society of Engineers made the rare decision to not accept the DOJ’s offer to settle by way of consent decree and instead contested its allegations in court. Their subsequent loss was a signal to all the other professions, including architecture, that such a stance was not only unlikely to succeed but was also enormously expensive.

The view that professional work is, like commercial activity, subject to antitrust laws continued into the 1980s, with a number of cases in which professions lost at trial. In a 1984 Supreme Court opinion in *Arizona v. Maricopa County Medical Society*, doctors hoped to establish agreed-upon fees to compete with HMOs; in *FTC v. Indiana Federation of Dentists* (US), dentists tried to form a “union” to resist insurers’ demands for copies of X-rays to determine if a procedure was necessary; in *FTC v. Superior Court Trial Lawyers Ass’n* (1990), lawyers organized a strike demanding higher fees for representing criminals for the District of Columbia. None succeeded, and more recent cases have continued the trend. The limit of professional exclusionary practices was 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. [17] And in 2014, a seemingly benign “don’t poach” professional ethics clause requiring members to “respect the integrity of other teachers’ studios” and “not actively recruit students from another studio” was struck down in *FTC v. Music Teachers National Association, Inc* (MTNA). [18]

In general, the application of antitrust laws to the professions is in a constant state of adjustment as codes of ethics are tested and the DOJ and

[15] Cited in R. T. McCoy, “Notes: Antitrust Liability of the Professional Associations after *Goldfarb*: Reformulating the Learned Professions Exemption in the Lower Courts,” *Duke Law Journal* (1977), link; 1,056–1,057.

[16] *National Society of Professional Engineers v. United States*, [435 U.S. 679] link, 692 (1978). 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... That policy decision has been made by Congress.” US Federal Trade Commission, *Statement of Jay Angoff of Counsel, Roger Brown & Associates before the Antitrust Modernization Commission on the McCarran-Ferguson Act*, October 18, 2006, link.

[17] 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. The issue of state boards having practitioners on them has to do with the different roles state boards vs. practitioners play. State boards advocate for the public while practitioners advocate for their profession. This difference (discussed more later) is found in the tension in architecture between the National Council of Registration Boards (NCARB), which advocates for the public (through requiring licensure), and the AIA, which advocates for the profession.

[18] The 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) insisting that every MTNA meeting begin with antitrust videos.

FTC try to determine a profession’s “market power.” The decisions increasingly imply that professional organizations can’t claim social ethics to avoid competing against each other for fees, clients, or workers.

### Architecture

Architecture, it should be said, has a long history of setting fees.

Richard Morris Hunt, co-founder of the AIA in 1857, inadvertently established a standard working rate when he sued a client for nonpayment of his 5 percent architectural fee. When he won the case, the 5 percent fee became the norm and was published as such in a subsequent AIA document. When competition for scarce jobs meant architects still charged less and competed on fees in the early 1860s, individual AIA chapters developed fee schedules for various job types. 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.

The landmark antitrust cases affecting the professions discussed above were joined by 1972 and 1990 injunctions against the AIA. The 1972 consent decree was the result of informal inquiries by the DOJ concerning the Institute’s Anti-Competitive Bidding Standard. At stake were the AIA’s suggested fee schedules, the prohibition of members from discounting fees, the strict guidelines for advertising, and the prohibition of competition governing its members. In May 1972, the DOJ and the AIA entered into a consent decree:

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 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. [19]

[19] *United States v. The American Institute of Architects*, Civil Action No. 992-72, 1972.

After much debate, with many members arguing against the consent judgment—insisting that competitive bidding would harm architecture’s obligation to the public—the AIA accepted the DOJ’s terms.

The 1990 consent decree stemmed from an investigation begun in the Reagan administration and represented a much broader complaint of anticompetitive behavior than the previous suit. The DOJ cited the president of the Chicago Chapter of the AIA, Thomas J. Eyerman, for distributing six thousand copies of a document prohibiting price competition regarding fees and compensation in 1984. Despite the Institute’s claims that the Chicago policy was rescinded within a few months and was not intended to violate the Sherman Antitrust Act (or the 1972 consent decree), AIA National was held responsible for Chicago’s indiscretion. In the decree, the parties stipulated to 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. [20]

[20] *United States v. The American Institute of Architects*, Civil Action No. 90-1567, 1990.

**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 their own prices as they want. If individual architects agree with each other on what they will charge for a project, it subjects them to antitrust attack. Architects can also be implicated for banding together to resist unfair pricing or hiring practices. For example, two architects agreeing to boycott an architectural competition is illegal; architects in a local area agreeing to not submit an RFP for a certain project is illegal.**

**In addition to the two consent decrees, the most significant case affecting mandated competition between architects is *Mardirosian v. American Institute of Architects* (1979), a case that 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 architectural codes of ethics.**

**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. The dispute emerged over architectural services for the alteration and refurbishment of the historic Union Station and National Visitors Center in Washington, D.C. Auerbach was contracted to prepare design and contract documents for the visitors' 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, claiming it violated Standard 9 of the AIA Code of**

**Ethics, which 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 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. [21]

[21] *United States v. The American Institute of Architects*.

Under Standard 9, the AIA stripped Mardirosian of AIA membership and he in turn charged the AIA with wrongful suspension of his AIA membership and sought treble damages against the AIA and Auerbach. [22] 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. Mardirosian demanded its removal. Auerbach filed a counterclaim for defamation, interference with contractual relations, and "conspiracy to deprive counterclaimant of his livelihood." [23]

[22] Mardirosian received legal support from Ralph Nader's Public Citizen consumer advocacy group. "Aram Mardirosian, Architect, Dies," *Bangor Daily News*, April 12, 2013, [link](#).

[23] *Mardirosian v. The American Institute of Architects*, 474 F.Supp. 628. 1979. Fastcase. Web. June 22, 2015.

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 *National Society of Professional Engineers v. United States* from the year prior, 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 a broad opinion that all ethical standards with anticompetitive effects would be 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; thus he was entitled to damages from the AIA under Section 4 of the Clayton Act. But more significantly, the court found that Standard 9 was illegal, its purpose and necessary effect being the suppression of competition. "The 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." [24]

[24] *Mardirosian v. The American Institute of Architects*.

In architecture, codes of ethics have existed from the early years of the AIA's formation. Prior to Mardirosian, the AIA Code of Ethics modified issues of architectural competition procedures (1969), political contribution policies (1970), recommended fee schedules (1971), rules governing the architect as developer (1974), and design-build rules (1978). After Mardirosian, in 1980, the architectural Code of Ethics was withdrawn 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 Code of Ethics in 1987. The most recent Code of Ethics (2012) is



organized around three 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 toward which members should aspire in professional performance and behavior; and Rules of Conduct, the violation of which are grounds for disciplinary action by the Institute. [25]

### Observations

The original question that motivated this research—*why can't we help the profession by mitigating competition between firms, avoiding a race to the bottom?*—now seems quaint. Not only is it naïve, but why would one want to go backward in time to enforce professional elitism, *noblesse oblige*, and protectionism? Why would one want to side with adamant (anti-antitrust) capitalists who also begrudge antitrust laws for inhibiting dominant businesses from reaping their supposedly just rewards? And yet, it remains the case that rulings in the name of antitrust often seem arbitrary, socially unjust, or politically motivated and that the professions in general, and architecture in particular, are buffeted by larger and unsympathetic politico-economic interests. In the 1970s, when Nixon terminated Bretton Woods and ushered in neoliberal economics, large and wealthy corporations were spared antitrust lawsuits while the professions were not. The DOJ's judgments were so supportive of business over consumer/public interest that Congress had to pass a law, the 1974 Tunney Act, requiring federal courts to review DOJ settlements. [26] In the 1980s, Reagan's free-market and anti-labor economics (most memorably his busting of the Professional Air Traffic Controllers Organization [PATCO] in 1981 and the termination of controllers' contracts, just months after he became president), [27] were sympathetic to big business and initiated the era of too-big-to-fail monopolies. [28] Today, the "innovation" economy operates in the context of strong intellectual property laws traditionally in conflict with antitrust law. Currently, the DOJ and FTC regularly obtain judgments favoring mega-corporations like Apple, Microsoft, Google, and Facebook.

Within the professions, a hierarchy of power affects their respective abilities to limit the reach of antitrust laws. Lawyers make the laws and contribute 10 percent of the US GDP; the health care industry accounts for 17.5 percent of the US GDP. [29] By sheer number—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 vastly outnumber architects: in 2015, there were 1,300,705 lawyers, 908,508 doctors, and 141,200 architects. [30] Beyond the numbers, though, there are other factors affecting power. Lawyers, as "officers of the courts," make the very laws we are analyzing. As one law journal has recognized, law has, ironically, been the least affected by *Goldfarb*, the first and most powerful intrusion of antitrust into the professions when it was directed at the State Bar of Virginia. Numerous rulings in favor of lawyers challenging antitrust injunctions have successfully used the state/Parker exemption such that, "lawyers remain able to obtain regulatory protection for most of their anticompetitive behavior." [31] Medicine escapes antitrust laws for different reasons. Because it does not have a single constituent structure and is, instead, regulated by a number of state and private operatives, each made more complicated by Medicare and Medicaid, no overall

[25] "Ethics: From the Office of General Counsel—2012 Code of Ethics & Professional Conduct, The American Institute of Architects," [link](#).

[26] The Act 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.

[27] 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 organized a strike 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, and PATCO were blindsided when Reagan went after them.

[28] As Paul 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 have studied the issue often describe as the virtual end of antitrust enforcement." Paul Krugman, "Robber Baron Recessions," the *New York Times*, Op-Ed, April 18, 2016, [link](#).

[29] See "Lawyers Now Take 10 percent of US GDP?" October 18, 2013, AgainstCronyCapitalism.org, [link](#).

[30] The information on engineers is very scarce regarding their numbers, economic impact, and ability to negotiate antitrust laws. The data indicates that there are approximately 420,000 professional engineers with an estimate that 50,000 are structural.

[31] For example, one exemption dealt with lawyers' access to directory listings, another with limits on advertising, another with opening access to the profession, and another upholding rules limiting the ability of lawyers to partner with laypeople. See Thomas D. Morgan, "The Impact of Antitrust Law on the Legal Profession," *Fordham Law Review*, vol. 67, no. 2, 1998, [link](#).

legislation monitors medical practice. In addition it operates under “ethical self-regulation.”[32] An article in the *Journal of the American Medical Association* states that “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.” [33]

Architecture has a minor role to play in shaping or fending off anti-trust proceedings. It does, however, as a client of the government, not escape its attention. The fact that the General Service Administration (GSA), the Army Corps of Engineers, and other government agencies resented the fixed fee schedules of architectural and engineering societies as far back as the 1960s should not be overlooked in the power dynamics shaping the DOJ and FTC attitudes toward architecture. [34]

### Ways to Collude Legally—Can’t We Cooperate?

Having said all this, there are tactics that would allow architects to avoid the directive to compete against each other. There are three ways to legally collude: state exemption and legislation; unionization; and implicit collusion and third-party surveys.

#### • State Exemption and Legislation

The Parker (or state) exemption is the most common justification for antitrust exemption. For this exemption, a state, as has been explained, has to initiate the law or act that legitimizes noncompetitive behavior. Because a state has to have significant social or economic incentives do so and because architecture does not offer such significance, state exemption for architectural business has never come up. For this to change, NCARB, as the architectural arm of each licensing state, would need to initiate such legislation. It is unlikely that they would ever do so, but it is still possible to imagine their suggesting something similar to the exemption for insurance. The McCarran-Ferguson (1945) Act allows the insurance industry to share information across states, allowing small firms to access data about industry losses and pricing in order to compete with the large firms (see footnote 7). This might be: “Architecture, like insurance, is better served for sharing risk information across organizations regarding future risk assessment to establish realistic fees for our products. Such shared information will allow small firms to more easily enter the marketplace.”

The state exemption provided by *Parker* allows political lobbying to legislate noncompetitive behavior to address social or economic unfairness. [35] This, of course, means that an organization or a profession must have the means to lobby in Washington and/or the separate states to effectively initiate and pass legislation. The AIA, which does lobby, does so with little money, little hope, and only minor points of legislation.

#### • Unions

The Clayton Antitrust Act of 1914, as we have seen, exempted unions from the Sherman Act because “the labor of a human being is not a commodity.” [36]

[32] Frank P. Grad, “The Antitrust Laws and Professional Discipline in Medicine,” *Duke Law Journal* 443–486 (1978), [link](#).

[33] Frances H. Miller and Thomas Greaney, “The National Residency Matching Program and Antitrust,” in *JAMA*, vol. 289, no. 7 (February 2003), [link](#).

[34] See Barry Wasserman, Patrick J. Sullivan, and Gregory Palermo, *Ethics and Practice of Architecture* (New York: John Wiley & Sons, Inc., 2000), 115.

[35] The Noerr-Pennington doctrine of 1961 protects petitioning activity directed at government agencies even if the desired governmental action adversely affects competition.

[36] 15 U.S.C. Sections 12, 13, 14–19, 20, 21, 22–27. See “The Clayton Antitrust Act,” [link](#).

The Norris-LaGuardia Act of 1932 strengthened the legitimacy of unionization. The Wagner Act of 1935—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, including strikes. Unions, in other words, offer mechanisms that protect the architectural worker from many of the vagaries that make employment in the profession so precarious. White-collar professions and the creative industries, while historically resistant to unionization on ideological and class grounds, more and more accept the value of collective bargaining. Unionization in architecture is not a ridiculous idea nor an unrealistic possibility.

- Implicit Collusion and Third-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” that a certain price helps everyone in the industry. Implicit collusion depends on mutual interdependence among firms and an intimate knowledge each has with the others. Richard Morris Hunt’s establishing, inadvertently, the 5 percent architectural fee adopted by the rest of the profession when his fee was published after a suit against a nonpaying client is implicit collusion. [37] Implicit collusion explains the historical predominance of the 6 percent commission for realtors. The multiple listing service (MLS) provides efficient information dissemination, and the fact that listings include those of both buyers and sellers makes it easy for MLS collective members to boycott a price-cutting seller by limiting access to that buyer’s customers. All realtors benefit from keeping their commissions the same in a realm where agents need to cooperate. [38] Likewise, the fact that all gas prices in a given area will usually be the same is tacit collusion; careful observation of each other’s pricing and the knowledge that one price works best for all (none benefit from a drive to lower or higher prices) delivers agreement without explicit communication.

Third-party surveys—shared information about pricing that is merely description, not advocacy—can aid tacit agreement. Antitrust laws have determined that industries conducting their own salary surveys can be seen as practicing illegal price-fixing while those that are neutral and “outside” the industry—merely reporting data—are legal if they are conducted by a purchaser, government agency, academic institution, or trade association but not by competitors, according to particular standards. [39] The third-party survey is what explains the known and “agreed-upon” salaries for associates in the legal profession. In the 1980s, 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, and it became the standard. [40] In architecture, universities are in an excellent position to initiate such a third-party survey if they, too, were interested in the profession as much as they are interested in competing against each other.

Beyond these legal forms of collusion carved out of antitrust laws, we have, of course, the legal right to cooperativize. One can take a stand against enforced competition at a number of different cooperative levels: one can share administrative burdens and costs through joint management and distribution of

[37] 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.

[38] Lawrence J. White, “The Residential Real Estate Brokerage Industry: What Would More Rigorous Competition Look Like?” NELLCO Legal Scholarship Repository, April 6, 2006, [link](#).

[39] Namely, that the information provided by survey participants is based on data more than three months old; at least five providers are reporting the data upon which each disseminated statistic is based, and no individual provider’s data represents more than 25 percent of that statistic; and that 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. “Antitrust Regulations & Salary Surveys,” *Compensation Force*, [link](#).

[40] 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.

insurance, benefits, pay, and legal expertise. That is, form a consumer cooperative. One can share knowledge, expertise, resources, and even employees. That is, form a producer cooperative. Or one can have full cooperativization, sharing profits within a firm and across firms. That is, form a worker cooperative. [41] The legal structure for these is generally the Limited Liability Company in as much as only five states have cooperative forms for registering a business, and all of them preclude professions from this business model. Nevertheless, the LLC offers a “non-cooperativized cooperative” framework that architecture could readily adapt.

Likewise, one can register as a nonprofit. Here, MASS Design Group offers the most successful example of a firm that is able to do humanitarian work while paying its partners and employees fair wages. The access to grants (national and international) that comes with being a nonprofit provides income that is not only comparable to client-driven, for-profit work but allows the group to find projects they want to support. While nonprofits are susceptible to competition—they compete for grants and for projects—the ability to pursue projects opened up by its social nonprofit structure minimizes the pool they compete with and the mind-set that you are in it for the competition.

### Questions and a Speculative Conclusion

The absolute American faith in competition that is codified in anti-trust law is worth contemplating. Where did it come from? Is it the case that our forefathers so equated democracy with competition that it is a constitutional foundation? And more to heart of this architectural inquiry, how did the AIA, beyond antitrust directive, respond so easily to competition’s siren? At the 2014 National Convention, the keynote speakers celebrated their ability to deliver more services while charging lower fees. The AIA was instructing firms on how to better compete with each other. (“Let the fighting begin!”) While we are a profession filled with lots of egos and a few celebrities, the majority of architects recognize the difficulty in their shared profession. Why, then, do we stand for this? Why do architects not have professionally sanctioned programs that mitigate the problems imposed by competition or journals that monitor our precarity? Law has the National Association of Law Placement (NALP) that not only shares information describing the monetary and social structure of various law offices to which lawyers apply for work but also advocates for fee and wage transparency. [42] Medicine’s AMA recognizes the shared plight of its doctors in an insurance-dominated era and hires consultants to lobby for doctors’ autonomy. [43] Why does the AIA insist that there isn’t even a problem, let alone search for a remedy?

More fundamentally, what exactly is gained by architecture being a profession? What does licensure really provide? Being a “learned professional,” as we have seen, exempts workers from labor laws regulating minimum wage and overtime, and it precludes using legal cooperative models of incorporation. [44] But more than this, deprofessionalization can unburden architecture from its ideological hang-ups—aristocratic class identification, specialization that holds us apart from other actors in the architecture-engineering-construction (AEC) industry, the false ideal of superior expertise, willed ignorance of a complex balance of diverse social forces, unfulfilled

[41] Here, the example of Mondragon offers guidelines. The Mondragon Corporation is a federation of worker cooperatives based in the Basque region of Spain. It was founded in 1956 by graduates of a local technical college to make paraffin heaters and is now the tenth-largest Spanish company in terms of asset turnover and is the leading business group in the Basque area. It now employs 74,335 people in 257 companies, with production in finance, industry, retail, and knowledge.

[42] Some of the topics that this weekly blog covers are attrition/retention of lawyers, career transition, LGBT, public interest, women, and work/life balance.

[43] See AMA website, [link](#).

[44] For the requirements to be exempt from the Fair Labor Standards Act, see United States Department of Labor, “Wage and Hour Division,” [link](#).

notions of autonomy, fictitious ideas of being above business, the expense of elite education. [45] When instituted in the nineteenth century, the three goals of professionalism were to ensure a guiding, elite knowledge sector; to hark back to pre-capitalist ideals of craftsmanship and *noblesse oblige*; and to offer “progressive” divisions of labor. These are no longer goals of our work nor are they applicable in today’s economy. [46] Connecting horizontally across various trades/disciplines (construction, engineering, software, manufacturing, development); sharing with them more risk and reward; developing unique areas of expertise via the different allegiances each firm makes—these and other tactics unleashed by eschewing the confines of a particular codified profession can lead, symbolically and actually, to a more diverse, socially relevant, and economically democratic enterprise.

[45] The fact that both free-market proponents and neo-Marxists are critical of professionalism might give one pause about its ideological imperative. But it might also be an indication of where precisely the red and blue state workers can agree on a way forward.

[46] See Magali Sarfatti Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (New Brunswick, NJ: Transaction Publishers, 2013), xiii.