
ADMITTED TO THE INDUSTRY: OCCUPATIONAL LICENSING OF
PRIVATE COLLEGE COUNSELORS FOLLOWING THE 2019
COLLEGE ADMISSIONS SCANDAL

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In March 2019, federal agents arrested William “Rick” Singer, a private college counselor, for conspiring with parents, athletic coaches, and other individuals to secure his clients’ admittance to prestigious universities. The investigation, “Operation Varsity Blues,” exposed the illegal and unethical practices of an individual involved in the largely unregulated independent educational consultant industry.

Following this highly publicized scandal, federal and state legislators proposed statutes to curb the inequities in college admissions exposed by Operation Varsity Blues. For example, California legislators considered the “College Consultants Act,” which would establish a form of occupational licensing for members of the college consulting industry to ensure that the state can more easily track the activities of private college counselors.

This Note argues that, while the College Consultants Act is a positive step, this legislation does not go far enough to ensure fairness in the college admissions process or to protect the public from the unethical actions of purported private college counselors. Rather, California legislators and other state lawmakers should consider implementing a certification system, which would restrict a private college counselor’s ability to use an accredited title based on the state’s assessment of the professional’s skill, educational background, and ethics. Through a certification system, states could promote fairness in college admissions by deterring and tracking future fraud, resolving information asymmetry between consumers and private college counselors, and encouraging competent, ethical counseling practices.

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I. INTRODUCTION

In March 2019, federal agents arrested William “Rick” Singer—a private college counselor and owner of the Edge College & Career Network LLC—for conspiring with parents, athletic coaches, and other individuals to secure his clients’ admittance to prestigious universities.¹ The investigation, “Operation Varsity Blues,” exposed the illegal and unethical practices of a private college counselor involved in the largely unregulated independent educational consultant industry.²

Independent educational consultants are private counselors hired by prospective students and their families to provide private coaching, tutoring, or application review services.³ Singer, for example, initially “provided [students

1. Press Release, U.S. Atty’s Off. for the Dist. of Mass.s, Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme (Mar. 12, 2019), [hereinafter “U.S. Atty’s Off. for the Dist. of Mass.”], <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic> [<https://perma.cc/B2MQ-3SBZ>].

2. *Id.*; see also Alexia Elejalde-Ruiz, *College Admissions Consulting Was Booming Well Before the Bribery Scandal. Here’s Why.*, CHI. TRIB. (Mar. 17, 2019, 7:00 AM), <https://www.chicagotribune.com/business/ct-biz-college-admissions-consultants-scandal-20190314-story.html> [<https://perma.cc/3PVC-D9ZG>] (“[T]he Independent Education Consultants Association . . . sets ethical standards for its 1,850 members in an unregulated industry.”).

3. Erin Richards, *Do All Students Cheat on Their College Applications? No, Consultants Say, but There Are Plenty of Problems*, USA TODAY (Mar. 18, 2019, 4:27 PM), <https://www.usatoday.com/story/news/education/2019/03/14/admissions-scam-complicated-business-college-consultants-singer-loughlin/3160330002/> [<https://perma.cc/6NV3-5Y8K>]; see also Ishan Puri, *What Does a Private College Counselor Do: College Admissions 101*, HUFFPOST (May 13, 2016), https://www.huffpost.com/entry/what-does-a-private-colle_b_9943236 [<https://perma.cc/XRP8-2Z9B>].

with] legitimate college counseling services, including setting up test-prep tutors.”⁴ Singer’s “side-door” scheme, however, involved two unethical (and illegal) methods to secure applicants’ admission to highly selective schools, including Georgetown University, University of Southern California, Stanford University, and Yale University.⁵

First, Singer directed his employees to submit false athletic profiles, complete with staged photographs of clients rowing or playing water polo, to universities, “without regard for the applicants’ athletic abilities.”⁶ Clients then made payments to Key Worldwide Foundation, Singer’s purported non-profit charity, and Singer transferred the funds to athletic coaches’ programs.⁷ In return, the coaches designated the clients as recruited athletes.⁸ For example, a Yale women’s soccer coach allegedly accepted \$400,000 to facilitate the admission of a student as a soccer recruit, though the student had never played competitive soccer.⁹ As some schools reserve space in the freshman class for athletes, and other schools “pre-read” and accept athletic recruit applications during the early-decision admissions period, the applicants’ chances of admission at these schools were significantly higher than other applicants.¹⁰

Second, Singer arranged for clients to cheat on ACT or SAT exams.¹¹ Singer assisted parents in filing paperwork with testing boards, requesting that students take the exams under special circumstances due to a purported learning disability.¹² Clients were then instructed to use one of two testing centers under Singer’s “control.”¹³ At these testing centers, parents bribed individuals, through

4. Jennifer Levitz & Melissa Korn, ‘Why Didn’t You Believe in Me?’ *The Family Reckoning After the College Admissions Scandal*, WALL ST. J. (Jan. 17, 2020, 10:51AM), <https://www.wsj.com/articles/why-didnt-you-believe-in-me-the-family-reckoning-after-the-college-admissions-scandal-11579276312> [<https://perma.cc/WT25-T6S2>].

5. Information at 3, *United States v. Singer*, No. 19-CR-10078 (D. Mass. Mar. 5, 2019); Scott Jaschik, *Massive Admissions Scandal*, INSIDE HIGHERED (Mar. 13, 2019), <https://www.insidehighered.com/admissions/article/2019/03/13/dozens-indicted-alleged-massive-case-admissions-fraud> [<https://perma.cc/WK66-YWAK>].

6. Jaschik, *supra* note 5; U.S. Atty’s Off. for the Dist. of Mass., *supra* note 1.

7. U.S. Atty’s Off. for the Dist. of Mass., *supra* note 1.

8. *Id.*

9. Alia Wong, *Why the College-Admissions Scandal Is So Absurd*, ATLANTIC (Mar. 12, 2019), <https://www.theatlantic.com/education/archive/2019/03/college-admissions-scandal-fbi-targets-wealthy-parents/584695/> [<https://perma.cc/56YS-HAGS>].

10. Jeffrey Selinger, *There Is No Way to Prevent the Next Cheating Scandal*, ATLANTIC (Mar. 20, 2019), <https://www.theatlantic.com/education/archive/2019/03/college-admissions-scandals-are-impossible-prevent/585361/> [<https://perma.cc/26L7-U6F3>]; see also Information at 5, *United States v. Singer*, No. 19-CR-10078 (D. Mass. Mar. 5, 2019) (“Recruited student athletes at USC, for example, are typically considered by a designated admissions sub-committee, which gives significant consideration to their athletic abilities and which frequently admits applicants whose grades and standardized test scores are below those of other USC students The admissions offices at the Universities typically allot a set number of slots to each head coach of a varsity sport for that coach’s recruited athletes. At each of the Universities, the admissions prospects of recruited athletes are higher—and in some cases significantly higher—than those of non-recruited athletes with similar grades and standardized test scores.”).

11. Jaschik, *supra* note 5; U.S. Atty’s Off. for the Dist. of Mass., *supra* note 1.

12. Jaschik, *supra* note 5.

13. *Id.*

payments to Singer's non-profit, to take the exam for the students.¹⁴ Alternatively, they bribed proctors to correct answers after students completed the exam.¹⁵ For example, through Singer, actress Felicity Huffman paid a proctor \$15,000 to correct her daughter's SAT answers, increasing her score by "approximately 400 points over her PSAT, taken without [Singer's proctor] one year earlier."¹⁶

Singer was ultimately charged with, and pleaded guilty to, one count each of racketeering conspiracy, conspiracy to commit money laundering, conspiracy to defraud the United States, and obstruction of justice.¹⁷ Others involved in the scandal were convicted of similar charges, fined, and sentenced to jail time. For example, a former Stanford University sailing coach who accepted \$610,000 in bribes through Singer's admissions scheme pleaded guilty to racketeering charges and was sentenced to just "one day in prison, with time served."¹⁸ Actress Lori Loughlin and her husband, fashion designer Mossimo Giannulli, admitted to paying \$500,000 in bribes to both Singer and the University of Southern California to secure their two daughters' admission to the school.¹⁹ Loughlin was sentenced to two months in prison, and issued a \$150,000 fine and 100 hours of community service after pleading guilty to conspiracy to commit wire and mail fraud.²⁰ Giannulli was sentenced to five months in prison, fined \$250,000, and ordered to complete 250 hours of community service after pleading guilty to conspiracy to commit wire and mail fraud, and honest services wire and mail fraud.²¹ Additionally, fellow Hollywood actress Felicity Huffman pleaded guilty to one count of conspiracy to commit mail fraud and honest services mail fraud for her involvement in the aforementioned SAT cheating plot.²² The judge imposed a \$30,000 fine and 250 hours of community service, and sentenced Huffman to

14. *Id.*

15. *Id.*

16. Aff. in Support of Criminal Compl. at 72–73, *United States v. Singer*, No. 19-cr-10078 (D. Mass. Mar. 5, 2019), <https://www.justice.gov/file/1142876/download>, [<https://perma.cc/QR86-Y86A>]; see also Kate Taylor, *By Turns Tearful and Stoic, Felicity Huffman Gets 14-Day Prison Sentence*, N.Y. TIMES (May 23, 2020), <https://www.nytimes.com/2019/09/13/us/felicity-huffman-sentencing.html> [<https://perma.cc/94J3-7TGT>].

17. U.S. Atty's Off. for the Dist. of Mass., *supra* note 1; see also Kate Taylor & Patrick J. Lyons, *William Singer, the Man in the Middle of the College Bribery Scandal*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/william-singer-admissions-scandal.html> [<https://perma.cc/CS55-LSUU>].

18. Kelly McLaughlin, *Here's Everyone Who Has Been Sentenced in the College Admissions Scandal So Far*, INSIDER (Mar. 19, 2021, 3:31 PM), https://www.businessinsider.in/international/news/hereaposs-everyone-who-has-been-sentenced-in-the-college-admissions-scandal-so-far/amp_slidelist/75816429.cms [<https://perma.cc/42EN-FGPK>].

19. Mark Morales & Dakin Andone, *Lori Loughlin Sentenced to 2 Months in Prison in College Admissions Scam. Her Husband, Mossimo Giannulli, Got 5 Months*, CNN (Aug. 21, 2020, 10:04 PM), <https://www.cnn.com/2020/08/21/us/lori-loughlin-sentencing-college-admissions-scam/index.html> [<https://perma.cc/LY66-Y5V3>].

20. McLaughlin, *supra* note 18; Morales & Andone, *supra* note 19.

21. Morales & Andone, *supra* note 19.

22. Taylor, *supra* note 16.

fourteen days in a federal prison.²³ While Huffman paid the full fine, she ultimately served just eleven days at a Northern California federal prison.²⁴

Following this highly publicized scandal, federal and state legislators proposed statutes to curb the inequities in college admissions exposed by Operation Varsity Blues.²⁵ For example, U.S. Senator Ron Wyden (D-OR) introduced the “College Admissions Fairness Act,” which would, in part, limit parents’ tax deductions for “certain charitable contributions to colleges and universities,” thereby discouraging parents from using large donations to secure their children’s admission.²⁶

In California, which is home to a number of the schools implicated in the admissions scam,²⁷ state legislators proposed a bundle of bills addressing the scandal.²⁸ For example, Assembly Bill 697, to be codified at Section 66018.5 of the California Education Code, requires universities receiving Cal Grant funds to report to the legislature whether they provide “preferential treatment in admission to applicants on the basis of their relationships to donors or alumni of the institution.”²⁹ Additionally, Assembly Bill 1383, to be codified at Section 66022.5 of the California Education Code, stipulates that a California State University or University of California institution “shall not admit a student by admission by exception” unless the student’s admission has been approved “by a minimum of three senior campus administrators.”³⁰

Of these bills and newly adopted statutes, only one targets the private college counseling industry, rather than applicants or universities.³¹ The “College Consultants Act,” introduced by California Assembly member Evan Low, proposes that the state establish a form of occupational licensing³² for members of the largely unregulated private college consulting industry.³³ The bill provides that the California Secretary of State establish a “cost-effective electronic registration process for the registration of college consultants and college consulting firms” that make more than \$5,000 annually.³⁴ The bill also requires the Department of Consumer Affairs to create a “College Consulting Advisory Task Force,

23. *Id.*

24. Elisha Fieldstadt & Ezra Kaplan, *Felicity Huffman Released from Prison on 11th Day of 14-Day Sentence*, NBC NEWS (Oct. 25, 2019, 10:32 AM), <https://www.nbcnews.com/pop-culture/celebrity/felicity-huffman-released-prison-end-14-day-sentence-n1071921> [<https://perma.cc/RG4Y-DFEA>].

25. *See, e.g.*, College Admissions Fairness Act, S. 1732, 116th Cong. (2019); Assemb. B. 1312, 2019 Assemb. Reg. Sess. (Cal. 2019).

26. S. 1732, 116th Cong. (2019).

27. Patrick McGreevy, *California Legislation Inspired by College Admissions Scandal Goes to Gov. Gavin Newsom*, L.A. TIMES (Sept. 11, 2019, 4:35 PM), <https://www.latimes.com/california/story/2019-09-11/california-legislation-college-admissions-scandal-approved> [<https://perma.cc/KN77-VK3P>].

28. *Id.*

29. CAL. EDUC. CODE § 66018.5 (West 2021).

30. § 66022.5.

31. McGreevy, *supra* note 27 (discussing proposed legislation targeting applicants and universities).

32. Assemb. B. 1312, 2019 Assemb. Reg. Sess. (Cal. 2019).

33. Elejalde-Ruiz, *supra* note 2.

34. Assemb. B. 1312, 2019 Assemb. Reg. Sess. (Cal. 2019).

consisting of representatives from both the public and private sectors with expertise in education, to provide advice on the college consulting industry.”³⁵

Yet, as of November 30, 2020, the California Senate has not taken further action on College Consultants.³⁶ Therefore, this bill likely will not be enacted into law.

Nevertheless, this Note recommends that states adopt an independent educational consultant occupational licensing system, similar to the one outlined in California’s proposal, to prevent these consultants from engaging in unethical practices and to increase equity in the college admissions process.³⁷ National professional organizations, which often pave the way for the creation of state occupational licensing, already have indicated support for licensing of independent educational consultants.³⁸ Additionally, licensing of private college counselors would encourage more competent and ethical counseling.³⁹ Furthermore, licensing would ensure that consultants’ practices do not unfairly benefit clients and severely disadvantage other applicants.⁴⁰

Part II of this Note presents the landscape of the independent educational consultant industry, as well as the legal history and framework of occupational licensing. Part III analyzes the relevant costs and benefits of imposing licensing requirements on independent educational consultants. Finally, Part IV recommends that states adopt certification, a form of occupational licensing, to regulate who can call oneself an independent educational consultant, curb the behavior of bad actors, and increase fairness in the college admissions process.

II. BACKGROUND

A. *College Admissions and the Independent Educational Consultant Industry*

According to the National Association for College Admission Counseling, independent educational consultants are “professionals working on a fee for service basis who provide services exclusively to students and families in the college selection and application process.”⁴¹ In other words, independent educational consultants provide private, individualized coaching services to

35. *Id.*

36. *AB-1312 College Consultants Act*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB1312 (last visited Aug. 27, 2021) [<https://perma.cc/TQ4B-B5DC>].

37. Assem. B. 1312, 2019 Assemb. Reg. Sess. (Cal. 2019).

38. Richards, *supra* note 3 (“‘If something good comes out of this situation with Singer and the bribery, it will be that at least a handful of states will step up and say the time has come to look at licensure for educational consultants,’ said Mark Sklarow, the CEO of the Independent Educational Consultants Association, the nation’s largest professional group for such workers.”).

39. See Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1937 (2018).

40. Sheba Turk, *College Consulting Is a Growing Industry, but Critics Fear It Only Helps Privileged Students*, CBS: 4WWL (May 13, 2019, 7:18 AM), <https://www.wwtv.com/article/news/college-consulting-is-a-growing-industry-but-critics-fear-it-only-helps-privileged-students/289-35a1a703-dc30-418d-a09a-6eafdc2de2b5> [<https://perma.cc/RUF5-FY2B>].

41. NAT’L ASS’N FOR COLL. ADMISSION COUNSELING, *GUIDE TO ETHICAL PRACTICE IN COLLEGE ADMISSION 13* (2020).

prospective college students.⁴² As college admissions in the United States has become increasingly competitive, specifically among the most prestigious schools,⁴³ the independent educational consultant industry has grown precipitously.⁴⁴ For example, in 1996, the two professional associations for private college counselors had just 300 members combined.⁴⁵ A 1997 survey of “first-time full-time [college] freshmen” found that only 2.7% of the respondents used independent educational consultants.⁴⁶ But by 2019, the Independent Educational Consultants Association (“IECA”) alone boasted 1,850 members⁴⁷ and estimated that there were 12,000 to 14,000 independent educational consultants working in the United States.⁴⁸ Additionally, 26% of high school seniors who placed in the 70th percentile or higher on the SAT and ACT admitted to hiring an independent educational consultant “to assist in their college search,” according to a 2009 national survey.⁴⁹ Furthermore, the independent educational consultant industry generated approximately \$1.9 billion in revenue in 2019, which is expected to grow to \$2.1 billion by 2023.⁵⁰

While some independent educational consultants are employed by college consulting firms or test preparation companies, the industry largely consists of sole-proprietors,⁵¹ such as former educators or parents with experience in guiding students through the college admissions process.⁵² For example, the three largest independent educational consultant companies generated “less than 1.0%” of the industry’s annual revenue in 2019.⁵³ This statistic indicates that

42. Richards, *supra* note 3; *see also* Puri, *supra* note 3.

43. Drew DeSilver, *A Majority of U.S. Colleges Admit Most Students Who Apply*, PEW RSCH. CTR. (Apr. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/> [<https://perma.cc/A2SG-3PUF>] (“Of the 1,364 four-year colleges and universities we looked at, 17 admitted fewer than 10% of applicants in 2017 . . . That group includes such prestigious names as Stanford (4.7%), Harvard (5.2%), Yale (6.9%) and Northwestern (9.2%). Another 29 schools admitted between 10% and 20% of applicants, including Georgetown (15.7%), the University of Southern California (16%), UCLA (16.1%) and the University of California, Berkeley (17.1%). All those schools, along with three others with higher admission rates, have been caught up in the admissions scandal . . .”).

44. Richards, *supra* note 3.

45. Emily M. Bernstein, *College Matchmakers; Consultants Plot Ways to Impress the ‘Right’ School*, N.Y. TIMES (Apr. 17, 1996), <https://www.nytimes.com/1996/04/17/nyregion/college-matchmakers-consultants-plot-ways-to-impress-the-right-school.html> [<https://perma.cc/6U7T-FQ25>].

46. Patricia M. McDonough, Jessica Korn & Erika Yamasaki, *Access, Equity, and the Privatization of College Counseling*, 20 REV. HIGHER EDUC. 297, 309 (1997).

47. Elejalde-Ruiz, *supra* note 2.

48. *Id.*

49. *National Study Shows Dramatic Increase in Hiring Private College Counselors*, INDEP. EDUC. CONSULTANTS ASS’N, <https://www.iecaonline.com/quick-links/ieca-news-center/press/background-information-on-ieca/national-study-shows-dramatic-increase-in-hiring-private-college-counselors/> (last visited Aug. 24, 2021) [<https://perma.cc/ASM6-EYBM>].

50. *Education Consultant: Industry Outlook*, IBISWORLD, <https://clients1.ibisworld.com/reports/us/industry/industryoutlook.aspx?entid=5844> (last visited Aug. 24, 2021), [<https://perma.cc/UU8B-CPKH>].

51. *Education Consultant: Competitive Landscape*, IBISWORLD, <https://clients1.ibisworld.com/reports/us/industry/competitivelandscape.aspx?entid=5844> (last visited Sep. 2, 2021) [<https://perma.cc/6TW4-5L3C>].

52. Puri, *supra* note 3.

53. *Education Consultant: Industry Outlook*, *supra* note 50.

most of the industry's \$1.9 billion in revenue is generated by small companies or sole proprietors.⁵⁴

Families hire these consultants because students' "high schools are not providing adequate college counseling" or "they want to pursue every available advantage" in the college admissions process.⁵⁵ These consultants often provide many of the same services as school-employed counselors, such as identifying target colleges and potential majors, developing a high school study program, providing guidance for students with learning disabilities, reviewing applications, and advising on scholarships and financial aid.⁵⁶ While school-employed guidance counselors may have to serve hundreds of students each school year,⁵⁷ independent educational consultants "work with just a handful of clients . . . meaning they can provide highly specialized, individually tailored services."⁵⁸

Consultants may also offer services that school-employed guidance counselors do not. For example, a Connecticut-area independent college counselor hosted an event at a boutique instructing students on proper attire for college admissions interviews.⁵⁹ Massachusetts-based Top Tier Admissions hosted a "four-day college application boot camp" for clients during the summer before their senior year.⁶⁰ This \$18,000 service began with individual counseling during the student's sophomore year and culminated in the boot camp.⁶¹ A consulting firm in Washington D.C. offered a \$17,500 counseling package that included "personal reminders" to ensure that students are completing their applications on time.⁶² Additionally, IvyMax, a San Francisco-area company, even organized "Global Philanthropy Leadership Programs" to boost high school students' resumes and serve as application essay inspiration.⁶³ These 15-day programs,

54. *Id.*

55. Amy Liu, *The Admission Industrial Complex: Examining the Entrepreneurial Impact on College Access*, 2011 J. COLL. ADMISSION 9, 12 (2011).

56. See Andrew Belasco, *College Transitions' Response to the College Admissions Scandal*, COLL. TRANSITIONS (Mar. 18, 2019), <https://www.collegetransitions.com/blog/college-transitions-response-to-the-college-admissions-scandal> [<https://perma.cc/6M9R-PKG5>]; *Frequently Asked Questions About Higher Education Consultants*, HIGHER EDUC. CONSULTANTS ASS'N, <https://hecaonline.org/studentfaqs#professionalism> (last visited Aug. 24, 2021) [<https://perma.cc/T2D5-M7UG>]; see also Gaby Del Valle, *The Outrageously Expensive World of College Counseling Services, Explained*, VOX (Mar. 14, 2019, 2:20 PM), <https://www.vox.com/the-goods/2019/3/14/18265847/college-counseling-coaching-services-ivy-league> [<https://perma.cc/SF4L-WAUD>]; Richards, *supra* note 3.

57. *State-By-State Student-To-Counselor Ratio Report: 10-Year Trends*, AM. SCHOOL COUNSELOR ASS'N & NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, <https://vtechworks.lib.vt.edu/bitstream/handle/10919/86925/StatebyState.pdf?sequence=1&isAllowed=y> (last visited Aug. 24, 2021) [<https://perma.cc/9LSE-SL6H>] ("ASCA recommends that schools strive to maintain a 250:1 student-to-counselor ratio. In this analysis, only three states (New Hampshire, Vermont, and Wyoming) maintain a ratio lower than 250:1.")

58. Del Valle, *supra* note 56.

59. See Jacques Steinberg, *Before College, Costly Advice Just on Getting In*, N.Y. TIMES (July 18, 2009), <https://www.nytimes.com/2009/07/19/education/19counselor.html> [<https://perma.cc/MT6H-M45D>].

60. Del Valle, *supra* note 56.

61. *Id.*

62. Richards, *supra* note 3.

63. Georgia Perry, *Silicon Valley's College-Consultant Industry*, ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/education/archive/2015/12/silicon-valley-college-consultants/419538/> [<https://perma.cc/JZ5B-8STH>].

which cost between \$2,900 and \$4,900, included trips to “build sustainable-energy sources” in Mongolia or to “work on microfinance lending outreach” in China.⁶⁴

While the more unique services detailed above come at an exorbitant cost, the IECA estimates that, on average, comprehensive counseling services still cost \$4,200.⁶⁵ Indeed, at some private counseling firms, “a comprehensive four-year training program,” which includes coaching, tutoring, and application review, can “cost well into the six figures.”⁶⁶

Some consultants may charge families a flat fee for these packages.⁶⁷ Others offer counseling at an hourly rate, with “an average rate of \$200 an hour.”⁶⁸ Alternatively, consultants may offer more limited services for a reduced, one-time fee. For example, a Washington D.C. consulting group’s “cheapest service is a one-time consulting session for \$350,” in which consultants “walk[] families through how to pick colleges and apply on their own.”⁶⁹

Given the prohibitive cost of most private college counseling services, independent college consultants tend to work with students with wealthy or upper-middle-class socioeconomic backgrounds.⁷⁰ Specifically, researchers found that students who employ private college counselors are “more likely to exhibit the following traits: 1) active advice seekers, 2) from privileged families, 3) apply to more colleges, 4) attend private colleges far from home, and 5) are less influenced by financial concerns.”⁷¹

As white, wealthy students already compose a disproportionately large percentage of the student body at elite colleges,⁷² many argue that students’ use of independent educational consultants only further disadvantages minority and low-income students.⁷³ Specifically, high school guidance counselors are often

64. *Id.*

65. Christina Wood, *How to Navigate the Murky World of College Admissions Counseling*, WEEK (Apr. 29, 2019), <https://theweek.com/articles/829416/how-navigate-murky-world-college-admissions-counseling> [<https://perma.cc/2L48-ELH4>].

66. Del Valle, *supra* note 56.

67. Richards, *supra* note 3.

68. See Elejalde-Ruiz, *supra* note 2.

69. See Richards, *supra* note 3.

70. See McDonough, Korn & Yamasaki, *supra* note 46, at 312. (“[T]he most powerful predictor of IEC use is socioeconomic status as measured by parental income (213.2%).”).

71. Liu, *supra* note 55, at 12.

72. See Del Valle, *supra* note 56 (“In 2017, more than 29 percent of Harvard’s incoming freshman class was made up of legacy students — those who had a parent or grandparents who had also attended the university.”); see also Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, UPSHOT: N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/Y5Z7-9EL7>] (“At 38 colleges in America, including five in the Ivy League — Dartmouth, Princeton, Yale, Penn and Brown — more students came from the top 1 percent of the income scale than from the entire bottom 60 percent.”).

73. See Del Valle, *supra* note 56 (“Even if those students didn’t hire private coaches to help them get into college, they likely benefited from other academic privileges that come with money . . . Private coaching is just one of many advantages these students have over their nonwealthy peers.”); Liu, *supra* note 55, at 12 (“[L]ess advantaged students, particularly first-generation college students, are further disadvantaged because those who

“an especially important source of assistance and information” for Black, Latinx, and low-income students, as well as “students whose parents do not have direct experience with college.”⁷⁴ College counseling, however, is “less available in schools with predominantly low-income and/or minority student populations” due to “resource constraints [that] reduce the availability of counselors for one-on-one meetings, shift the focus of counseling to the needs of the school’s ‘typical’ or most ‘needy’ students, and require students and their families to initiate contact with school counselors.”⁷⁵ Therefore, students who lack the financial resources to seek out independent educational consultants also “likely face the greatest structural barriers to receiving [college] counseling” within their high schools.⁷⁶

These inequities in the college admission process are only exacerbated by the actions of some independent educational consultants, like Singer, who secure wealthy clients’ admission through illegal or unethical means. For example, some consultants have admitted that parents have asked them to compose student essays or omit students’ disciplinary history from applications.⁷⁷ Other parents may request that consultants facilitate large donations to universities to ensure their child’s admittance.⁷⁸ Furthermore, some independent educational consultants also serve as university admissions counselors themselves, posing a potential conflict of interest and highlighting the strong influence that these private counselors may have over the admissions process.⁷⁹

To distance themselves from this unethical behavior, college consultants may, but are not required to, apply for membership in a handful of professional

already have the college-going resources, information and cultural capital end up accumulating more of these things.”).

74. Laura W. Perna, Heather T. Rowan-Kenyon, Scott L. Thomas, Angela Bell, Robert Anderson & Chunyan Li, *The Role of College Counseling in Shaping College Opportunity: Variations Across High Schools*, 31 REV. HIGHER EDUC. 131, 132 (2008).

75. *Id.* at 134, 154.

76. *Id.* at 154 (“These findings suggest that students who do not proactively seek contact with counselors and/or attend a high school where college enrollment is not the norm are less likely to receive sufficient college counseling. In other words, students with the greatest need for college counseling likely face the greatest structural barriers to receiving that counseling.”).

77. See Elejalde-Ruiz, *supra* note 2.

78. See *id.*; see also Scott Jaschik, *Should Colleges Reveal How Many Donor Children They Admit?*, INSIDE HIGHERED (June 10, 2019), <https://www.insidehighered.com/admissions/article/2019/06/10/senator-of-fers-legislation-respond-admissions-scandal> [<https://perma.cc/Q9SD-RTME>] (“Steven A. Cohen, the hedge fund billionaire, gave \$5 million to USC in 2014. . . . [t]he gift followed the highly competitive school’s decision to admit Cohen’s twin daughters that year. . . . Dr. Dre . . . boasted that his daughter had been accepted to USC ‘all on her own.’ . . . In 2013 Dr. Dre and Jimmy Iovine, a music producer, together gave \$70 million to USC to create the USC Jimmy Iovine and Andre Young Academy for Arts, Technology and the Business of Innovation.”).

79. Scott Jaschik, *Ethics and Private Admissions Counseling*, INSIDE HIGHERED (Feb. 4, 2018), <https://www.insidehighered.com/news/2008/02/04/ethics-and-private-admissions-counseling> [<https://perma.cc/F3Q2-BZRK>].

organizations, which require members to abide by professional codes of conduct.⁸⁰ For example, the National Association for College Admission Counseling's Code of Ethics provides that it is unethical to "submit false, plagiarized, or fraudulent statements on applications or other documents."⁸¹ Members also may "not offer or accept any reward or remuneration to influence an admission, housing, scholarship, financial aid, or enrollment decision."⁸² The Higher Education Consultants Association's ethics code requires that consultants do not "advocate to colleges or universities on behalf of students, unless expressly invited to do so by the college."⁸³ It also stipulates that consultants may not promise or guarantee a student's admission to a particular university, nor "suggest special educational testing for the sole purpose of securing extended testing time" on the ACT or SAT.⁸⁴ Similarly, the American Institute of Certified Educational Planners, which requires its members to hold a master's degree and pass a written exam,⁸⁵ requires consultants to "avoid[] actions that could give the appearance of applying undue influence on decisions regarding admission."⁸⁶ While these professional organizations hold members to these ethical standards and limit membership to those whom they deem qualified, membership in these organizations is completely voluntary.⁸⁷

Furthermore, there are currently no state licensing systems that regulate consultants' behavior or govern who may call themselves independent educational consultants.⁸⁸ By contrast, in most states, school guidance counselors must hold a master's degree in counseling, complete required coursework, pass an examination, demonstrate prior relevant experience, receive certification from the state Board of Education, or some combination of these requirements.⁸⁹ Therefore, while independent educational consultants are providing many of the same services as high school guidance counselors, they are not held to the same professional standards.

80. See, e.g., HIGHER EDUC. CONSULTANTS ASS'N STANDARDS & ETHICS § V (2017); NACAC CODE OF ETHICS AND PROFESSIONAL PRACTICES Section I (2018).

81. NACAC CODE OF ETHICS AND PROFESSIONAL PRACTICES § I(B).

82. *Id.*

83. See HIGHER EDUC. CONSULTANTS ASS'N STANDARDS & ETHICS § V.

84. *Id.* §§ IV(C), V.

85. *CEP Standards*, AM. INST. OF CERTIFIED EDUC. PLANNERS, <https://www.aiccp.org/cep-standards> (last visited Aug. 24, 2021) [<https://perma.cc/P38M-N6Z3>].

86. AICEP PRINCIPLES OF GOOD PRACTICE Section IV(C) (2019).

87. See, e.g., *About IECA*, INDEP. EDUC. CONSULTANTS ASS'N, <https://www.iecaonline.com/about/> (last visited Aug. 24, 2021) [<https://perma.cc/LM4X-NA7A>].

88. Wood, *supra* note 65 ("But admissions counseling is a completely unregulated field. 'There is not a single state that licenses educational consultants,' says Mark Sklarow, CEO of the Independent Educational Consultants Association (IECA). In other words, anyone can claim the title of college admissions counselor and set their own rate, prying on panicked parents with fat bank accounts.")

89. *State Certification Requirements*, AM. SCH. COUNSELOR ASS'N, <https://www.schoolcounselor.org/About-School-Counseling/State-Requirements-Programs/State-Licensure-Requirements> (last visited Aug. 24, 2021) [<https://perma.cc/SHH4-CZN2>].

As a result, industry professionals, including the IECA, have “endorsed the idea of licensing practitioners so as to better protect the industry from bad actors.”⁹⁰ Consultants also emphasize that the findings of Operation Varsity Blues have only underscored the need for state licensing of independent educational consultants.⁹¹

B. Occupational Licensing

An occupational license is a form of government permit that “allow[s] workers to legally practice” their profession.⁹² Most American consumers, for example, are familiar with state licensing requirements for dentists, lawyers, and doctors.⁹³ Nevertheless, interior designers, auctioneers, bartenders, and travel guides are all licensed in some U.S. states.⁹⁴ Furthermore, there are over “800 occupations [that] are subject to licensing requirements in at least one state.”⁹⁵

Occupational licensing also is an increasingly common form of organizing the U.S. labor force.⁹⁶ For example, during the 1950s, only “five percent of American workers were subject to licensing requirements”⁹⁷ By 2018, “more than 43 million people in the United States held a professional certification or license,” which is approximately “16.9 percent of the civilian noninstitutional population,” according to the U.S. Bureau of Labor Statistics.⁹⁸

While occupational licensing is now quite common, licensing did not take root in the United States until the late 19th century.⁹⁹ In the late 1800s, states began to “establish[] educational criteria for the licensing of physicians.”¹⁰⁰ In 1889, the U.S. Supreme Court first considered the validity of these state licensing requirements in *Dent v. West Virginia*, a case in which a physician’s medical

90. Elejalde-Ruiz, *supra* note 2.

91. See Richards, *supra* note 3 (“‘If something good comes out of this situation with Singer and the bribery, it will be that at least a handful of states will step up and say the time has come to look at licensure for educational consultants,’ said Mark Sklarow, the CEO of the Independent Educational Consultants Association . . .”).

92. Karen Dynan, *Occupational Licensing Reform*, U.S. DEP’T OF THE TREASURY (July 28, 2015), <https://www.treasury.gov/connect/blog/Pages/Occupational-Licensing-Reform.aspx> [https://perma.cc/7K5D-REBY].

93. DEP’T OF THE TREASURY OFF. OF ECON. POL’Y, COUNCIL OF ECON. ADVISORS & DEP’T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS, in OCCUPATIONAL LICENSING: BENEFITS, COSTS, AND ISSUES 1, 6 (2016) [hereinafter DEP’T OF THE TREASURY OFF. ET AL.]

94. Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & John K. Ross, *Regulating Work: Measuring the Scope and Burden of Occupational Licensure Among Low- and Moderate-Income Occupations in the United States*, 35 INST. ECON. AFF. 3, 6–7 t.1 (2015).

95. Joseph Sanderson, *Don’t Bury the Competition: The Growth of Occupational Licensing and A Toolbox for Reform*, 31 YALE J. ON REG. 455, 459 (2014).

96. See Robinson, *supra* note 39, at 1910.

97. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1096 (2014).

98. Evan Cunningham, *Professional Certifications and Occupational Licenses: Evidence from the Current Population Survey*, MONTHLY LABOR R.: U.S. BUREAU OF LABOR STATISTICS (June 2019), <https://www.bls.gov/opub/mlr/2019/article/professional-certifications-and-occupational-licenses.htm> [https://perma.cc/Z54G-4KU2].

99. MORRIS M. KLEINER, GUILD-RIDDEN LABOR MARKETS: THE CURIOUS CASE OF OCCUPATIONAL LICENSING 13 (W.E. Upjohn Inst. for Emp. Rsch. ed., 2015).

100. *Id.*

license was revoked for practicing in West Virginia with out-of-state credentials.¹⁰¹ The court determined that, under its police powers, a state could require professionals to obtain a license, if that regulation was imposed to protect citizens' health, safety, and welfare.¹⁰² Although individuals enjoy the right to pursue a lawful occupation, states still may limit entry into that occupation to secure citizens' welfare.¹⁰³ Furthermore, *Dent* established "the right of states, rather than the federal government, to grant licenses."¹⁰⁴ As a result of the Supreme Court's ruling in *Dent*, each state could design and implement its own licensing requirements, the "level of entry barriers," and "the penalties for practicing without a license."¹⁰⁵

From 1890 to 1910, during the political changes of the Progressive Era, states began requiring licenses for a number of different occupations, such as "doctors, plumbers, barbers, funeral directors, nurses, electricians, horseshoers, [and] dentists."¹⁰⁶ Nevertheless, most of these licenses were concentrated in the healthcare and law sectors, with "physicians and dentists in the United States achiev[ing] nearly universal licensing."¹⁰⁷

As the U.S. economy became more service-orientated following World War II, occupational licensing became even more widespread at the state-level.¹⁰⁸ Practitioners, often hoping to limit competition in local markets, would lobby state officials to implement occupational licensing statutes.¹⁰⁹ National professional associations also "frequently lobb[ie]d legislatures to license specific occupations."¹¹⁰ Economists describe this practice as rent-seeking behavior, as "[h]eightedened barriers to entry restrict competition, which allows professionals to raise their rates, free from the inconveniences of an open market."¹¹¹

Nevertheless, government officials would pass many of these regulations as a way to generate revenue because, oftentimes, the "fees from licensed members of the occupation [we]re greater than the cost of monitoring the licensing provisions."¹¹² As states have imposed licensing regulations on an increasing number of professions, "the share of workers licensed at the State level has risen five-fold since the 1950s."¹¹³

101. 129 U.S. 114, 122 (1889); KLEINER, *supra* note 99, at 13.

102. *Dent v. State of W. Va.*, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.").

103. Paul J. Larkin, Jr., Legal Memorandum, *A Brief History of Occupational Licensing*, 204 HERITAGE FOUND. 1, 2 (2017).

104. KLEINER, *supra* note 99, at 13.

105. *Id.*

106. *Id.* at 14 (internal citation omitted).

107. *Id.*

108. *Id.*

109. *Id.*

110. Robinson, *supra* note 39, at 1919.

111. Gerald S. Kerska, *Economic Protectionism and Occupational Licensing Reform*, 101 MINN. L. REV. 1703, 1707 (2017).

112. KLEINER, *supra* note 99, at 14.

113. DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 3 ("The share of workers licensed at the State level has risen five-fold since the 1950s. About two-thirds of this change stems from an increase in the number

As discussed in *Dent*, states typically impose licensing requirements on a particular profession to protect consumers' health and safety when "low-quality practitioners can potentially inflict serious harm on consumers or the public at large."¹¹⁴ For example, licensing is widespread in the medical field, where unlicensed practitioners who lack proper training could seriously harm patients.¹¹⁵ States also tend to license professions to "ensure high-quality services" when there are information asymmetries that make it difficult for consumers to assess service quality or the professional's reputation.¹¹⁶

Given that state licensing regulations are aimed at protecting consumers and guaranteeing high-quality services, it follows that those who work in the service industry are more likely to face licensing requirements compared to those in other sectors.¹¹⁷ Specifically, the healthcare, law, and education sectors are "traditionally very highly licensed occupations."¹¹⁸ For example, as of 2016, "nearly 60 percent" of U.S. education workers held an occupational license.¹¹⁹

While states generally have the freedom to design and impose their own licensing requirements, occupational licensing typically takes one of "three basic forms: registration, certification, and licensing."¹²⁰ Registration is the least restrictive form of regulation, as it typically requires a professional to merely "file his or her name, address, line of work, and qualifications with a relevant state or local agency."¹²¹ Registration systems may also require a professional to pay a fee or post a bond.¹²² This form of license does not restrict an individual's right to practice, so long as he or she registers and pays the mandated fee.¹²³

California's College Consultants Act is a form of registration system, as it simply requires that private college counselors or college consulting firms that generate more than \$5,000 annually register through an electronic registration process designed by the Secretary of State.¹²⁴ Thus, this system does not restrict private college counselors from practicing their profession, but simply requires them to register their practice with the state.

of professions that require a license, with the remaining growth coming from changing composition of the workforce.").

114. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 7.

115. DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 7.

116. *Id.* at 3; Elizabeth Graddy, *Toward a General Theory of Occupational Regulation*, 72 SOC. SCI. Q. 676, 678 (1991).

117. DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 19 ("[S]ervice sector workers are more likely to be licensed than workers in the goods-producing sector—32 percent of service sector workers are licensed compared to 16 percent of workers outside the service sector . . .").

118. *Id.* at 21.

119. *Id.* at 19.

120. Erica L. Sieg, Note, *The Land of the Free?: The ALLOW Act and Economic Liberty from Occupational Licensing*, 24 WASH. & LEE J. CIV. RTS. & SOC. JUST. 261, 268–69 (2017).

121. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 210 (2016).

122. *Id.*

123. Sieg, *supra* note 120, at 268.

124. Assem. B. 1312, 2019 Assem. Reg. Sess. (Cal. 2019).

Certification is “an intermediate form of regulation,” in which the government restricts a professional’s ability to use a particular title.¹²⁵ To use the title, a government or private group first assesses a professional’s skill or educational background, “typically based on an examination, and issues a certificate to that effect.”¹²⁶ Therefore, although certification requirements “restrict the use of a profession’s title to those who have been certified,” anyone may practice the profession.¹²⁷ Thus, certification provides professionals with a “right to title,” rather than a “right to practice.”¹²⁸ For example, in Georgia, for an interior designer to call oneself a “registered interior designer,” that individual must register with the Georgia Board of Architects & Interior Designers proving that they have “obtain[ed] sufficient education and pass[ed] a national examination.”¹²⁹

In the case of private college counselors, certification would operate like admission to one of the industry’s national professional associations.¹³⁰ For example, as discussed above, the American Institute of Certified Educational Planners restricts the title of “Certified Educational Planner” to those who “hold at least a Master’s degree in a relevant educational field,” and pass “a written assessment that [] provide[s] insight into your ability to interpret student needs.”¹³¹

Lastly, a license is the most restrictive form of occupational regulation, as “licensing laws make it unlawful, and sometimes illegal, to practice in a particular field without first receiving the government’s approval.”¹³² Therefore, a license provides professionals with the “right to practice” the profession.¹³³ In many states, for example, an individual who practices or purports to practice medicine without a license may be guilty of a misdemeanor or felony that is punishable by fine or imprisonment.¹³⁴ Furthermore, licensing restricts a professional’s “scope of practice,”¹³⁵ as the government determines whether one is permitted to practice and “the range of services one can provide.”¹³⁶ In the independent college consultant industry, licensing would prevent private college counselors who did not receive a state license from working with any clients.

125. Larkin, *supra* note 121, at 210.

126. *Id.*

127. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 8.

128. KLEINER, *supra* note 99, at 1.

129. *Georgia Board of Architects & Interior Designers*, GEORGIA SECRETARY OF STATE: LICENSING, <https://sos.ga.gov/index.php/licensing/plb/2> (last visited Aug. 24, 2021) [<https://perma.cc/7RV3-G9Z8>]; *see also* Cunningham, *supra* note 98.

130. *See, e.g., CEP Standards*, *supra* note 85.

131. *Id.*

132. Larkin, *supra* note 121, at 210–11.

133. KLEINER, *supra* note 99, at 1.

134. *See, e.g., CAL. BUS. & PROF. CODE* § 2052 (2011) (“[A]ny person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment . . . without having at the time of so doing a valid, unrevoked, or unsuspended certificate . . . is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment.”) (emphasis added).

135. Graddy, *supra* note 116, at 677–78.

136. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 59.

After establishing a form of licensing requirement, state governments normally “delegate the actual implementation of licensing requirements to volunteer, or quasi-volunteer, boards of practitioners.”¹³⁷ These state-sanctioned licensing boards are often composed of “active members of their respective industries”¹³⁸ who meet to “set and enforce” industry standards.¹³⁹ While these standards are enacted and imposed at the state level, national professional associations “frequently . . . work with licensing boards to adopt model rules or best practices.”¹⁴⁰

As occupational licensing limits who may practice and therefore may restrict industry competition, opponents to licensing argue that licensing is a form of unconstitutional economic protectionist legislation.¹⁴¹ Arguments that licensing requirements amount to economic protectionism tend to fail, however, because courts apply rational basis review to these economic regulations.¹⁴² When reviewing these regulations, therefore, the courts often “find some non-protectionist policy goal,” and consequently, uphold the legislation.¹⁴³ For example, the Ninth Circuit upheld California’s licensing of psychoanalysts, finding that the “licensing scheme is rationally related to California’s interest in protecting the mental health and safety of its citizens.”¹⁴⁴

Furthermore, the Supreme Court has noted that “the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”¹⁴⁵ Therefore, while “[a] State cannot exclude a person from the practice of . . . any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment,” licensing requirements must only have a “rational connection” to a practitioner’s capacity to practice.¹⁴⁶ As a result, courts tend to uphold challenges to the constitutionality of occupational licensing.¹⁴⁷

Although a state’s ability to impose professional licensing requirements is typically upheld by the courts, legislators must consider whether applying these requirements is the best way to protect the public from incompetent or fraudulent practitioners.¹⁴⁸

137. Robinson, *supra* note 39, at 1918.

138. Edlin & Haw, *supra* note 97, at 1095–96.

139. Robinson, *supra* note 39, at 1918.

140. *Id.* at 1919.

141. Sanderson, *supra* note 95, at 466.

142. Amanda Shanor, Forum, *Business Licensing and Constitutional Liberty*, 126 *YALE L.J.* 314, 315 (2016).

143. Sanderson, *supra* note 95, at 466.

144. Nat’l Ass’n for Advancement of Psychoanalysis v. California Bd. of Psych., 228 F.3d 1043, 1051 (9th Cir. 2000).

145. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

146. Schwab v. Bd. of Bar Exam. of N.M., 353 U.S. 232, 238–39 (1957).

147. Sanderson, *supra* note 95, at 466.

148. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 42–43.

III. ANALYSIS

Occupational licensing requirements have both costs and benefits to industry professionals, the public, and the economy. When determining whether to impose licensing requirements on a particular profession, the U.S. Department of the Treasury recommends that states consider the “relative magnitude of these costs and benefits.”¹⁴⁹ Specifically, the Treasury encourages legislators to weigh a number of factors, such as whether there is a “legitimate public health and safety concern,” the effect of licensing on “practitioner supply” and “the price of goods and services,” and “whether existing legal remedies, consumer rating and reputational mechanisms, and less-burdensome regulatory approaches are adequate to protect consumers,” to achieve the same policy goals.¹⁵⁰

Part III analyzes the relevant costs and benefits of imposing a form of occupational licensing, including traditional licensing, certification, or registration, on independent educational consultants.¹⁵¹ In Part IV, this Note recommends that states impose certification requirements upon the private college consulting industry, as this method best balances these costs and benefits.¹⁵²

A. *Benefits of Licensing Independent Educational Consultants*

1. *Protecting Public Welfare and Preventing Fraud*

The most common justification for occupational licensing legislation is that licensing protects public health, safety, and welfare.¹⁵³ Occupational licensing statutes protect consumers’ welfare by (1) “ensuring that practitioners have a certain degree of expertise or competence”¹⁵⁴ and (2) deterring or tracking fraudulent acts by industry professionals.¹⁵⁵

i. Ensuring Practitioner Competence

First, as the Supreme Court observed in *Dent v. West Virginia*, states impose occupational licensing because these requirements “secure or tend to secure [the public] against the consequences of ignorance and incapacity.”¹⁵⁶ The regulation of inexperienced or incompetent professionals is particularly important in fields like medicine or dentistry, where practitioners’ actions can pose grave health or safety risks to consumers.¹⁵⁷ For these professions, “education requirements prior to entry may be a more effective and proactive way to prevent harm

149. *Id.* at 8.

150. *Id.* at 41–42.

151. *See infra* Part III.

152. *See infra* Part IV.

153. Robinson, *supra* note 39, at 1936.

154. *Id.*

155. Sanderson, *supra* note 95, at 463.

156. 129 U.S. 114, 122 (1889).

157. Sanderson, *supra* note 95, at 462.

than the vague threat of sanctions (through tort law or otherwise) after harm occurs.”¹⁵⁸

While *Dent* acknowledges occupational licensing’s role in protecting consumers from practitioners’ “ignorance and incapacity,” the type of consequences from which occupational licensing should protect consumers is unclear.¹⁵⁹ Some scholars adopt the broad perspective that licensing is a means to protect the *general* public welfare.¹⁶⁰ They suggest that occupational licensing should “protect consumers from incompetent, dishonest, financially irresponsible, unsafe, and unsanitary provision of various services.”¹⁶¹ Under this expansive view, licensing legislation should not only protect consumers’ physical health and safety, “but also their more general welfare—for instance, requiring licensing of a practitioner if it may help the consumer avoid significant financial loss.”¹⁶²

In the context of private college counselors, states could argue that, in licensing independent educational consultants, families of college applicants are protected from financial loss stemming from the unethical actions of these private college consultants.¹⁶³ Even more broadly, states could argue that licensing legislation protects the public general welfare by ensuring that consumers are not unfairly disadvantaged in the admissions process by deals organized by private consultants, like Singer.¹⁶⁴ These justifications, however, are quite tenuous.

Other legislators and scholars maintain that licensing is necessary only “where it can be shown to protect the physical safety or health of third parties” and “that licensing should not be used to protect consumers from willfully entering into an agreement with a service provider.”¹⁶⁵ Minnesota legislators, for example, adopted this restrictive view by introducing a bill that would confine occupational licensing, certification, or registration to occupations that pose a threat to public health or safety.¹⁶⁶ The statute would limit the state’s ability to enact occupational license, certification, or registration requirements that “impose[] a substantial burden on the person unless the government demonstrates that it has a compelling interest in *protecting against present and recognizable harm to the public health and safety*.”¹⁶⁷ Therefore, as reflected in this Minnesota bill, some lawmakers argue that occupational licensing should protect the public only from physical harms.

158. *Id.*

159. *Dent*, 129 U.S. at 122.

160. Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 190 (1979); Sanderson, *supra* note 95, at 462.

161. Rose, *supra* note 160, at 190.

162. Robinson, *supra* note 39, at 1937.

163. *See, e.g.*, Class Action Compl. at 20–21, *Olsen v. Singer et al.*, No. 3:19-cv-01351 (N.D. Cal. Mar. 13, 2019) (alleging that plaintiffs are entitled to damages as they paid application fees to apply to universities involved in Singer’s scandal, were denied admission by these schools, and that they would not have applied to these schools had they known about the fraudulent admissions scheme).

164. *See id.* at 1–2.

165. Robinson, *supra* note 39, at 1937.

166. S. Res. 380, 87th Leg., 87th Sess. (Minn. 2011).

167. *Id.* (emphasis added).

Under this view, occupational licensing of independent educational consultants would be improper because these professionals do not threaten clients' physical safety or health. Furthermore, as clients voluntarily contract with these consultants, licensing should not be used to protect these consumers from freely entering into an agreement with a service provider.¹⁶⁸

The traditional justification that occupational licensing protects consumers from harm by inexperienced or incompetent practitioners does not neatly apply in the context of independent educational consultants, no matter which view one takes.

ii. Preventing Fraud

Lawmakers may also implement occupational licensing to protect the public from fraud by bad actors, rather than to protect consumers from physical or financial harm by incompetent practitioners.¹⁶⁹ As California proposed the registration of college consultants in the wake of Singer's college admissions conspiracy,¹⁷⁰ fraud prevention and detection is likely the principal justification of this licensing scheme.

This justification is also considered in *Dent v. West Virginia*, as the Supreme Court acknowledged that licensing requirements may also secure citizens against practitioner's "deception and fraud."¹⁷¹ Occupational licensing enables states to curb fraud and criminal activity by "tackl[ing] fraudsters proactively."¹⁷² Licensing legislation confronts fraud by "dissuad[ing] fraudsters from entering the field and mak[ing] it easier to track them if they do."¹⁷³

For example, in California, immigration consultants are required to "register and file a \$100,000 bond with the Secretary of State" to practice their profession because there have been numerous instances of fraud by immigration consultants.¹⁷⁴ Immigration consultants are individuals who can provide some services offered by immigration attorneys, such as helping clients complete immigration paperwork, translating documents, and submitting forms to the relevant government agencies.¹⁷⁵ Some immigration consultants, however, advertise that they are "*notarios públicos*," which may confuse consumers "because in some countries, *notarios* have training similar to lawyers and can perform legal services in those countries."¹⁷⁶ These *notarios públicos* may promise to secure their clients "citizenship, green cards, or asylum," but then defraud clients of

168. Robinson, *supra* note 39, at 1937.

169. Sanderson, *supra* note 95, at 463.

170. McGreevy, *supra* note 27.

171. 129 U.S. 114, 122 (1889).

172. Sanderson, *supra* note 95, at 463.

173. *Id.*

174. *Avoiding Fraud by Immigration Consultants*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Public/Free-Legal-Information/Unauthorized-Practice-of-Law/Avoiding-Fraud-by-Immigration-Consultants> (last visited Aug. 24, 2021) [<https://perma.cc/2JEG-DNDH>].

175. *Id.*

176. *Id.*

hundreds of thousands of dollars.¹⁷⁷ In requiring legitimate immigration consultants to register with the state, prospective clients can visit an online database managed by the Secretary of State or call a designated phone number to determine whether an immigration consultant is a registered consultant.¹⁷⁸ Through this process, immigrants can still seek out immigration consultants, whose services are less costly than immigration attorneys, while also avoiding fraud by consultants that are not vetted or tracked by the state.¹⁷⁹

As in the case of immigration consultants, in registering, certifying, or licensing private college consultants, states can maintain and provide consumers with a list of verified consultants, which in turn allows these states to track potential fraud.¹⁸⁰ First, in employing a registration system, a consultant must “file his or her name, address, line of work, and qualifications with a relevant state or local agency,” and perhaps pay a fee or post a bond, as in the case of immigration consultants.¹⁸¹ Similarly, certification would require those who wish to practice under the title “college consultant” or “independent educational consultant” to meet minimum state requirements and, in effect, register with the state.¹⁸² Under a traditional licensing scheme, only those consultants who received a license would lawfully be able to provide private college counseling services.¹⁸³ Therefore, registration or certification enable the state to curb fraud, as “simply maintaining a list of practitioners . . . is useful for ensuring that providers are easily reached in the case of a complaint.”¹⁸⁴ Yet, these forms of occupational licensing do not restrict a consultant’s right to lawfully practice—a principal critique of traditional licensing laws.¹⁸⁵

Nevertheless, some critics of occupational licensing suggest that these regulations do not actually prevent fraud, but merely “tap into public anger over scam artists . . . even though laws that prohibit fraud and allow victims to be compensated for negligence and other harm are already on the books.”¹⁸⁶ While the public was understandably outraged by Singer’s fraudulent college admissions scheme,¹⁸⁷ the criminal penalties and civil remedies that address Singer’s fraud do little to compensate the victims—those who were disadvantaged in the college admissions process by Singer’s actions. First, while Singer and some clients were ultimately charged with racketeering conspiracy, conspiracy to defraud the United States, and other charges, the criminal charges were only filed after

177. See, e.g., Del Valle, *supra* note 56.

178. *Avoiding Fraud by Immigration Consultants*, *supra* note 174.

179. Joyce E. Cutler, *Calif. Tries Again to Check ‘Notarios’ Immigration Consultants*, BLOOMBERG L. (June 5, 2019, 1:28 PM), <https://biglawbusiness.com/calif-tries-again-to-check-notarios-immigration-consultants> [<https://perma.cc/J8YU-BWEJ>].

180. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 43.

181. Larkin, *supra* note 121, at 210.

182. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 43.

183. Larkin, *supra* note 121, at 210–11.

184. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 44.

185. Sieg, *supra* note 120, at 268.

186. Adam B. Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives*, REASON FOUND., Aug. 2007, at 4.

187. See, e.g., Richards, *supra* note 3.

dozens of students achieved admission to selective schools to which they ordinarily would not have received admission.¹⁸⁸ As a result, the universities themselves determined whether to expel the involved students or to allow the students to remain enrolled.¹⁸⁹ Thus, while parents were later criminally charged and students were possibly disciplined by their respective universities, students who could have secured admission in place of those embroiled in Singer's scheme were still not made whole.

In an attempt to be made whole, some students who were rejected by the universities involved in the college admissions scandal have filed federal, class-action lawsuits to enjoin the universities from continuing unfair admissions practices, as well as to receive damages and restitution.¹⁹⁰ For example, two Stanford University students initiated a class-action lawsuit against a number of the universities implicated in the scandal, as well as against Singer.¹⁹¹ The plaintiffs allege that they paid application fees to apply to the universities involved in the scandal, were subsequently rejected by these schools, and that they would not have applied to these schools had they known about Singer's fraudulent admissions scheme.¹⁹² Therefore, the students seek damages "including but not limited to the recoupment of all admission fees paid to said universities during the applicable statute of limitations period, claw-back of all illegal fees paid by bribing parents to Singer . . . for treble damages, costs of suit, and a reasonable attorney's fee."¹⁹³

While, if successful, these class-action lawsuits may reimburse students' application fees, the lawsuits do not address the fact that students did not attend the school of their choice, while wealthy students who received Singer's illegal "consulting" services studied at these universities. Furthermore, while these lawsuits may discourage universities from engaging in fraud with independent educational consultants out of fear of future litigation, the lawsuits do not restrain other universities or private college counselors from engaging in fraudulent or

188. U.S. Atty's Off. for the Dist. of Mass., *supra* note 1; *see also* Taylor & Lyons, *supra* note 17.

189. *See, e.g.*, Levitz & Korn, *supra* note 4 ("Yale, Stanford and Georgetown expelled students caught up in the scheme. USC has finished most of its student reviews, with outcomes ranging from expulsion to finding no violations of school policy. Students still under review can't get degrees or transcripts until their investigations are complete.").

190. Joey Garrison, *14 More Rejected Students Sue Universities, Mastermind of Admissions Scheme*, USA TODAY (June 18, 2019), <https://www.usatoday.com/story/news/nation/2019/06/18/14-more-rejected-students-file-class-action-suit-against-universities-mastermind-admissions-scheme/1489550001/> [<https://perma.cc/T5U5-TJMF>].

191. Abigail Johnson Hess, *Here's Who Qualifies for the \$5 Million Class-Action Lawsuit Filed in Response to the College Admissions Scandal*, CNBC (Mar. 14, 2019, 3:11 PM), <https://www.cnbc.com/2019/03/14/who-is-included-in-the-lawsuit-against-colleges-in-bribery-scandal.html> [<https://perma.cc/CS5T-PLX7>].

192. Class Action Compl. at 3, Olsen et al. v. Singer et al., No. 3:19-cv-01351 (N.D. Cal. Mar. 13, 2019) ("Each of the qualified, rejected students was damaged by the fraudulent and negligent conduct of the Defendants in that, at a minimum, each Class member paid college admission application fees to the Defendant universities without any understanding or warning that unqualified students were slipping in through the back door of the admissions process by committing fraud, bribery, cheating, and dishonesty."); *see also* Hess, *supra* note 191.

193. Class Action Compl. at 20–21, Olsen v. Singer et al., No. 3:19-cv-01351 (N.D. Cal. Mar. 13, 2019).

unfair schemes. This is particularly worrisome, given that universities' admissions processes and criteria are largely kept secret,¹⁹⁴ making it difficult to uncover fraud without investigations like Operation Varsity Blues. Thus, although civil litigation may reimburse students who were rejected from specific universities amid an unfair process, they likely will not fully constrain future fraudulent practices.

Furthermore, licensing requirements may enable victims of a consultant's fraud to more easily bring civil cases against fraudsters. For example, researchers Marc T. Law and Sukkoo Kim found that the strict licensing requirements imposed on physicians during the Progressive Era "may have increased the incidence of medical malpractice suits."¹⁹⁵ Law and Kim reasoned that, as medical malpractice suits are "based on standards of care available in a given locality," without licensing requirements, "the standards of local practice were difficult to define because anyone could legally call himself a physician."¹⁹⁶ Thus, licensing requirements helped to define the standards of local practice, thereby making it easier and "less costly for consumers to sue negligent and unqualified doctors for poor outcomes."¹⁹⁷

Similarly, in the case of independent educational consultants, licensing requirements may more carefully define what constitutes a consultant's proper role in the college admissions process. As a result, victims of consultants' fraud can more easily identify and prove unfair admissions practices. Therefore, while existing remedies do not adequately compensate victims for unfair college admissions practices, licensing requirements may both prevent future acts of fraud and aid victims in identifying unfair admissions practices.

Thus, in applying occupational licensing, certification, or registration requirements to independent educational consultants, states can more effectively prevent future instances of fraud by discouraging fraudsters from entering the industry and more easily track consultants' fraudulent acts in the largely secret college admissions process.¹⁹⁸

2. *Resolving Information Asymmetries*

In addition to protecting the public from fraudulent acts by independent educational consultants, occupational licensing legislation can provide consumers with information about private college counselors' skill levels and ethical standards. This information is particularly important in the context of private college counselors, as there are information asymmetries that make it difficult

194. See, e.g., Anemona Hartocollis, *Harvard's Admissions Process, Once Secret, Is Unveiled in Affirmative Action Trial*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/harvard-admissions-affirmative-action.html> [<https://perma.cc/6MRU-KG9W>].

195. Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723, 753 (2005).

196. *Id.*

197. *Id.*

198. Sanderson, *supra* note 95, at 463.

for consumers to accurately assess service quality or the professional's reputation.¹⁹⁹

Information asymmetry exists between consumers and practitioners where there is "large variation in service quality" or "little contact between consumers and practitioners."²⁰⁰ Additionally, it may be "difficult [for consumers] to learn a provider's reputation or to try out different providers."²⁰¹ Furthermore, adequate evaluation of a practitioner's ability may require "specialized knowledge or expertise."²⁰²

In the case of independent educational consultants, there is an information asymmetry between consumers and consultants, as there is large variation in the types of services consultants provide, and it is difficult for consumers to actually assess the practitioner's ability.²⁰³ First, there is a significant variation in service quality and the types of services consultants provide because "the industry is highly fragmented, mainly compris[ed] [of] sole-proprietor companies and non-profit organizations operating at the local and regional levels."²⁰⁴ Given the fragmented nature of the industry, consumers cannot rely on brand reputation to determine service quality and must research individual consultants to determine the types of services they provide, the cost of services, and the consultants' reputations.²⁰⁵ Second, given consultants' selectivity and sometimes misleading advertising, it is difficult for consumers to assess a consultant's reputation and success in their work.²⁰⁶ Some consultants, for example, advertise their high success rates in getting students into their first-choice colleges. These consultants, however, may "only accept the most promising students as clients," thereby inflating the success rate.²⁰⁷ Due to the fragmented nature of the independent educational consultant industry and the difficulty of assessing consultants' actual service quality, consumers must conduct their own careful research to select the best private college counselor.²⁰⁸

As a result of this information asymmetry, the quality of college consulting services is unlikely to improve. Consumers' inability to differentiate high- and

199. DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 4; Graddy, *supra* note 116, at 678.

200. Graddy, *supra* note 116, at 678.

201. DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

202. *Id.*

203. *See* Graddy, *supra* note 116, at 678.

204. *Education Consultant: Competitive Landscape*, *supra* note 51.

205. *See How to Choose a College Admissions Counselor*, PRINCETON REVIEW, <https://www.princetonreview.com/college-advice/how-to-choose-a-college-admissions-counselor> (last visited Aug. 24, 2021) [<https://perma.cc/A7KY-NUMV>] ("Always request a preliminary meeting or phone conversation with any counselor you are considering. These questions will help you decide if a particular counselor is the right choice for your family.").

206. Lynn O'Shaughnessy, *Six Ways to Pick an Independent College Counselor*, CBS NEWS (May 25, 2009, 10:59PM), <https://www.cbsnews.com/news/six-ways-to-pick-an-independent-college-counselor/> [<https://perma.cc/Y6WA-BWWC>].

207. *Id.*

208. *See How to Choose a College Admissions Counselor*, *supra* note 205.

low-quality practitioners allows low-quality practitioners to remain in the market, thereby reducing average market quality and diminishing “the incentives for other providers to invest in quality improvements.”²⁰⁹

By requiring professionals to meet minimum quality standards, licensing provides consumers with “sufficient information to assess service quality” and the practitioner’s skill level.²¹⁰ Therefore, through imposing licensing requirements upon independent educational consultants, consumers can more easily assess consultants’ ethical standards and skill levels, thus pushing low-quality consultants from the market.²¹¹

Under a traditional occupational licensing scheme, states would restrict those that were permitted to practice college admissions consulting to those who applied for and received a license from the state licensing agency.²¹² Through this “right to practice” legislation, the state could also regulate the range of services private college counselors can provide, which would also serve to eliminate possible fraud in the college admissions process.²¹³ While this form of licensing would provide consumers with the reassurance that licensed private college counselors meet baseline educational or ethical standards, by its nature, strict licensing would exclude a number of practitioners from the industry.²¹⁴ With fewer service providers, consumers may have to pay even higher prices for independent educational consultants.²¹⁵ This Note will further explore the issue of decreased competition as a result of traditional occupational licensing in Section III.B.1.

Alternatively, certification “provides the informational benefits of licensing without its costs.”²¹⁶ Certification legislation would allow the state to certify college consultants who meet educational and ethical standards, allowing these professionals to call themselves “certified private college counselors” without restricting entry into the industry.²¹⁷ Consequently, consumers who seek the services of private counselors would be sure that “certified counselors” meet prescribed educational and ethical requirements, while un-certified consultants may not have these qualifications. As a result, certification resolves information asymmetry between consumers and college admissions consultants, while “allowing individuals to select for themselves the degree of competence that they are willing to buy in the market.”²¹⁸

209. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

210. Graddy, *supra* note 116, at 678.

211. See DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

212. *Id.* at 4.

213. *Id.* at 30.

214. MORRIS M. KLEINER & EVGENY S. VOROTNIKOV, INST. JUST., AT WHAT COST? STATE AND NATIONAL ESTIMATES OF THE COSTS OF OCCUPATIONAL LICENSING 10 (2018) (“In terms of costs to consumers . . . licensing an occupation reduces the supply of service providers who are legally allowed to work in that occupation, often allowing them to command more for their services. Met with fewer choices, consumers must pay these monopoly prices, do it themselves or go without.”).

215. *Id.*

216. Larkin, *supra* note 121, at 242.

217. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 8.

218. Larkin, *supra* note 121, at 242.

Registration of college consultants, as proposed in California, likely would not have these same informational benefits for consumers. As registration merely requires that professionals file contact information with the state, registration does not provide consumers with detailed service quality information, but rather only conveys the fact that they are recognized by the state.²¹⁹

While traditional occupational licensing and certification may resolve information asymmetries between consumers and practitioners, some scholars argue that information asymmetry is no longer a concern.²²⁰ For example, Paul J. Larkin, Jr., a legal research fellow at The Heritage Foundation, suggests that consumers can now rely on private entities and the internet for service quality information.²²¹ Larkin argues that consumers can “obtain the necessary service quality information for large-scale service providers (for example, H&R Block) from private entities, such as Underwriters’ Laboratories, or Consumer Reports,” while consumers can seek out “necessary information for local services (for example, plumbers) from the website Angie’s List.”²²² Others argue consumers can receive service quality information from private mechanisms, such as “private certifications,” “brand reputation,” and “customer review platforms like Yelp and Google reviews.”²²³

While private entities and customer review websites may be effective in reducing information asymmetry for some industries, these private mechanisms likely would not ease information asymmetry in the context of college admissions consultants. Unlike large-scale service providers, like H&R Block, the college consulting industry largely consists of sole proprietors,²²⁴ such as former educators or other professionals with experience in the college admissions process.²²⁵ Given that the industry is highly fragmented,²²⁶ private entities could not easily or effectively assess the service quality of so many operations.

Additionally, while review websites like Yelp²²⁷ provide students and parents with a platform to rate college admissions consultants, these websites tend to lump together tutoring services, testing specialists, and college admissions consultants.²²⁸ These websites also allow consultants to pay for “premium placement on Yelp search and competitor business pages,” which could perhaps skew

219. *Id.* at 210.

220. *See, e.g., id.* at 242.

221. *Id.*

222. *Id.*

223. Patrick McLaughlin, Matthew D. Mitchell & Anne Philpot, *The Effects of Occupational Licensure on Competition, Consumers, and the Workforce*, GEORGE MASON: MERCATUS CTR. (Nov. 3, 2017), <https://www.mercatus.org/publications/corporate-welfare/effects-occupational-licensure-competition-consumers-and-workforce> [https://perma.cc/URB6-TMNM].

224. *Education Consultant: Competitive Landscape*, *supra* note 51.

225. Puri, *supra* note 3.

226. *Education Consultant: Competitive Landscape*, *supra* note 51.

227. *See, e.g., Best College Admissions Consultant in New York, NY*, YELP, https://www.yelp.com/search?find_desc=college%20admissions%20consultant&find_loc=New%20York%2C%20NY (last visited Aug. 24, 2021) [https://perma.cc/DK5P-QHH7]; *The Best 10 College Counseling in Chicago, IL*, YELP, https://www.yelp.com/search?cflt=collegecounseling&find_loc=Chicago%2C+IL (last visited Aug. 24, 2021) [https://perma.cc/5ECG-7AMU].

228. *Id.*

consumer's perception of the quality of these consultants' services.²²⁹ Furthermore, these websites rely on crowd-sourced information from fairly anonymous individuals who may (or may not) have used the consultants services,²³⁰ rather than by experts who can accurately assess consultants' skill and ethical practices. Although private assessment entities and review websites may reduce information asymmetry in some industries, these methods do not account for the college consulting industry's highly fragmented nature, consultants' advertising practices, and the skill required to effectively assess the consultant's quality and ethics.

Traditional occupational licensing or less restrictive certification legislation would provide consumers with more accurate, accessible information regarding college consultants' qualifications, encouraging consultants to improve their service quality and deterring low-quality consultants from entering the market.²³¹

3. *Creating More Knowledgeable and Competent Consultants*

Occupational licensing can not only protect the public from fraud²³² and resolve information asymmetry,²³³ but can also result in an increase in overall service quality.²³⁴ Licensing regulations can increase service quality by (1) "diminish[ing] the number of less qualified or unmotivated individuals who could enter the occupation,"²³⁵ and (2) "increas[ing] the incentive to invest in education and thereby enhanc[ing] quality."²³⁶ Therefore, in the context of independent educational consultants, occupational licensing can foster more knowledgeable, competent college counseling by discouraging charlatans, like Singer, from entering the field and by incentivizing consultants to invest in education and training.

First, occupational licensing requirements can increase service quality by preventing unqualified consultants from providing college counseling services and discouraging unmotivated individuals from joining the industry.²³⁷ Occupational licensing can restrict or discourage these practitioners from participating

229. *Yelp Ads*, YELP, <https://biz.yelp.com/support/advertising> (last visited Aug. 24, 2021) [<https://perma.cc/V2R9-5TM8>].

230. For example, College Quest, LLC, a college counseling service based in Oakland, California, has received seventeen reviews since 2012, which appear to be submitted by prospective college students' parents. *College Quest, LLC*, YELP, <https://www.yelp.com/biz/college-quest-llc-oakland> (last visited Aug. 24, 2021) [<https://perma.cc/4JQY-AB8X>].

231. See DEP'T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

232. Sanderson, *supra* note 95, at 463.

233. Graddy, *supra* note 116, at 678.

234. Sanderson, *supra* note 95, at 463 ("By conditioning permission to practice on educational requirements, licensing may increase the incentive to invest in education and thereby enhance quality—at least if the mandated education has a genuine connection to the occupation for which it is required.").

235. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market* 5 (Princeton Univ. Indus. Relations Section, Working Paper No. 549, 2009), <https://dataspace.princeton.edu/handle/88435/dsp01w3763678p> [<https://perma.cc/F9U8-E5BX>].

236. Sanderson, *supra* note 95, at 463.

237. Kleiner & Krueger, *supra* note 235, at 5.

in the college consultant industry “by imposing initial education, testing, continuing training requirements, internship requirements, or fees.”²³⁸ Although these requirements likely limit competition within the industry,²³⁹ these additional responsibilities also discourage those who are unqualified or likely to participate in fraud from entering the profession in the first place. As a result, overall service quality will likely increase.

Second, licensing requirements may incentivize the industry to invest in education, which in turn increases service quality.²⁴⁰ In “conditioning permission to practice on educational requirements” that reasonably relate to the occupation, licensing theoretically would improve overall service quality.²⁴¹ Education requirements are particularly important when there are information asymmetries regarding a practitioner’s credentials,²⁴² which as previously discussed, is likely the case with independent educational consultants. Furthermore, licensing requirements are “particularly important” in industries like the private college counseling industry “where self-employment or sole practitioners are common because sole practitioners may lack certain incentives that are provided by the more structured environment of the firm.”²⁴³ Therefore, licensing requirements are an important tool to increase service quality through education, particularly when there are information asymmetries between consumers and practitioners and the industry is composed of sole proprietors, as in the private college consultant industry.

Nevertheless, the majority of empirical studies regarding occupational licensing have found that licensing regulations do not improve service quality.²⁴⁴ These studies, however, primarily focus on “incremental changes in licensing restrictions, rather than comparing licensed professionals to comparable unlicensed professionals.”²⁴⁵ For example, these studies have shown that “more-difficult requirements to earn a dental license (in the form of the pass rate of the required exam) do not lead to improved dental outcomes of patients” and stricter mortgage broker licensing requirements “ha[ve] no influence on the number of foreclosures.”²⁴⁶

By contrast, the few studies that analyze the *initial* adoption of licensing requirements have found that licensing does increase service quality.²⁴⁷ For example, a National Bureau of Economic Research study found that states’ initial

238. *Id.*

239. See discussion *infra* Section III.B.1.

240. Sanderson, *supra* note 95, at 463.

241. *Id.*

242. *Id.* (“Licensing might thus be a rational response if regulators believe that the market is undervaluing education, perhaps because rationally ignorant consumers cannot distinguish between a qualification from an elite institution and a diploma mill until too late . . .”).

243. *Id.* at 462–63.

244. Ryan Nunn & Gabriel Scheffler, *Occupational Licensing and the Limits of Public Choice Theory*, 4 ADMIN. L. REV. ACCORD 25, 33–34 (2019).

245. *Id.*

246. MORRIS M. KLEINER, HAMILTON PROJECT, BROOKINGS INST., REFORMING OCCUPATIONAL LICENSING POLICIES 6 (2015).

247. Nunn & Scheffler, *supra* note 244, at 34.

adoption of midwifery licensing statutes in the early twentieth century were “associated with a 6 to 7 percent reduction in maternal mortality.”²⁴⁸ Furthermore, a study of state-level mortality statistics in 1900, 1910, 1920, and 1930 found that “stricter licensing [of physicians] also lowered mortality rates from diseases where physician quality may have mattered.”²⁴⁹ Therefore, while empirical research has found that legislation that “ratchets-up” licensing requirements may not increase service quality, the initial adoption of licensing regulation likely does increase overall service quality.²⁵⁰

Therefore, in initially adopting licensing, certification, or registration requirements for the currently unregulated college consultant industry,²⁵¹ the industry is likely to experience an increase in service quality.²⁵² Nevertheless, given that there is little research regarding the initial adoption of licensing laws’ effect on service quality,²⁵³ it is difficult to determine how greatly occupational licensing, certification, or registration would improve the quality of private college counseling. Therefore, states would likely need to conduct further research to determine the extent to which adopting licensing requirements for college consultants would increase service quality and if that increase would outweigh the potential costs.²⁵⁴

B. *Costs of Licensing Independent Educational Consultants*

1. *Decreased Competition*

While occupational licensing may protect consumers from unsafe, incompetent, or fraudulent practitioners,²⁵⁵ the principal critique of licensing legislation is that licensing “act[s] as a barrier to entry into the profession,” which limits competition.²⁵⁶ With decreased competition, industry professionals may raise their rates, while consumers and the greater economy bear the cost.²⁵⁷

In other words, licensing serves “as a bottleneck for entry into an occupation,” and therefore, “restricts the supply of practitioners, allowing those who are licensed to command more for their services.”²⁵⁸ As a result, consumers must either pay the practitioners’ inflated prices, perform the services themselves, or go without the service.²⁵⁹

248. D. Mark Anderson, Ryan Brown, Kerwin Kofi Charles & Daniel I. Rees, *The Effect of Occupational Licensing on Consumer Welfare: Early Midwifery Laws and Maternal Mortality* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22456, 2016).

249. Law & Kim, *supra* note 195, at 754.

250. Nunn & Scheffler, *supra* note 244, at 34.

251. Elejalde-Ruiz, *supra* note 2.

252. Nunn & Scheffler, *supra* note 244, at 34.

253. *See id.*

254. Kleiner & Krueger, *supra* note 235, at 5.

255. Robinson, *supra* note 39, at 1937.

256. Edlin & Haw, *supra* note 97, at 1112.

257. Kerska, *supra* note 111, at 1707.

258. KLEINER & VOROTNIKOV, *supra* note 214, at 8.

259. *Id.* at 10–12 (citation omitted).

Economist Milton Friedman analyzed this phenomenon, now dubbed the “Cadillac effect,” and hypothesized that in a world in which it was illegal to sell any car except Cadillacs, people would pay the cost of this luxury vehicle or go without a car.²⁶⁰ Therefore, although the “average quality of car might go up,” consumers who could not afford Cadillacs or those “who would have preferred to spend the extra funds otherwise would still be worse off.”²⁶¹ Simply put, according to Friedman, occupational licensing increases service costs, which are ultimately borne by consumers.

While decreased competition may increase cost, this increased cost is unlikely to affect consumers’ use of private college consulting, as the cost of counseling is already prohibitive for most families, with counseling services costing a total of \$4,200 on average.²⁶² Those who employ private college counselors are more likely to come from privileged families and “are less influenced by financial concerns.”²⁶³ Thus, the average consumer of counseling services will likely accept the additional cost caused by restricting industry membership. While these privileged families may “have preferred to spend the extra funds otherwise,” and, according to Friedman, are consequently worse off in some way,²⁶⁴ one must balance this potential cost with the risk of fraud and unfairness in the college admissions process caused by unchecked college consultants.

Another critique of occupational licensing is that licensing may decrease competition and raise service cost without increasing service quality.²⁶⁵ For example, scholars Morris M. Kleiner and Evgeny S. Vorotnikov argue that nurse practitioners can more cheaply perform services that are otherwise performed by primary care physicians, but licensing restrictions prevent this.²⁶⁶ They found that “more stringent restrictions on what nurse practitioners can do without a physician’s supervision do not increase quality or safety but may raise the price of well-child medical exams by between 3 and 16 percent.”²⁶⁷ Similarly, other studies have found that “dental hygienist and dental assistant licensing is estimated to increase the price of a dental visit by 7 to 11 percent, and optometry licensing is estimated to increase the price of eye care by 5 to 13 percent,” while also failing to increase service quality.²⁶⁸ Furthermore, the U.S. Department of the Treasury surveyed empirical research and found that “in only two out of the 12 studies was greater licensing associated with quality improvements,”²⁶⁹ whereas “significantly higher prices accompanied stricter licensing” in nine of the eleven relevant studies.²⁷⁰ Therefore, in some fields, occupational licensing

260. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 153 (40th anniversary ed. 2002); Kleiner & Vorotnikov, *supra* note 214, at 10.

261. KLEINER & VOROTNIKOV, *supra* note 214, at 10.

262. Wood, *supra* note 65.

263. Liu, *supra* note 55, at 12.

264. KLEINER & VOROTNIKOV, *supra* note 214, at 10.

265. McLaughlin, Mitchell & Philpot, *supra* note 223.

266. KLEINER & VOROTNIKOV, *supra* note 214, at 10.

267. *Id.*

268. McLaughlin, Mitchell & Philpot, *supra* note 223.

269. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 58.

270. *Id.* at 60.

may restrict competition and increase service cost without concurrently increasing service quality.

While licensing schemes may reduce competition without simultaneously enhancing service quality, the *initial adoption* of licensing requirements is associated with increases in service quality, as discussed in Section III.A.3.²⁷¹ Therefore, in adopting licensing, certification, or registration of private college counselors, there would likely be an increase in service quality, despite decreased competition.

Furthermore, occupational licensing's restriction on competition particularly harms consumers "when there are few if any alternatives (for example, surgery)."²⁷² This issue, however, is not relevant to the college consulting industry, as there are alternative service providers for students to pursue if there is decreased competition in the independent educational consultant industry. For example, students who ordinarily would pay for college consulting services likely also attend a high school with adequate college preparation resources and high school counselors.²⁷³ Students, therefore, can turn to these in-school resources for guidance, though they may not receive as wide-ranging or hands-on services as private consultants.²⁷⁴ These students could also seek out test preparation services or tutors to increase their test scores or GPAs, making them more attractive college applicants.²⁷⁵ Thus, although potential decreases in competition may result in higher costs that can be passed on to the consumer, consumers have alternatives to the services provided by private college counselors. Therefore, unlike Friedman's Cadillac hypothetical, consumers are not forced to choose between the high-cost luxury service or going without—they can use existing services provided by public and private schools, or alternative services, such as tutoring, that also help students gain admission to the school of their choice.²⁷⁶

Furthermore, economists typically attribute licensing's monopoly-like effect to the rent-seeking behavior of industry professionals, in which groups of professionals lobby for occupational licensing to intentionally restrict competition and raise their prices.²⁷⁷ While the adoption of licensing may somewhat restrict competition, scholars argue that "competition by unlicensed individuals is *virtually eliminated* through the use of the state's enforcement powers," namely through the state licensing board.²⁷⁸ These state licensing boards are usually staffed by active members of the profession and are responsible for setting and

271. Nunn & Scheffler, *supra* note 244, at 34; *supra* Section III.A.3.

272. Larkin, *supra* note 121, at 235–37.

273. See Perna et al., *supra* note 74, at 134, 154.

274. See Richards, *supra* note 3.

275. See, e.g., James S. Murphy, *The SAT-Prep Industry Isn't Going Anywhere*, ATLANTIC (Mar. 15, 2014), <https://www.theatlantic.com/education/archive/2014/03/the-sat-prep-industry-isnt-going-anywhere/284430/> [<https://perma.cc/P555-YPLT>] ("Although more schools than ever are making SAT scores optional for application, good test prep will remain important as long as high-stakes, time-constrained, multiple-choice exams are being used to determine who gets admitted to the most selective colleges and universities.").

276. See generally FRIEDMAN, *supra* note 260, at 153.

277. Kerska, *supra* note 111, at 1707.

278. Kleiner & Krueger, *supra* note 235, at 5 (emphasis added).

enforcing state industry standards.²⁷⁹ As these boards are staffed by industry members, licensing restrictions are enforced by “people with a vested interest in the occupation and sometimes even by the same people who lobbied for a license’s creation.”²⁸⁰ Thus, these boards have an incentive to “guard entry into the occupation and otherwise enforce the monopoly.”²⁸¹ As a result, these boards may use their administrative powers to further decrease competition by expanding or limiting the work practitioners can perform, establishing further entry barriers, reducing the number of slots in required educational programs, or raising the pass rate for licensing exams.²⁸² Therefore, in applying licensing requirements to independent educational consultants, legislators must be careful to design the requirements such that licensing boards are limited in their ability to use their power specifically to decrease competition.

Perhaps the most effective way to limit the effects of decreased competition, however, is to adopt certification requirements. As professionals can still practice their profession, this “less restrictive occupational regulation [] does not give certified providers a clear monopoly for their services.”²⁸³ Thus, consumers are not limited to choosing a certified provider, but may select “a presumably less expensive uncertified competitor based on what is important to them and what they can afford.”²⁸⁴ Scholars even recommend replacing existing licensing schemes with certification systems, as “providing more competition, would, in most cases, result in substantial gains in economic growth and employment without measurable harm to consumers.”²⁸⁵ Similarly, registration would likely also avoid the negative effects of decreased competition, as it does not involve high barriers of entry.²⁸⁶ As both certification or registration do not create complete monopolies, these licensing schemes would likely have fewer negative effects on competition than traditional licensing, while also discouraging bad actors and providing consumers and universities with some information regarding the consultant’s quality.²⁸⁷

Although licensing legislation may result in decreased competition,²⁸⁸ legislators can minimize this negative effect on consumers by adopting a certification or registration system.²⁸⁹ Consequently, legislators also can pursue the policy goals of preventing fraud, resolving information asymmetries, and ensuring competent, fair college counseling.

279. Edlin & Haw, *supra* note 97, at 1095–96; Robinson, *supra* note 39, at 1918.

280. Kleiner & Vortnikov, *supra* note 214, at 8.

281. *Id.*

282. Kleiner & Krueger, *supra* note 235, at 5.

283. Kleiner & Vortnikov, *supra* note 214, at 17.

284. *Id.* at 11.

285. MORRIS M. KLEINER, THE INFLUENCE OF OCCUPATIONAL LICENSING AND REGULATION, IZA WORLD LAB. 9 (Oct. 2017), <https://wol.iza.org/uploads/articles/392/pdfs/the-influence-of-occupational-licensing-and-regulation.pdf> [<https://perma.cc/JBH9-XJ5J>].

286. See Sieg, *supra* note 111, at 268.

287. See KLEINER & VOROTNIKOV, *supra* note 207, at 17.

288. Kerska, *supra* note 111, at 1707.

289. KLEINER & VOROTNIKOV, *supra* note 214, at 21.

2. *Licensing Disproportionately Affects Low-Income and Minority Practitioners*

As occupational licensing legislation may require professionals to complete higher levels of training or education, pay a registration fee, or pass an entrance exam, occupational licensing “presents particular burdens for minorities, the less educated and those with fewer financial resources at their disposal.”²⁹⁰

First, the educational requirements or registration fee costs of some licensing schemes pose a significant barrier for low-income individuals who hope to join licensed professions.²⁹¹ For example, “[o]f the 29% of workers who require licenses to work, nearly 48% required a college degree.”²⁹² Additionally, approximately 68% of licensed workers “required some form of continuing education beyond high school,” and “46% needed to complete an internship.”²⁹³ As these educational or training programs can cost thousands of dollars, even when a four-year degree is not required,²⁹⁴ low-income individuals may not be able to afford the costs associated with meeting licensing requirements. Additionally, workers likely cannot earn full-time income during prolonged training periods or internships,²⁹⁵ and thus lose out on wages they ordinarily would have been earning.²⁹⁶ Furthermore, registration fees for licensing exams or the mere cost of registering with the state may be prohibitive for low-income workers.²⁹⁷ For example, the average initial licensing costs are \$301.25 for a practical nurse, \$167.87 for a pipefitter, and \$121.40 for an emergency medical technician.²⁹⁸ Therefore, the costs of education and application to a licensing program can restrict low-income people from joining a licensed profession, thereby disproportionately shifting resources from low-income individuals to higher-income individuals who can afford these costs.²⁹⁹

290. *Id.* at 9.

291. Seth Johnson, *Occupational Licensing: How States and Professionals Work to Keep the Poor from Working*, 24 PUB. INT. L. REP. 11, 14–15 (2018).

292. *Id.* at 15.

293. *Id.*

294. See, e.g., Meredith Kolodner & Sarah Butrymowicz, *A \$21,000 Cosmetology School Debt, And a \$9-An-Hour Job*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/business/cosmetology-school-debt-iowa.html> [<https://perma.cc/TYZ8-VHA9>] (“In Iowa in particular, the companies charge steep prices — nearly \$20,000 on average for a cosmetology certificate, equivalent to the cost of a two-year community-college degree twice over — and they have fought to keep the required number of school hours higher than anywhere else in the country.”).

295. See *id.* (“Each state sets its own standards. Most require 1,500 hours, and some, like New York and Massachusetts, require only 1,000. Iowa requires 2,100 — that’s a full year’s worth of 40-hour workweeks, plus an extra 20.”); Carpenter II, Knepper, Erickson & Ross, *supra* note 94, at 15–16 (“[T]he average cosmetologist spends 372 days in training.”).

296. See DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 12.

297. Johnson, *supra* note 291, at 14–15.

298. Zach Herman, *The National Occupational Licensing Database*, NAT’L CONF. OF ST. LEGIS. (Mar. 24, 2020), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx> [<https://perma.cc/6RW3-6N2T>].

299. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 12.

While the educational requirements of some licensed professions may act as a barrier for individuals to enter a profession,³⁰⁰ this concern is less pronounced in the case of independent college consultants, as these practitioners very likely already have a college degree due to the nature of their profession. Yet, requirements that private college counselors have a Master's degree could pose a barrier for some consultants to enter the profession or to continue to practice.³⁰¹ Therefore, when designing licensing or certification requirements, legislators must consider the level of education that should reasonably be required to ensure competent and ethical counseling before setting education prerequisites. Furthermore, through adopting a certification or registration scheme, legislators could minimize the negative impacts of educational requirements, as these forms of licensing do not prevent all counselors from practicing.

Licensing legislation, however, also disproportionately affects minority practitioners.³⁰² Occupational licensing may result in fewer minority practitioners entering into a licensed profession "either because minorities find it more costly to meet licensing requirements or because licensing represents a deliberate effort to exclude minorities."³⁰³ First, as previously discussed, the steep costs of education, exams, and fees may prevent minority practitioners from entering a licensed profession, as these individuals may be members of communities of color that systematically have been denied economic opportunities or access to credit.³⁰⁴ Second, as the state grants licensing boards the power to "set and enforce" industry standards,³⁰⁵ these boards may use these powers to discriminate.³⁰⁶ For example, licensing boards could use their powers to adjust entry requirements or to redefine the scope of practice such that fewer minority practitioners are granted licenses.³⁰⁷ Thus, occupational licensing may be used inadvertently or explicitly to exclude minority practitioners from a licensed profession. Therefore, should legislatures impose licensing or certification on independent educational consultants, they must recognize that entry requirements or the state licensing board's actions could prevent otherwise qualified minority counselors from providing college admissions advising. Additionally, states could impose certification or registration systems, as these schemes allow boards only to restrict the use of title, rather than preventing counselors from practicing at all.

Finally, as licensing occurs at the state level, it is often "difficult for licensed professionals to move their practice across state lines," an issue which

300. *Id.*

301. *See, e.g., CEP Standards, supra* note 85 (limiting membership of the professional organization to those with Masters' degrees).

302. Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J.L. & ECON. 351, 352 (2009).

303. *Id.*

304. Lisa Rice, *The Fair Housing Act: A Tool for Expanding Access to Quality Credit*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT* 75, 93 (Gregory D. Squires ed., 2018).

305. Edlin & Haw, *supra* note 97, at 1095–96; Robinson, *supra* note 39, at 1918.

306. Law & Marks, *supra* note 302, at 352.

307. *Id.*; *cf. Kleiner & Krueger, supra* note 235, at 5.

disproportionately burdens “low-income citizens, migrant workers, and military spouses.”³⁰⁸ For most licensed professions, individuals must, at a minimum, fill out an application and pay registration fees to practice their profession in a new state.³⁰⁹ Professionals may also find that the state to which they are moving has different requirements, and therefore, they must “meet new qualifications (such as education, experience, training, testing, etc.).”³¹⁰ Consequently, licensing requirements pose further barriers to entry and “can discourage people from moving or lead them to exit their occupation.”³¹¹ Again, when imposing licensing or certification requirements on private college counselors, one must consider potential effects on mobility and balance these concerns against the policy benefits of occupational licensing.

Therefore, although licensing legislation may disproportionately burden low-income or minority practitioners, these effects are likely less pronounced in the private college counselor industry. Furthermore, states can minimize these discriminatory effects by instituting certification or registration requirements, rather than traditional licensing.

IV. RECOMMENDATION

This Note recommends that states require the certification of independent educational consultants because certification would achieve the primary policy goals of preventing fraud,³¹² resolving information asymmetry,³¹³ and encouraging more competent and ethical counseling practices,³¹⁴ while allowing freer entry into the consulting industry than traditional licensing requirements would allow.³¹⁵

First, this Note recommends that states adopt certification requirements rather than strict licensing legislation because certification would provide consumers with information about an independent educational consultant’s service quality without the costs of decreased competition that accompany traditional licensing.³¹⁶ In limiting who may advertise themselves as “independent educational consultants,” states can ensure that consumers have adequate information about a consultant’s education and skill level, while “allowing [consumers] to choose the quality they can afford.”³¹⁷ For example, websites that consult families on selecting independent educational consultants almost uniformly recommend that families select private college counselors who are members of industry

308. Kerska, *supra* note 111, at 1707–08; Larkin, *supra* note 121, at 239–40.

309. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 12.

310. *Id.* at 13.

311. *Id.*

312. Sanderson, *supra* note 95, at 463 (“Licensing has long been used to provide authorities with the ability to tackle fraudsters proactively by reducing the need to prove individual acts of fraud . . .”).

313. See Larkin, *supra* note 121, at 242.

314. See DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

315. See *id.* at 43.

316. Larkin, *supra* note 121, at 242.

317. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 44.

organizations, such as the Higher Education Consultants Association and the Independent Educational Consultants Association.³¹⁸ While consumers may be advised to seek out members of these professional organizations, both those who have been vetted by these organizations and those who have *not* can call themselves “independent educational consultants” or “college consultants.” In instituting certification legislation, consumers can be confident that those who advertise as college consultants have been vetted and certified, rather than having to search professional organizations’ membership databases.

Second, certification would allow states to prevent and track potential fraud.³¹⁹ Certification, like licensing, can “tackle fraudsters proactively” because requiring individuals to seek certification from the state to use the label “college consultants,” discourages “fraudsters from entering the field and makes it easier to track them if they do.”³²⁰ Similarly, registration could provide the same benefits of identifying and tracking individuals who may be committing fraudulent or criminal acts, as registration requires a professional to “file his or her name, address, line of work, and qualifications with a relevant state or local agency.”³²¹ Nevertheless, registration lacks the previously discussed informational benefits of certification because registration does not limit who can call themselves independent educational consultants.³²² Therefore, certification can effectively reduce fraud without limiting workers’ access to the college consultant industry, while also providing informational benefits for consumers.³²³

Third, certifying independent educational consultants would encourage more competent and ethical counseling practices.³²⁴ In excluding low-quality or unethical consultants from purporting to be independent educational consultants, certification would incentivize private college counselors to increase service quality so that they can meet consumers’ reputational expectations.³²⁵ While empirical research is mixed as to whether strict licensing requirements increase service quality, studies have shown that the initial adoption of occupational licensing does increase service quality.³²⁶ Therefore, in adopting certification requirements, rather than more strict licensing requirements, states are more likely to increase service quality while avoiding the negative effects traditional licensing requirements can have on competition and service prices.³²⁷

318. See, e.g., *How to Choose a College Admissions Counselor*, *supra* note 205; Josh Moody, *What to Look for When Hiring a College Consultant*, U.S. NEWS & WORLD REP. (Apr. 4, 2019, 11:43 AM), <https://www.usnews.com/education/best-colleges/articles/2019-04-04/what-to-look-for-when-hiring-a-college-consultant> [<https://perma.cc/GY23-GANF>]; O’Shaughnessy, *supra* note 206.

319. Sanderson, *supra* note 95, at 463.

320. *Id.*

321. Larkin, *supra* note 121, at 210.

322. Sieg, *supra* note 120, at 268.

323. DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 44.

324. *See id.* at 11.

325. *See id.*

326. Nunn & Scheffler, *supra* note 244, at 34.

327. Kleiner, *supra* note 246, at 6; Nunn & Scheffler, *supra* note 244, at 34.

Certification would also minimize the burdens that traditional licensing places on low-income and minority individuals,³²⁸ as certification would not completely restrict entry into the college counseling profession and, therefore, would not provide licensing boards with full control over entry into the industry.³²⁹

While certification may have these policy benefits, some may argue that private college counselors are unlikely to seek out certification because, unlike licensing, un-certified professionals may still provide college consulting services, though they cannot use the title “certified college consultant” or “certified independent educational consultant.”³³⁰ The college consulting industry, however, hinges on perceived prestige, and parents who can afford to hire these professionals are likely to seek out those with the highest accreditation.³³¹ Furthermore, following Operation Varsity Blues, independent educational consultants themselves sought out accreditation separating themselves from fraudsters or unexperienced consultants. For example, Mark Sklarow, CEO of the Independent Educational Consultants Association, noted that there was a “spike in membership at the IECA” in the days following the announcement of the college admissions scandal.³³² Additionally, the American Institute of Certified Educational Planners reported “a 380% increase in CEP applications in March and April” of 2019, the months immediately following the reveal of Singer’s conspiracy.³³³ Therefore, both consumers and independent educational consultants are likely to be receptive towards states’ introduction of certification legislation.

Furthermore, professional organizations for independent educational consultants already impose membership requirements that mirror typical certification requirements. For example, the American Institute of Certified Educational Planners requires that members (1) “[h]old at least a Masters degree in a relevant educational field (or demonstrate extensive comparable experience),” (2) “submit five professional references,” and (3) “[t]ake a written assessment that will provide insight into [their] ability to interpret student needs, including data from relevant testing, and recommend appropriate schools or colleges.”³³⁴ Applicants

328. KLEINER & VOROTNIKOV, *supra* note 214, at 9.

329. *See* Law & Marks, *supra* note 302, at 352.

330. *See* KLEINER & VOROTNIKOV, *supra* note 214, at 11 (“Certification, in contrast, avoids these pitfalls of licensing because it does not restrict the freedom of occupational practice, allowing consumers to choose a certified provider or a presumably less expensive uncertified competitor based on what is important to them and what they can afford.”).

331. *See* Liu, *supra* note 55, at 12 (finding that students who employ private college counselors are “more likely to exhibit the following traits: 1) active advice seekers, 2) from privileged families, 3) apply to more colleges, 4) attend private colleges far from home, and 5) are less influenced by financial concerns”).

332. Michelle Fox, *The Business of College Advisors Is Booming. Here’s How to Navigate the Consulting Process*, CNBC (Mar. 18, 2019, 2:53 PM), <https://www.cnbc.com/2019/03/15/heres-how-to-navigate-the-booming-business-of-college-advisors.html> [<https://perma.cc/R4VT-79FC>].

333. *People of Action: 380% Increase in Certified Educational Planner Applications*, AM. INST. OF CERTIFIED EDUC. PLANNERS, <https://www.aicep.org/people-of-action-380-increase-in-certified-educational-planner-applications> (last visited Aug. 24, 2021) [<https://perma.cc/MG5Z-W2M2>].

334. *CEP Standards*, *supra* note 85.

must also submit “a thorough census form that reviews education, training, expertise, and professional activities.”³³⁵ These application materials are reviewed by a committee, and if an applicant is certified, they must be re-certified “after a five-year period.”³³⁶ Similarly, the IECA requires that members hold a master’s degree or higher, demonstrate three years of experience in the field, advise a minimum number of students and conduct a minimum number of “evaluative campus visits,” and submit three professional references.³³⁷ Members must also pay \$600 in annual dues.³³⁸ Thus, as in a state occupational licensing system, counselors seeking professional organization membership must meet educational, testing, and experiential requirements, and pay a fee.³³⁹ As an increasing number of private college counselors have joined these professional organizations, despite their entry requirements, college consultants likely would be willing to comply with state standards in exchange for the right to use an accredited title.

Therefore, certification encourages fairness in the college admissions process and consultants themselves appear to be willing to comply with certification requirements to receive accreditation and distance themselves from bad actors.

Consequently, states should enact certification legislation for the independent educational consultant industry because certification would aid in preventing fraud,³⁴⁰ resolve information asymmetry between consumers and consultants,³⁴¹ and encourage more competent and ethical counseling practices,³⁴² while allowing the consulting industry to be more inclusive than under traditional licensing.³⁴³

V. CONCLUSION

In the wake of Operation Varsity Blues, which exposed the illegal and unethical practices of a private college counselor, states are faced with addressing unfairness in the college admissions process, as well as the largely unregulated independent educational consultant industry.³⁴⁴ Private consultants, like Singer, are not yet subject to regulations that limit their ability to practice private college counseling nor the scope of their practice.³⁴⁵ In introducing legislation called the

335. *Id.*

336. *Id.*

337. *Professional Membership*, INDEP. EDUC. CONSULTANTS ASS’N, <https://www.iecaonline.com/quick-links/independent-educational-consultants/join-ieca/apply-for-membership/professional-member-application/> (last visited Aug. 24, 2021) [<https://perma.cc/245C-DNF5>].

338. *Id.*

339. *See* Kleiner & Krueger, *supra* note 235, at 5.

340. Sanderson, *supra* note 95, at 463 (“Licensing has long been used to provide authorities with the ability to tackle fraudsters proactively by reducing the need to prove individual acts of fraud . . .”).

341. *See* Larkin, *supra* note 121, at 242.

342. *See* DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

343. *See id.* at 43–44.

344. *See* U.S. Atty’s Off. for the Dist. of Mass., *supra* note 1; *see also* Elejalde-Ruiz, *supra* note 2 (“[T]he Independent Education Consultants Association . . . sets ethical standards for its 1,850 members in an unregulated industry.”).

345. *See* Elejalde-Ruiz, *supra* note 2.

“College Consultants Act,” California legislators sought to implement registration, a form of occupational licensing, upon the private college consulting industry.³⁴⁶ The bill, if passed, would empower the California Secretary of State to establish an online process for the registration of college consultants and college consulting firms that make more than \$5,000 each year.³⁴⁷

This legislation, however, does not go far enough to ensure fairness in the college admissions process or to protect consumers from the unethical actions of purported private college counselors. Rather, California’s College Consulting Advisory Task Force and other states should consider implementing a certification system, as this system would deter and track potential fraud,³⁴⁸ resolve information asymmetry between consumers and counselors,³⁴⁹ and encourage competent, ethical counseling practices.³⁵⁰ Furthermore, certification, unlike traditional occupational licensing schemes, would allow freer entry into the consulting industry, as certification restricts one’s use of title, but not one’s right to practice.³⁵¹ Consequently, certification can promote fairness in the college admissions process by reducing the influence of bad actors, like Singer, while minimizing the effect that decreased competition can have on counselors’ already prohibitive prices.³⁵² Furthermore, it is particularly important that states institute a check on the influence of independent educational consultants because wealthy students are already disproportionately enrolled at elite colleges,³⁵³ and these students’ use of potentially unethical private counselors further disadvantages low-income students who do not have the resources to hire consultants.³⁵⁴ As low-income students and students from communities of color also “face the greatest structural barriers” to receiving college preparation counseling at their high schools,³⁵⁵ the unethical actions of private college counselors only exacerbates this inequity.

Therefore, to promote fairness and equity in the college admissions process, states should follow California in imposing a form of occupational licensing upon the currently unregulated independent educational consultant industry. These states, however, should go beyond mere registration. They should certify

346. Assem. B. 1312, 2019 Assem. Reg. Sess. (Cal. 2019).

347. *Id.*

348. Sanderson, *supra* note 95, at 463 (“Licensing has long been used to provide authorities with the ability to tackle fraudsters proactively by reducing the need to prove individual acts of fraud . . .”).

349. *See* Larkin, *supra* note 121, at 242.

350. *See* DEP’T OF THE TREASURY OFF. ET AL., *supra* note 93, at 11.

351. *See id.* at 44.

352. *See* discussion *infra* Section III.B.1.

353. Del Valle, *supra* note 56 (“In 2017, more than 29 percent of Harvard’s incoming freshman class was made up of legacy students—those who had a parent or grandparents who had also attended the university.”); *see also* Aisch, Buchanan, Cox & Quealy, *supra* note 72 (“At 38 colleges in America, including five in the Ivy League—Dartmouth, Princeton, Yale, Penn and Brown—more students came from the top 1 percent of the income scale than from the entire bottom 60 percent.”).

354. Del Valle, *supra* note 56; Liu, *supra* note 55, at 12.

355. Perna et. al, *supra* note 74, at 154 (“These findings suggest that students who do not proactively seek contact with counselors and/or attend a high school where college enrollment is not the norm are less likely to receive sufficient college counseling. In other words, students with the greatest need for college counseling likely face the greatest structural barriers to receiving that counseling.”).

consultants to ensure that those who call themselves “college consultants” or “independent educational consultants” have been vetted by the state.³⁵⁶

356. See KLEINER, *supra* note 99, at 1.

