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**CAVITY FILLING OR ROOT CANAL?
HOW COURTS SHOULD APPLY NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS V. FTC**

ABSTRACT

This Comment argues that federal courts and the FTC should narrowly construe a recent Supreme Court decision restricting the scope of the antitrust state-action doctrine. In North Carolina State Board of Dental Examiners, the Supreme Court held that state boards controlled by active market participants must receive active state supervision to invoke state-action antitrust immunity. Notably, the majority opinion did not provide a test for determining whether active market participants control a state agency. Nor did it offer guidance on the adequate level of supervision states must provide to satisfy the active supervision requirement.

Fortunately, states and courts can look to an FTC Staff Guidance Statement and the Parker doctrine as polestars for answering the questions left open by the Court. The FTC Staff Guidance Statement provides insights into how to identify when active market participants control a state board. The Parker doctrine supports a presumption that a state supervisory scheme is adequate when it satisfies the four constant requirements identified by Justice Kennedy in N.C. Dental. Taken together, the FTC Staff Guidance Statement and the Parker doctrine suggest that N.C. Dental is amenable to an interpretation that does not eviscerate the antitrust state-action doctrine.

What's more, strong policy reasons support an interpretation of N.C. Dental that does not unduly trammel states' rights. To be sure, state-sanctioned cartels in the form of licensing commissions and regulatory boards represent a pervasive problem in the United States economy. Nonetheless, this Comment argues that N.C. Dental need not portend the demise of antitrust federalism, especially as it applies in the context of state health care regulation. Supreme Court precedent and structural principles that undergird the Constitution weigh in favor of an interpretation and application of N.C. Dental that does not vitiate the antitrust state-action exemption. Additionally, even when immunity fails, courts should adopt a recently proposed "modified rule-of-reason analysis" for cases involving state regulatory boards. This approach maximizes the holding's upside while avoiding the downside of

disrupting states' regulatory regimes in sensitive industries such as health care and medical regulation.

INTRODUCTION

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.¹

Recently, a considerable amount of economic and legal commentary has focused on a controversial but ubiquitous practice: state delegation of regulatory authority to private actors.² Much of this commentary has been negative, and rightfully so. When a state delegates regulatory authority over an industry or profession to persons who are active market participants in that same industry, a stark conflict of interest arises because those private delegates might “confuse[] their own interests with the State’s policy goals.”³ Put bluntly, delegating regulatory authority to active market participants invites self-dealing.⁴

The purported benefit of occupational licensing is that it helps improve the safety and quality of goods and services offered in a state.⁵ However, recent studies suggest that, despite an explosion in occupational licensing regimes throughout the United States,⁶ these regimes yield only marginal safety and quality benefits and, further, increase the prices of goods and services⁷ and

¹ *Parker v. Brown*, 317 U.S. 341, 351 (1943).

² See, e.g., Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1095–96 (2014); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 932 (2014).

³ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

⁴ *Id.*

⁵ Edlin & Haw, *supra* note 2, at 1098.

⁶ Today, “nearly a third of American workers need a state license to perform their job legally, and this trend toward licensing is continuing.” Edlin & Haw, *supra* note 2, at 1096. In the 1950s, only approximately 5% of the United States workforce needed a license for their occupation. *Id.*

⁷ *Id.* at 1098 (“Kleiner, the leading economist studying the effects of licensing on price and quality of service, estimates that licensing costs consumers \$116 to \$139 billion every year.”).

reduce job availability.⁸ In other words, empirical evidence indicates that the costs of occupational licensing far exceed the benefits.⁹

At first blush, the Sherman Act appears an effective tool for addressing the problem of private-regulatory delegations. After all, occupational licensing is a deliberate restriction of competition, and the entities that impose these restraints closely resemble a prime target of the antitrust laws: cartels.¹⁰ Yet, because of the Supreme Court's decision in *Parker v. Brown*,¹¹ the Sherman Act often has trouble reaching licensing boards that enact anticompetitive restraints under the auspices of state authority.¹²

Parker established that acts of state legislatures are automatically immune from the Sherman Act.¹³ Two later cases, *Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*¹⁴ and *Town of Hallie v. City of Eau Claire*,¹⁵ addressed the status of private actors and municipalities within the antitrust state-action doctrine. In *Midcal*, the Supreme Court formally established a two-pronged test for private actors to obtain immunity: (1) they must act pursuant to a clearly articulated state policy to displace competition (the "clear articulation" requirement); and (2) the state must actively supervise the conduct of private actors to whom it has delegated the authority to displace competition (the "active supervision" requirement).¹⁶ In *Town of Hallie*, the Court held that municipalities only need to satisfy the first, clear articulation prong because "[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement."¹⁷

⁸ *Id.* ("Labor economists have shown that the net effect of licensing on quality is equivocal." (citing CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FTC, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21–27, 40 (1990), http://www.ramblemuse.com/articles/cox_foster.pdf).

⁹ *Id.*

¹⁰ See Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism: North Carolina Board of Dental Examiners v. FTC*, 2014–2015 CATO SUP. CT. REV. 195, 196.

¹¹ 317 U.S. 341 (1943). The *Parker* Court considered whether the Sherman Act could reach a California regulatory program that restricted competition among raisin growers. *Id.* at 344. The Court held that although private actors could not agree to limit supply and stabilize prices in this way, the Congress that enacted the Sherman Act never intended to restrain state action. *Id.* at 350–52.

¹² See, e.g., *id.* at 352, 368. "Parker immunity" and "antitrust state-action exemption" are used interchangeably throughout this Comment. It is also important to note that state-action in the context of the *Parker* antitrust doctrine is entirely distinct from the concept of state-action under the fourteenth amendment.

¹³ *Id.* at 352.

¹⁴ 445 U.S. 97 (1980).

¹⁵ 471 U.S. 34 (1985).

¹⁶ *Midcal*, 445 U.S. at 105.

¹⁷ *Hallie*, 471 U.S. at 47.

Parker, *Midcal*, and *Town of Hallie* establish “three categories of state-action antitrust immunity:” (1) state legislatures enjoy complete immunity without having to satisfy either prong of *Midcal*; (2) municipalities need only satisfy the first prong by showing that they acted pursuant to a clearly articulated policy; and (3) private actors must satisfy both the clear articulation and active state supervision prongs.¹⁸

A footnote in *Town of Hallie* suggested that “true [(i.e. public)] state agencies” should be treated the same as municipalities for purposes of *Parker* immunity.¹⁹ Though it was dictum, courts generally adhered to this principle.²⁰ However, “determining whether an actor is sufficiently ‘public’ so as not to require supervision has often proven difficult.”²¹ Indeed, until 2015, there was a three-way circuit split on this issue.²² Then, in *North Carolina State Board of Dental Examiners v. FTC (N.C. Dental)*, the Supreme Court resolved the split, at least partially.²³

In *N.C. Dental*, the Court held that state boards controlled by active market participants must satisfy the active supervision requirement to receive *Parker* immunity.²⁴ Because “[state] boards [throughout the United States] are typically dominated by active members of the very profession that they are tasked with regulating,”²⁵ the effect of this holding is significant: assuming states want to immunize their boards from antitrust suit, they will need to either reorganize or “actively supervise” boards that previously did not require

¹⁸ Alexander Volokh, *Are the Worst Kinds of Monopolies Immune From Antitrust Law?: FTC v. North Carolina Board of Dental Examiners and the State-Action Exemption*, 9 N.Y.U. J.L. & LIBERTY 119, 125 (2015); see also David Gringer, *Antitrust Treatment of State Licensing Boards in the Wake of North Carolina State Board of Dental Examiners v. F.T.C.*, 24 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL., Fall 2015, at 50, 50 (“State action immunity offers its most robust protection where the actor in question is the state acting as sovereign.”).

¹⁹ *Hallie*, 471 U.S. at 46 n.10 (1985) (“In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.”).

²⁰ Volokh, *supra* note 18, 125 (“Courts all agree with the *Town of Hallie* dictum that true state agencies fall into [the same] category [as municipalities]”); see also *United States v. Denedo*, 556 U.S. 904, 921 (2009) (Roberts, C.J., concurring in part and dissenting in part) (“[F]ootnotes are part of an opinion, too, even if not the most likely place to look for a key jurisdictional ruling.”).

²¹ 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 226b, at 166 (3d ed. 2006).

²² Volokh, *supra* note 18, at 126; see *infra* text accompanying notes 69–71.

²³ 135 S. Ct. 1101, 1114 (2015).

²⁴ *Id.* (“A state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.”).

²⁵ Edlin & Haw, *supra* note 2, at 1103.

supervision.²⁶ Moreover, the active supervision requirement is more difficult to satisfy than the clear articulation requirement.²⁷ As such, *N.C. Dental* restricts the scope of the antitrust state-action doctrine, though it remains to be seen how expansively the FTC and lower courts will apply the decision.²⁸

Some commentators view *N.C. Dental* as a step in the right direction in the fight against state-sanctioned cartels.²⁹ Others, however, have expressed concern at the potential threat the decision poses to the predominant model of state economic regulation and, in particular, state health care regulation.³⁰ Professional self-regulation, such as doctors regulating doctors or lawyers regulating lawyers, has existed since the mid-nineteenth century.³¹ That this practice continues to this day, with every state relying to some extent on professional self-regulation, is not surprising: delegating regulatory authority to persons with experience in a particular field enables states to draw upon these individuals' expertise in formulating their regulatory policies.³² Because it restricts the scope of the *Parker* immunity, *N.C. Dental* may make professionals reluctant to serve on state regulatory boards, thereby interfering with the states' ability to regulate such internal affairs. Thus, the decision implicates federalism concerns at the heart of the antitrust state-action doctrine. Indeed, *Parker* embodies the structural constitutional principle that states are entitled to a significant amount of authority as co-sovereigns under our federalist system.³³

²⁶ *N.C. Dental*, 135 S. Ct. at 1114.

²⁷ See Volokh, *supra* note 18, at 124–26.

²⁸ See *N.C. Dental*, 135 S. Ct. at 1114; *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (describing the two-pronged test as “rigorous”).

²⁹ See, e.g., Sasha Volokh, *Victory against Big Dentistry! The Antitrust Story*, WASH. POST: VOLOKH CONSPIRACY (Feb. 25, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/25/victory-against-big-dentistry-the-antitrust-story/>.

³⁰ See Kathleen Foote, *Immune No Longer: State Professional Boards Consider Their Options*, 30 ANTITRUST, Fall 2015, at 55, 56; Colin R. Kass, Scott M. Abeles & John Ingrassia, *Has the Supreme Court Thrown Health Care Regulation into Disarray? A Comment on the Court's Reworking of the State Action Doctrine*, 30 ANTITRUST, Fall 2015, at 58, 61; see also Roxann E. Henry, *Antitrust and the Judiciary*, 30 ANTITRUST, Fall 2015, at 3, 3 (“The impact of *North Carolina Dental* on the state action exemption will affect a wide range of industries with representatives on state regulatory boards.”).

³¹ See *N.C. Dental*, 135 S. Ct. at 1117 (Alito, J., dissenting) (“When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.” (citing SAMUEL S. WHITE, *HISTORY OF ORAL AND DENTAL SCIENCE IN AMERICA* 197–214 (1876))).

³² *Id.* at 1122 (“It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions.”).

³³ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (“To be sure, our Constitution does embody structural principles of federalism and sovereignty.”).

In addition to these federalism concerns, the holding in *N.C. Dental* raised two key questions. First, what constitutes a controlling number of active market participants: only a majority, or perhaps a minority that sets a board's agenda or generally gets its way?³⁴ Second, what constitutes active state supervision? In other words, if a state decides to comply with *N.C. Dental* by subjecting its regulatory boards to "active state supervision," what must that supervision entail? As to this latter question, the majority gleaned from *Parker's* progeny four "constant requirements" for satisfying the active state supervision requirement:

[1] The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; [2] the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; [3] the "mere potential for state supervision is not an adequate substitute for a decision by the State" . . . [and 4] the state supervisor may not itself be an active market participant.³⁵

To be sure, the majority ultimately characterized the inquiry as "flexible and context-dependent," and stated that "the adequacy of supervision otherwise will depend on all the circumstances of a case."³⁶ Although the Court acknowledged that "[a]ctive supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision,"³⁷ the decision nonetheless left states wondering what else might be required to satisfy the active supervision requirement.³⁸

To help resolve some of these questions, several state officials requested guidance from the FTC on how to interpret and comply with the holding.³⁹ The

³⁴ *N.C. Dental*, 135 S. Ct. at 1123 (Alito, J., dissenting). The dissent also posed additional questions. For example, "who is an active market participant" and "what is the scope of the market in which a member may not participate while serving on the board?" *Id.* These questions are addressed in Part II.

³⁵ *Id.* at 1116–17 (citations omitted) (quoting *FTC v. Ticor Title Ins.*, 504 U.S. 621, 638 (1992)). The four constants can be summarized as follows: (1) substantive review; (2) power to veto or modify; (3) decision by state official; (4) supervisor not itself an active market participant.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *N.C. Dental* is not the first case where Justice Kennedy failed to provide meaningful guidance on the dictates of the active supervision requirement. In *FTC v. Ticor Title Insurance*, 504 U.S. 621 (1992), Chief Justice Rehnquist's dissent criticized Justice Kennedy's majority opinion for not explaining "just how active a State's regulators must be before the 'active supervision' requirement will be satisfied." *Id.* at 644 (Rehnquist, C.J., dissenting).

³⁹ FED. TRADE COMM'N, STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS 2 (2015) [hereinafter STAFF GUIDANCE STATEMENT], https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

FTC responded by issuing a non-binding “Staff Guidance Statement,”⁴⁰ which stated that the Commission would apply *N.C. Dental* “reasonably and flexibly.”⁴¹ Understandably, this assurance is cold comfort to state legislators and prospective professional regulators: over the last twenty-five years, the Supreme Court sided with the FTC in all three of the *Parker* cases it decided, each of which narrowed the scope of the antitrust state-action doctrine.⁴² Moreover, even if the Commission could somehow guarantee that it would focus its enforcement efforts on agencies engaged in egregious conduct, *N.C. Dental* still opens the courthouse doors for private plaintiffs to bring antitrust suits against state boards and their members.⁴³ Indeed, the plaintiffs’ bar has already started taking advantage of this opportunity.⁴⁴

Fortunately, there are several persuasive arguments for why *N.C. Dental* need not dissuade private actors from serving on state boards. The most problematic aspect of the holding—the amorphous standard established for the active supervision requirement—is amenable to a practical, and legally supportable, solution: federal courts should regard a supervisory system that satisfies the four constant requirements identified by Justice Kennedy as presumptively adequate.⁴⁵ Although Justice Kennedy intimated that these requirements were merely necessary, this Comment argues that courts should adopt a presumption that these constants are sufficient. Supreme Court precedent and policy considerations support this claim.

Although the majority opinion is consistent with the Court’s functionalist trend in shaping antitrust jurisprudence, two reasons support a more precise standard here. First, in the vast majority of cases, a supervisory system that satisfies the four constant requirements will provide “realistic assurance that a private party’s anticompetitive [restraint] promotes state policy.”⁴⁶ Supreme

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015); *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013); *Ticor Title*, 504 U.S. 621 (1992); *see also* Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, Remarks to Heritage Foundation: Reflections on the Supreme Court’s North Carolina Dental Decision and the FTC’s Campaign to Rein in State Action Immunity (Mar. 31, 2015), 2015 WL 1641275, at *4–5 (discussing additional state-action cases in which the FTC has succeeded).

⁴³ *See* Ohlhausen, *supra* note 42, at *7 (“*N.C. Dental* was a fairly broad decision.”). The Clayton Antitrust Act provides a private cause of action and treble damages for violations of the Sherman Antitrust Act. 15 U.S.C. § 15(a) (2012).

⁴⁴ Foote, *supra* note 30, at 56 (listing several cases that have been filed “at a rapid clip” in the wake of *N.C. Dental*).

⁴⁵ *See supra* text accompanying note 35.

⁴⁶ *Patrick v. Burget*, 486 U.S. 94, 101 (1988); *see also infra* Part III.

Court precedent supports this contention.⁴⁷ Moreover, the majority's refusal to provide a workable standard for the active supervision requirement, just like in *Ticor Title*,⁴⁸ has created unnecessary uncertainty that is fueling private regulators' anxieties.⁴⁹

Second, the *Parker* doctrine reflects the Supreme Court's view that, under our federalist system, the federal judiciary should not second-guess, much less decide, whether a state regulatory board "is . . . structured in a way that merits a good-government seal of approval."⁵⁰ Similarly, the *Parker* doctrine is intended to preclude judicial inquiry into the merits of a state's regulatory policy.⁵¹ Hence the tension *N.C. Dental* poses to the Court's previously-settled understanding of the *Parker* doctrine: An active supervision requirement that imposes requirements beyond the four constants will invite courts and the Commission to engage in normative evaluations of state regulatory policies. This, in turn, is likely to frustrate states' regulatory regimes.

Although *Parker* immunity is the best-case scenario for private actors,⁵² even when it does not apply and a case proceeds to a trial on the merits, a member of an active market participant-controlled board *should* have a better chance of successfully defending herself than a typical antitrust defendant. To that end, federal courts should adopt the modified rule of reason proposed by antitrust scholars Aaron Edlin and Rebecca Haw.⁵³ Under this approach, social-welfare justifications for anticompetitive restraints, which are traditionally irrelevant in antitrust cases,⁵⁴ should apply with special force.⁵⁵ This should be especially helpful when the antitrust defendant is a member of a state medical board.

⁴⁷ See, e.g., *Patrick*, 486 U.S. at 101 (first citing *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 51 (1985); then citing *Parker v. Brown*, 317 U.S. 341, 352 (1942); and then citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987)).

⁴⁸ *Ticor Title*, 504 U.S. at 644 (Rehnquist, J., dissenting).

⁴⁹ See Foote, *supra* note 30, at 55 (describing the various state officials still seeking interpretive guidance on *N.C. Dental* after the FTC issued its Staff Guidance).

⁵⁰ *N.C. Dental*, 135 S. Ct. at 1117 (Alito, J., dissenting).

⁵¹ *Id.* ("The question before us is not whether such [state regulatory] programs serve the public interest.").

⁵² Importantly, immunity obviates the need for expensive and time-consuming litigation.

⁵³ Haw & Edlin, *supra* note 2, at 1100. For an explanation of the modified rule-of-reason approach, see *infra* text accompanying notes 237–50.

⁵⁴ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 686 (1978).

⁵⁵ Haw & Edlin, *supra* note 2, at 1146.

Although the modified rule of reason reflects a balanced approach, the proposal also warrants certain critiques. In particular, Edlin and Haw downplay a central premise of the *Parker* doctrine: the federal government should avoid interfering with states' core police powers and should resist the temptation to substitute its judgment for the states' on matters of state regulatory policy, even when the efficiency-based goals of the antitrust laws suggest otherwise.⁵⁶ Finally, there are other avenues for challenging private delegations that can address some of the problems posed by self-dealing, government-sanctioned cartels without infringing on states' rights as co-equal sovereigns.⁵⁷

For the foregoing reasons, this Comment argues that *N.C. Dental* should not unduly restrict the state-action antitrust exemption, at least as applied in the context of state health care regulation. This Comment proceeds in four parts. Part I discusses the facts of *N.C. Dental* and evaluates the majority and dissenting opinions. Part II expands on the FTC's treatment of the ambiguous "controlling number" language in the *N.C. Dental* holding.⁵⁸ Part III argues that the four constant requirements identified by Justice Kennedy should, in most cases, suffice to satisfy the active supervision requirement. Part IV considers additional reasons why the Commission and, perhaps more realistically, the lower courts should interpret *N.C. Dental* in a way that avoids dissuading private actors from serving on state boards.

I. THE NARROWED SCOPE OF THE ANTITRUST STATE-ACTION DOCTRINE: *N.C. STATE BOARD OF DENTAL EXAMINERS V. FTC*

This Part consists of three sections. Section A provides the factual background of *N.C. Dental*. Section B evaluates Justices Kennedy and Alito's respective majority and dissenting opinions. Section C explains why states are likely to respond to *N.C. Dental* in one of two ways.

A. *N.C. Dental—Factual Background*

The North Carolina State Board of Dental Examiners (the Board) regulated the practice of dentistry in North Carolina; its membership consisted of six dentists, one dental hygienist, and one citizen member.⁵⁹ North Carolina law

⁵⁶ *Id.* at 1131.

⁵⁷ Volokh, *supra* note 2, at 940.

⁵⁸ 135 S. Ct. 1101, 1114 (2015). This question is critical—*N.C. Dental* now requires agencies controlled by active market participants to satisfy the active supervision requirement. *Id.* at 1116.

⁵⁹ N.C. GEN. STAT. § 90-22(b) (2015).

required that North Carolina-licensed dentists elect practicing dentists to serve on the Board.⁶⁰ In 2003, after receiving complaints from dentists about non-dentist providers of teeth-whitening services, the Board took action.⁶¹ It sent “at least 47 cease-and-desist letters to 29 non-dentist teeth-whitening providers,” alleging that these teeth whiteners were engaged in the unauthorized practice of dentistry.⁶² By 2007, the Board’s campaign had succeeded: North Carolina was free of the scourge of non-dentist teeth whiteners.⁶³

In 2010, the FTC sued the Board for violating the FTC Act.⁶⁴ The Commission viewed the Board’s exclusionary conduct as an anticompetitive restraint of trade.⁶⁵ The Board argued that it did not matter whether its actions were anticompetitive: as a state agency, the *Parker* antitrust state-action exemption shielded its conduct from antitrust scrutiny.⁶⁶ The FTC disagreed: it argued that, because the Board was composed of active market participants, *Parker* immunity did not apply unless the Board’s actions were actively supervised by the state of North Carolina.⁶⁷ After the Commission affirmed two rulings by an administrative law judge denying the Board’s motion to dismiss on the ground of *Parker* immunity, the Board appealed to the Fourth Circuit, which “affirmed the FTC in all respects.”⁶⁸

The Fourth Circuit’s holding created a three-way circuit split on the proper way to distinguish between public and private state agencies for purposes of state-action antitrust immunity.⁶⁹ The split represented a spectrum ranging from deferential to restrictive in terms of their approaches for classifying agencies as public. The Second, Fifth, and Tenth Circuit Courts of Appeals fell at the most deferential end of the spectrum; these courts followed a “cursory view [approach] that categorize[d] agencies as public based on minimal

⁶⁰ N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d 359, 364 (4th Cir. 2013).

⁶¹ *Id.* at 365.

⁶² *Id.* at 364–65.

⁶³ *Id.* at 365.

⁶⁴ *Id.* The FTC Act is broader, but also includes Section 1 of the Sherman Act. *See* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 873 (2010) (“[T]he Supreme Court has held that the FTC’s power to condemn ‘unfair methods of competition’ covers everything that the Sherman Act covers and goes even further to reach a ‘penumbra’ of practices that are not covered by the Sherman Act.”).

⁶⁵ *N.C. Dental*, 717 F.3d at 365.

⁶⁶ *Id.*

⁶⁷ *Id.* at 368; *see also infra* text accompanying note 84.

⁶⁸ N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1109 (2015).

⁶⁹ Volokh, *supra* note 18, at 126.

analysis, sometimes merely relying on the agency’s statutory labeling.”⁷⁰ The First, Seventh, Ninth, and Eleventh Circuits followed an “intermediate view”—these circuits “adopt[ed] more of a laundry-list view that weigh[ed] various factors cutting for or against publicness.”⁷¹

Finally, the approach taken by the Fourth Circuit in *North Carolina State Board of Dental Examiners v. FTC*, represented the most restrictive view of all the circuit courts that had confronted this issue.⁷² The Fourth Circuit labeled an agency as public, and thus “found active supervision to be required whenever the [state] agency [was] composed of private industry participants *and* . . . politically accountable only to other private industry participants.”⁷³ This split likely influenced the Court’s decision to review the Fourth Circuit’s decision in *N.C. Dental*, a case that one antitrust scholar dubbed, “The Saga of the Dental Examiners.”⁷⁴

B. More Antitrust (Majority) v. More Federalism (Dissent)

The majority opinion, penned by Justice Kennedy, began by noting the crucial role that antitrust plays in the U.S. economy: “Federal antitrust law is a central safeguard for the Nation’s free market structures.”⁷⁵ The Court explained that the antitrust laws, by promoting robust competition, inure to the benefit of the States and their citizenry.⁷⁶ However, the majority also acknowledged that, despite these benefits, “our federalism”—the delicate balance of powers between the federal government and the several states⁷⁷—

⁷⁰ *Id.* at 126–27.

⁷¹ *Id.* The circuit courts that followed this approach would “weigh[] various factors cutting for or against publicness, such as open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity’s decision-making structure.” *Id.*

⁷² *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359 (4th Cir. 2013).

⁷³ Volokh, *supra* note 18, at 127.

⁷⁴ *Id.* at 121.

⁷⁵ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (“In this regard it is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’” (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972))).

⁷⁶ *Id.* “The Sherman Act . . . empowers the States and provides their citizens with opportunities to pursue their own and the public’s welfare.” *Id.* (citing *FTC v. Ticor Title Ins.*, 504 U.S. 621, 632 (1992)).

⁷⁷ Federalism is of course the relationship between all branches of the Federal Government and the state governments. The slogan “our federalism,” however, has become synonymous with judicial federalism, the notion that federal courts must wield their power with a sensitivity to its impact on the balance of power between Nation and States.

Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism”*, 27 GA. L. REV. 697, 703 (1993); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3–28, at 196 (2d ed. 1988)

requires limiting antitrust's reach.⁷⁸ "If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act . . . federal antitrust law would impose an impermissible burden on the States' power to regulate."⁷⁹ To avoid imposing this impermissible burden, the *Parker* Court created an antitrust state-action exemption.⁸⁰ This exemption "recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'"⁸¹ Indeed, *Parker* immunity helps preserve the states' rights under our dual system of government to regulate their internal affairs.

In addressing the merits, Justice Kennedy's analysis focused on the distinction between sovereign and nonsovereign actors. The Board had argued that it was exempt under *Parker* because "its members were invested by North Carolina with the power of the State"⁸² The Court thus confronted the problem that gave rise to the circuit split: whether the Board qualified as public or private.⁸³ In holding that a "nonsovereign actor controlled by active market participants" must satisfy both *Midcal* requirements (i.e., clear articulation and active supervision), the majority vindicated the position taken by the FTC at the Fourth Circuit; whereas the FTC's approach had focused almost exclusively on the board's membership structure.⁸⁴ While the political accountability point emphasized by the Fourth Circuit appeared to factor into the decision,⁸⁵ the holding is broader than the Fourth Circuit's approach: a board of gubernatorial-appointee active market participants will need to satisfy active supervision if they exercise control over a state regulatory board.⁸⁶ In sum, *N.C. Dental* established that boards controlled by active market

("[Judicial federalism is] a view that federal courts must regard their power as tempered by a keen appreciation of the essential role of the states and their judicial systems in our constitutional universe.").

⁷⁸ *N.C. Dental*, 135 S. Ct. at 1109.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1110 ("[T]he Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity.").

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *supra* text accompanying note 72.

⁸⁴ *N.C. Dental*, 135 S. Ct. at 1110. Under the Commission's view, "a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine." Ohlhausen, *supra* note 42, at *1-2 (quoting N.C. Bd. of Dental Exam'rs, Docket No. 9343, at 13 (F.T.C. Feb. 8, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinon.pdf>).

⁸⁵ *N.C. Dental*, 135 S. Ct. at 1116.

⁸⁶ Volokh, *supra* note 29.

participants are nonsovereign actors.⁸⁷ And because these nonsovereign actors pose unique risks not shared by municipalities, the Court decided that controlled boards must satisfy the active state supervision requirement to obtain *Parker* immunity.⁸⁸

Justice Alito's dissent criticized the majority opinion on three grounds. First, the dissent argued that the Court's decision reflected "a serious misunderstanding of the doctrine of state-action antitrust immunity."⁸⁹ According to the dissent, *Parker* and its progeny do not invite judicial inquiry into the risk that a state regulatory agency comprised of private actors will pursue its members' financial interests.⁹⁰ State regulatory boards had always been staffed with private actors,⁹¹ and the risk that such boards would engage in self-dealing was "nothing new."⁹² Moreover, North Carolina's dental regulatory scheme appeared analogous to the raisin marketing program upheld in *Parker*.⁹³ Under the dissent's view, then, the majority erred by focusing on the Board's membership structure, as precedent did not dictate that type of inquiry.⁹⁴ Similarly, "whether such [regulatory] programs serve the public interest" should not have affected the availability of *Parker* immunity.⁹⁵ Instead, the dispositive factor should have been whether North Carolina labeled the Board a state agency.

Second, and related to the first criticism, Justice Alito argued that the Court's decision jeopardized the same federalism principles that motivated the *Parker* Court to exempt state action from antitrust scrutiny.⁹⁶ Justice Alito explained that "[t]he Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States."⁹⁷ Rather, the state-action carve-out to the antitrust laws reflected a concern for

⁸⁷ *N.C. Dental*, 135 S. Ct. at 1114 (Alito, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* ("Today . . . the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval But that is not what *Parker* immunity is about.")

⁹¹ See *supra* text accompanying notes 32–33.

⁹² *N.C. Dental*, 135 S. Ct. at 1117 (Alito, J., dissenting).

⁹³ *Id.* ("[T]he very state program involved in [*Parker*] was unquestionably designed to benefit the regulated entities, California raisin growers.")

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1122.

⁹⁷ *Id.* at 1119.

the States' right to self-regulation as co-sovereigns under a federalist system.⁹⁸ Further, the *Parker* Court thought it highly unlikely that the drafters of the Sherman Act intended the law to reach states' internal regulatory policies.⁹⁹ North Carolina's delegation to its Board of Dental Examiners thus represented the same "quintessential police power legislation" that had been upheld prior to and immediately after the Sherman Act's enactment.¹⁰⁰ Hence, "the North Carolina statutes establishing and specifying the powers of the [Board] represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize."¹⁰¹

Third, in addition to criticizing the majority for incorrectly applying precedent and infringing on states' rights,¹⁰² the dissent cautioned that the Court's decision would "create practical problems and [was] likely to have far-reaching effects on the States' regulation of professions."¹⁰³ In particular, the dissent queried whether states would have trouble deciphering the majority opinion. The dissent specifically identified three ambiguities in the holding: (1) what constitutes "a controlling number [of active market participants]"; (2) who qualifies as an "active market participant"; and (3) "[w]hat is the scope of the market in which a member may not participate while serving on the board?"¹⁰⁴ The dissent also pointed out the difficulty of identifying when regulatory capture has occurred.¹⁰⁵ As this litany of pointed questions makes clear, the holding raised numerous questions that were far from self-explanatory.

C. Two Responses: Either Avoid Active Market Participant Control, or Actively Supervise

Assuming states value the protections afforded by *Parker* immunity, which is a fair assumption,¹⁰⁶ they will likely respond to *N.C. Dental* in one of two

⁹⁸ *Id.* at 1119.

⁹⁹ *Id.* ("For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.")

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1123.

¹⁰³ *Id.* at 1122.

¹⁰⁴ *Id.* at 1123.

¹⁰⁵ *Id.* at 1118.

¹⁰⁶ Twenty-two states signed on to an amicus brief that expressed the concern that affirming the FTC would severely disrupt their regulatory regimes. *See* Brief for State of West Virginia and 22 Other States as

ways: (1) restructure their boards to avoid active market participant control, or (2) provide active state supervision.

Presumably, the footnote in *Town of Hallie* still applies, and agencies not controlled by active market participants remain sufficiently public such that they only need to satisfy *Midcal*'s clear articulation requirement.¹⁰⁷ As such, some states might decide to avoid the uncertainty of a flexible and context-dependent active supervision inquiry by reorganizing their state boards to avoid active market participant control altogether. One way to accomplish this would involve disempowering active market participants such that they would only provide advisory opinions to state boards composed of elected officials. Yet, this option has potentially significant drawbacks. If states reconstitute their boards such that active market participants only provide advisory opinions, a primary advantage of delegating discretionary authority to professionals is lost: cost savings. Indeed, professionals serving on state medical boards are usually part-time employees that do not receive a salary from the state.¹⁰⁸ Although the federal government has the financial ability to staff its regulatory agencies with full-time experts, financially-constrained state governments often rely on part-time, unpaid professionals to serve on state regulatory boards.¹⁰⁹ This consideration should not be overlooked.

Alternatively, states could ensure that boards controlled by active market participants are subject to their active supervision. Several states, such as Florida and Tennessee, staff their regulatory boards with a majority of active market participants.¹¹⁰ Rather than reorganizing their regulatory boards to avoid active market participant control, these states might opt for providing active supervision. As Justice Kennedy pointed out in his majority opinion: "States . . . can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision."¹¹¹

Amici Curiae Supporting Petitioner, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534).

¹⁰⁷ See *supra* text accompanying notes 20-21.

¹⁰⁸ Counsel representing the Board expressed this concern at oral argument. See Transcript of Oral Argument at 4, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534) ("States obtain valuable benefits from using market participants as part-time public officials. They gain the benefits of their expertise and they gain the benefits of not having to have a full-time bureaucracy with a full salary.").

¹⁰⁹ *Id.*

¹¹⁰ Edlin & Haw, *supra* note 2, at 1103.

¹¹¹ *N.C. Dental*, 135 S. Ct. at 1115.

The remainder of this Comment attempts to resolve some of the ambiguities in the holding and, in so doing, argues for an interpretation and application of *N.C. Dental* that preserves states' regulatory flexibility within the delicate balance of "our federalism."¹¹²

II. CONTROLLING INFLUENCES: IDENTIFYING AND AVOIDING ACTIVE MARKET PARTICIPANT CONTROL

This Part considers one of the central questions raised by *N.C. Dental*: what constitutes a "controlling number" of active market participants?¹¹³ Section A explains why this issue needs clarification. Section B discusses the FTC Staff Guidance Statement's definition of "active market participant" and considers the factors identified by the FTC as indicative of control. Section C considers how states can avoid active market participant control of their regulatory boards.

A. *Is a Controlling Number Equivalent to a Majority?*

The majority opinion in *N.C. Dental* held that active state supervision is necessary to invoke *Parker* immunity when a "controlling number of decision makers [on a state board] are active market participants in the occupation the board regulates."¹¹⁴ Because it referred to a "controlling number" of decision makers, the holding creates the possibility that a state regulatory board with less than a *majority* of interested decision makers would need to demonstrate active state supervision to obtain *Parker* immunity.¹¹⁵ Notably, the opinion did not provide a test for identifying those situations where a non-majority, "controlling" influence exists.

A currently pending case involving an antitrust challenge to a taxicab authority illustrates the need to clarify this aspect of the holding. In *Wallen v. St. Louis Metropolitan Taxicab Commission*,¹¹⁶ a group of independent drivers brought suit against a taxicab commission and its members for "engag[ing] in anti-competitive conduct stifling competition in the vehicle for hire and taxicab

¹¹² See *supra* note 77.

¹¹³ *N.C. Dental*, 135 S. Ct. at 1114.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Wallen v. St. Louis Metro. Taxicab Comm'n*, No. 15-1432, 2015 WL 5561844 (E.D. Mo. Sept. 18, 2015).

industry.”¹¹⁷ The plaintiffs’ complaint alleged that active market participants controlled the taxicab commission.¹¹⁸ Because the state had not actively supervised the commission, plaintiffs argued that the commission was not entitled to *Parker* immunity under the *N.C. Dental* holding.¹¹⁹

In their motion to dismiss, defendants argued that they were not required to satisfy the active supervision requirement: “since only four of the nine . . . Commissioners are members of the taxicab industry, a controlling number of Defendant MTC’s decision makers *are not* active market participants and [thus the active supervision requirement] . . . does not apply.”¹²⁰ In other words, the defendant taxicab commission argued that a non-majority of active market participants could not constitute a controlling number.

The defendants’ interpretation of *N.C. Dental* is likely erroneous: Justice Kennedy deliberately used the phrase “controlling number” instead of majority. At the very least, this case evinces the need for guidance on this ambiguity in the *N.C. Dental* holding.¹²¹ The FTC Staff Guidance Statement provides a useful starting point for interpreting the holding.

B. FTC Staff Guidance Statement: Defining “Active Market Participant” & Indicia of Control

The FTC Staff Guidance Statement defines “active market participant” and provides factors for states to consider when assessing whether active market participants control their regulatory boards.¹²² Because boards controlled by active market participants must satisfy *Midcal*’s active state supervision requirement, it is important to define “active market participant” and to delimit the scope of the relevant market. The FTC’s statement indicates that active market participant includes any person that either is licensed by the board “in the occupation [it] regulates” or, alternatively, “provides any service that is subject to the regulatory authority of the board.”¹²³ Notably, for the purpose of

¹¹⁷ Brief for Defendant at 1, *Wallen v. St. Louis Metro. Taxicab Comm’n* (E.D. Mo. Oct. 16, 2015) (No. 15-1432), 2015 WL 9942788.

¹¹⁸ Complaint at 3, *Wallen v. St. Louis Metro. Taxicab Comm’n* (E.D. Mo. Sept. 18, 2015) (No. 15-1432), 2015 WL 9687122.

¹¹⁹ *Id.* at 7.

¹²⁰ Brief for Defendant at 9, *Wallen, v. St. Louis Metro. Taxicab Comm’n* (E.D. Mo. Oct. 16, 2015) (No. 15-1432), 2015 WL 9942788.

¹²¹ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

¹²² STAFF GUIDANCE, *supra* note 39, at 7–8.

¹²³ *Id.* at 7.

identifying whether a private actor serving on a state board qualifies as an active market participant, the Staff Guidance Statement explicitly rejects according any weight to the method by which that person was selected to serve on the board.¹²⁴

The Guidance also provided a list of five factors the Commission would consider when assessing active market participant control of a board. The first two factors concerned “[t]he structure of the . . . board . . . and the rules governing the exercise of the board’s authority” and “[w]hether the board members who are active market participants have veto power over the board’s regulatory decisions.”¹²⁵ Third and fourth, the Commission indicated that it would consider the non-market participant’s influence and exercise of control over the board, especially in relation to the active market participants.¹²⁶ Fifth, “[w]hether the active market participants . . . exercised, controlled, or usurped the decisionmaking power of the board” would factor into the Commission’s calculus.¹²⁷ The first two factors indicate formal control and are amenable to *ex ante* evaluation; these are straightforward inquiries. However, factors three through five would reveal *de facto* control and, consequently, must be evaluated retrospectively.

A hypothetical variation on the facts of *N.C. Dental* illustrates the interaction of these factors. Suppose that the Dental Examiners Board had consisted of three practicing dentists, three practicing dental hygienists, and two citizens appointed by the governor to represent the general public. In assessing whether the active market participants control the board, the initial step would involve identifying the nature of the restraint. Assuming the restraint was anticompetitive in some respect, a court would first consider the board’s membership structure. Here, the practicing dentists do not constitute a majority.¹²⁸ Nonetheless, they might exercise implicit or *de facto* control over the board.¹²⁹ Evidence of such control could take a variety of forms.¹³⁰

¹²⁴ *Id.*

¹²⁵ *Id.* at 8.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ This Comment assumes a court would find a board controlled by active market participants if a majority of its members were practicing dentists.

¹²⁹ An analogous situation occurs in corporate law when courts consider whether a non-majority shareholder exercises control over a board of directors. *See infra* note 134.

¹³⁰ Moreover, whether a particular type of evidence qualified as relevant would depend on the unique facts of the case, such as the nature of the alleged antitrust violation or the power allocated or otherwise exercised by the active market participants.

For instance, the rigor with which the board members reviewed public comments and objections or otherwise debated the merits of the regulation prior to its approval would provide relevant evidence of the board members' independence.¹³¹ This relates to factors three through five,¹³² which can all be assessed by looking to the administrative record compiled by the agency in promulgating the restraint. If the record revealed the non-dentist members had engaged in a searching inquiry prior to approving, such as by requiring the dentist members to respond to claims that teeth-whitening services pose minimal health risks, that would suggest the dentists did not exert control over the board.¹³³ Conversely, if the record indicated that the non-dentist board members acquiesced to the dentists' views, or otherwise failed to have the dentists defend the rule against negative public comments and objections, that would suggest the dentists exercised control over the board.¹³⁴ Indeed, a lack of debate on a policy to exclude non-dentist teeth-whitening services suggests acquiescence or, at the very least, deference to the demands of the board's dentists. In such a situation, the dentists likely exercise de facto control over the board. However, it would be prudent to analyze a pattern of decision-making to address the possibility that the non-dentists are actually independent and simply sided with the dentists because they agreed with them on a particular issue. This, too, could explain the lack of debate in the preceding example.

Another relevant inquiry would involve examining the professional and financial interdependence of dentists and hygienists. Even if those hygienists were not directly employed by practicing dentists, there is undoubtedly a symbiotic relationship between hygienists and dentists. This relationship could lead the board's dentists and hygienists to adopt a quid pro quo strategy when considering exclusionary regulations to impose on the dental industry.¹³⁵ Such

¹³¹ STAFF GUIDANCE, *supra* note 39, at 8.

¹³² See *supra* text accompanying notes 125–26.

¹³³ See STAFF GUIDANCE, *supra* note 39, at 8–9.

¹³⁴ See, e.g., *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1115 (Del. 1994). In *Kahn*, though a stockholder owned 43.3% of the voting shares, the court did not identify him as a controlling stockholder on that basis. *Id.* at 1113–14. Rather, it looked to the relationship between the board of directors and the stockholder during the course of the transaction negotiations. *Id.* at 1114–15. The evidence indicated that the stockholder threatened a tender offer at its price, which the committee reluctantly accepted. *Id.* at 1118–19. Despite the independent committee's hard bargaining, it eventually acquiesced to the stockholder's offering price. *Id.* This indicated that the stockholder had control and, consequently, that the committee did not operate independently of the controller's influence. See *id.* at 1120–21.

¹³⁵ See *The Supreme Court 2014 Term—Leading Cases: Sherman Act—State-Action Immunity—North Carolina State Board of Dental Examiners v. FTC*, 129 HARV. L. REV. 371, 379 (Nov. 2015) (“An ideal approach [to requiring active supervision of controlled boards] would require state supervision . . . where there

significant financial interdependence strongly suggests implicit control, making active supervision necessary.¹³⁶ Indeed, although the five factors listed in the Staff Guidance Statement do not cover this scenario, the Commission would almost certainly view the active market participants as having control over the board given such financial interdependence.

C. Avoiding Active Market Participant Control

State legislatures can ensure their state agencies are not controlled by active market participant members in at least two ways. First, states could disempower private actors from serving on boards that regulate fields in which the actors have a personal interest. If such members were permitted to issue only advisory opinions or lacked voting rights, and state officials were required to approve all opinions proposed by the active market participants, supervision would be unnecessary.¹³⁷ Because the private actors would lack decisionmaking authority, and the decision would necessarily come from the state itself, immunity would attach without the need to satisfy active supervision—a state agency would only need to satisfy the clear articulation requirement.¹³⁸ Although this option might reduce uncertainty, it also risks curtailing expert input in agency decisionmaking or, alternatively, increasing costs if states find it necessary to create additional government positions for expert officials.¹³⁹

Another option is for state legislatures to mandate that the majority of a state agency's membership consists of consumer advocates, economists, or other persons that lack a direct financial interest in the industry over which the board exercises regulatory authority.¹⁴⁰ For the reasons discussed above, however, following this option would not guarantee that *Parker* could be invoked in all situations. For example, if a court were to find that the consumer representatives had not vigorously debated a proposed regulation to ban non-dentists from providing teeth-whitening services, then a court could easily find that the active market participants controlled the board, at least with respect to that restraint.¹⁴¹ Similarly, if the board did not consider proposals that

is a risk of 'back-scratching'—but would not call for supervision of boards that are unmotivated by private gain.”).

¹³⁶ The active supervision requirement is discussed *infra* Part III.

¹³⁷ See *supra* text accompanying notes 14–16.

¹³⁸ See *supra* text accompanying notes 14–16.

¹³⁹ See *supra* text accompanying notes 107–08.

¹⁴⁰ See STAFF GUIDANCE, *supra* note 39, at 1.

¹⁴¹ See *supra* text accompanying notes 107–08.

represented less restrictive alternatives to the restraint the board promulgated, that would provide evidence of active market participant control.¹⁴² In both cases, even if the completely disinterested members of the board outnumbered the active market participants two-to-one, active supervision is necessary. The ambiguity in this approach, which stems from the lack of a definite standard for making the controlling-number determination, presents more risk to state legislatures as they attempt to navigate the post-*N.C. Dental* legal landscape.

Considered in this light, states will likely want to provide for active supervision, particularly over agencies such as state medical boards and bar associations. The advisory opinion option would require states to enact laws for every proposed regulation and would limit the discretionary authority of such boards.¹⁴³ This is particularly troublesome in the context of medical regulation, where the quantity and complexity of regulations arguably necessitates delegating discretionary regulatory authority to private actors in the first place. Although active supervision would require the state to supervise such boards' conduct on the merits, the majority declared that adequate state "supervision need not entail day-to-day . . . micromanagement" of state agencies' operations.¹⁴⁴ This approach raises a corollary question: how can a state ensure that it adequately supervises its active market participant-controlled boards?

III. ACTIVE STATE SUPERVISION: THE FOUR CONSTANTS SHOULD SUFFICE

This Part argues that federal courts and the FTC should regard a state supervisory system that meets the four constant requirements, identified by the majority in *N.C. Dental*, as presumptively adequate for purposes of *Parker* immunity.¹⁴⁵ Section A surveys the cases that developed the active supervision requirement within the *Parker* doctrine, and these cases constitute persuasive authority for the proposed presumption. Section B considers the policy justifications, grounded in federalism principles, for maintaining limits on the active supervision inquiry.

¹⁴² See *infra* text accompanying notes 256–58.

¹⁴³ See *supra* text accompanying notes 107–08.

¹⁴⁴ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1116 (2015). Importantly, assuming they do not restrict market entry, prices, or product output, many of the regulations passed by these boards are unlikely to raise antitrust concerns. Thus, state legislatures can avoid neutering their professional boards and maintain these boards' discretionary authority, and in the most sensitive areas provide active supervision to immunize them.

¹⁴⁵ *Supra* text accompanying note 35.

A. Active State Supervision—Supreme Court Pedigree

This section first discusses the pre-*Midcal* cases that shaped the Court's understanding of the active supervision requirement. Next, it considers the post-*Midcal* cases that further developed the contours of the active supervision requirement. These cases confirm that the four constant requirements have sufficed for providing adequate state supervision in the Court's antitrust state-action cases. Moreover, these cases reveal that, throughout *Parker*'s doctrinal history, the Court has regarded the active supervision inquiry as a limited one that seeks to ensure that the state—not the federal government—has substantively reviewed challenged anticompetitive programs. What's more, the Court has consistently cautioned against the federal government imposing its policy preferences on states that have deliberately implemented occupational licensing and other regulatory regimes.

1. *Midcal*'s Predecessors

Even before *Midcal* formally established the active state supervision requirement,¹⁴⁶ the Court had considered state supervision a relevant factor in its antitrust state-action cases. In *Goldfarb v. Virginia State Bar*, the Supreme Court considered a challenge to a minimum-fee schedule published by a county bar association and enforced by the State Bar.¹⁴⁷ Plaintiffs were a class of individuals who had unsuccessfully sought to retain lawyers willing to perform title examinations at less than the minimum fee prescribed in the schedule.¹⁴⁸ They alleged that both the fee schedule and its enforcement by the State Bar violated the Sherman Act's prohibition on price-fixing.¹⁴⁹ The Virginia State Bar argued it was exempt from antitrust scrutiny under *Parker*.¹⁵⁰

The Court sided with the plaintiffs. Chief Justice Burger explained that the nominal labeling of an entity as a state agency does not automatically transform it into a sovereign actor entitled to *Parker* immunity.¹⁵¹ Instead, the

¹⁴⁶ See *supra* text accompanying note 17.

¹⁴⁷ 421 U.S. 773, 790 (1975).

¹⁴⁸ *Id.* at 775–76.

¹⁴⁹ *Id.* at 778; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359 (1977) (“The schedule and its enforcement mechanism operated to create a rigid price floor for services and thus constituted a classic example of price fixing.”).

¹⁵⁰ *Goldfarb*, 421 U.S. at 779.

¹⁵¹ *Id.* at 791 (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”).

central inquiry was whether the State itself compelled or required the anticompetitive activities.¹⁵² Although the Court had not yet established the two-part *Midcal* test and would later relax the compulsion requirement, it considered the lack of direct supervision by the Virginia Supreme Court pertinent to its decision denying immunity.¹⁵³

In another pre-*Midcal* case two years later, the Court again considered active supervision relevant to its antitrust state-action analysis. In *Bates v. State Bar of Arizona*,¹⁵⁴ a pair of lawyers alleged that the Arizona State Bar's rules on legal advertising, which prohibited lawyers in that state from advertising on price, constituted an unreasonable restraint on trade.¹⁵⁵ Like the Virginia State Bar in *Goldfarb*, the Arizona State Bar argued it was exempt from the Sherman Act under the *Parker* doctrine.¹⁵⁶

Although the Court found that the Bar's rules infringed the plaintiffs' First Amendment rights, it found the Arizona Bar immune.¹⁵⁷ Central to the Court's holding was that the "rules [were] subject to pointed re-examination by the policymaker—the Arizona Supreme Court."¹⁵⁸ Because Arizona's Supreme Court embodied the sovereign government, its supervision effectively transformed the private actors' conduct into the conduct of the state.

Goldfarb and *Bates* each recognized the importance of active supervision when states delegate regulatory authority to active market participants. In fact, active state supervision accounts for the diverging holdings in each case: the Virginia Supreme Court's passive role in enacting and monitoring the minimum fee schedule contrasted sharply with the Arizona Supreme Court's "pointed re-examination" of the lawyer advertising rules.¹⁵⁹ Although neither case provided significant guidance on the dictates of the active supervision requirement, antitrust scholars Areeda and Hovenkamp observe that, "[o]nce it was clear that authorized Arizona authorities [i.e. the State's Supreme Court] clearly intended to prevent lawyer advertising, the *Bates* Court did not make a strict assessment for Sherman Act purposes of whether the blanket state ban

¹⁵² *Id.*

¹⁵³ "[The Court] considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity." N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (citing *Goldfarb*, 421 U.S. at 791).

¹⁵⁴ 433 U.S. 350 (1977).

¹⁵⁵ *Id.* at 353, 356.

¹⁵⁶ *Id.* at 357.

¹⁵⁷ *Id.* at 363.

¹⁵⁸ *Id.* at 361–62.

¹⁵⁹ *Id.* at 362.

was truly necessary for the achievement of proper state purposes.”¹⁶⁰ The Court acknowledged this principle—that the federal courts should refrain from evaluating the substantive merits of the states’ regulatory policies in *Parker* cases—in its subsequent state-action cases.

2. *Midcal and Its Progeny*

Nearly forty years after *Parker*, the Supreme Court decided *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*¹⁶¹ *Midcal* distilled from the *Parker* line of cases a two-pronged test for nonsovereign actors to obtain *Parker* immunity: (1) “the challenged restraints must be ‘one clearly articulated and affirmatively expressed as state policy’;” and (2) “the policy must be ‘actively supervised’ by the State itself.”¹⁶²

The *Midcal* Court considered whether “California’s plan for wine pricing violate[d] the Sherman Act.”¹⁶³ The program at issue allowed wine producers “to prevent price competition by dictating the prices charged by wholesalers.”¹⁶⁴ The Court explained that the producers could only escape Sherman Act liability if antitrust immunity attached to their conduct.¹⁶⁵ Because the producers were nonsovereign, private actors, the Court predicated *Parker* immunity on satisfaction of the two above conditions. Although the wine pricing system satisfied the first prong, it failed the second.¹⁶⁶

The Court found California’s passive role in supervising the wine pricing system inadequate to constitute active supervision. “The State simply authorize[d] price setting and enforce[d] the prices established by private parties,” and “neither establishe[d] prices nor review[ed] the reasonableness of the price schedules.”¹⁶⁷ The Court distinguished California’s passive role in supervising the regulatory program in *Midcal* from the facts of *Parker*, where

¹⁶⁰ 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 221d, at 372 (2d ed. 2006).

¹⁶¹ 445 U.S. 97, 104 (1980).

¹⁶² *Id.* at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)); see also *supra* text accompanying note 17.

¹⁶³ *Id.* at 102.

¹⁶⁴ *Id.* at 103.

¹⁶⁵ *Id.* at 102–03.

¹⁶⁶ *Id.* at 105 (“The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance.”).

¹⁶⁷ *Id.* In addition, the Court also cited two additional factors that led it to conclude that the state did not actively supervise the program: the state did not “regulate the terms of fair trade contracts” and also “[did] not monitor market conditions or engage in any ‘pointed reexamination’ of the program.” *Id.* at 105–06.

the state took an active role in supervising the raisin marketing program.¹⁶⁸ Because California had not adequately supervised the program, the *Parker* antitrust exemption did not attach to the agency's conduct, thus subjecting the program to antitrust scrutiny.¹⁶⁹ In a pointed reminder of antitrust's supremacy as federal law, the Court declared: "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."¹⁷⁰

After *Midcal*, a series of cases developed the contours of the active supervision requirement and, more generally, the principles underlying the *Parker* doctrine. The first case to apply the *Midcal* two-pronged test, *Southern Motor Carriers Rate Conference, Inc. v. United States*,¹⁷¹ involved a suit by the United States to enjoin the collective ratemaking activities of "[two] 'rate bureaus' composed of motor common carriers operating in four Southeastern States."¹⁷² The bureaus would set common carrier rates for intrastate transportation of commodities by having a bureau committee submit a collective proposal to a State Public Service Commission.¹⁷³ The petitioner-rate bureaus justified this practice by stating that the joint proposals "permit[ed] the [Public Service Commissions] to consider more carefully each submission."¹⁷⁴ The Government argued that this practice violated the Sherman Act's prohibition on conspiratorial price-fixing.¹⁷⁵

The central issue in *Southern Motor Carriers* was whether the state needed to compel the ratemaking activities for *Parker* immunity to shield the bureaus from the Sherman Act.¹⁷⁶ In holding that "there [was] no inflexible 'compulsion requirement,'"¹⁷⁷ Justice Powell's opinion acknowledged the practical necessity of extending *Parker* immunity to private parties.¹⁷⁸ The

¹⁶⁸ *Id.* at 105.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 106.

¹⁷¹ 471 U.S. 48 (1985).

¹⁷² *Id.* at 50.

¹⁷³ *Id.* at 52. The Court pointed out, however, that the "[m]embers of the bureau [were] not bound by the joint proposal," and that "[a]ny disapproving member [could] submit an independent rate proposal to the state regulatory Commission."¹⁷⁴

¹⁷⁴ *Id.* at 51.

¹⁷⁵ *Id.* at 53.

¹⁷⁶ *Id.* at 50.

¹⁷⁷ *Id.* at 62.

¹⁷⁸ *Id.* at 61; see also *Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them.").

decision thus reflected an appreciation for the flexibility that states need to formulate regulatory policies.

Interestingly, the Court later cited this case for the proposition that active supervision requires a state official to “have and exercise ultimate authority” over the challenged anticompetitive conduct of private actors.¹⁷⁹ Although the opinion mentioned this language, the Government in *Southern Motor Carriers* conceded that the state Public Service Commissions exercised supervision over the rate bureaus’ rate-setting mechanisms.¹⁸⁰ Thus, the active supervision issue was not even litigated, and the Court only considered whether the clear articulation requirement could be satisfied in the absence of compulsion. Nevertheless, the case exemplifies the federalism principles that animate the state-action doctrine.

Although the Supreme Court explicitly held that active supervision was unnecessary in *Town of Hallie v. City of Eau Claire*,¹⁸¹ a brief description of the case is useful for clarifying the relationship between *Parker*, *Midcal*, and *N.C. Dental*. In *Town of Hallie*, the Court considered the placement of municipalities within the *Parker* scheme.¹⁸² The case involved several Wisconsin towns’ allegations of anticompetitive conduct by the city of Eau Claire.¹⁸³ The city refused to allow the Wisconsin towns to use its sewage treatment plant; it did, however, offer landowners use of the plant on the condition that they agree “to have their homes annexed by the city and to use the city’s sewage collection and transportation services.”¹⁸⁴ Because the towns already had their own collection and transportation services, they alleged that the city’s conduct constituted illegal tying.¹⁸⁵

The Supreme Court held that the city only needed to satisfy the first prong (i.e., clear articulation) to invoke *Parker* immunity.¹⁸⁶ The Court explained that the public nature of the municipalities obviated the need for active state supervision.¹⁸⁷ And “because various Wisconsin statutes clearly contemplated

¹⁷⁹ *S. Motor*, 471 U.S. at 51.

¹⁸⁰ *Id.* at 62.

¹⁸¹ 471 U.S. 34, 47 (1985).

¹⁸² Volokh, *supra* note 18, at 124.

¹⁸³ *Town of Hallie*, 471 U.S. at 36.

¹⁸⁴ *Id.* at 37 (citation omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 42.

¹⁸⁷ *Id.* at 45.

that cities could engage in anticompetitive conduct,”¹⁸⁸ the clear articulation prong was satisfied. Hence, the city was immune from antitrust liability.

In *324 Liquor Corp. v. Duffy*,¹⁸⁹ the Court considered a challenge to the New York liquor-pricing statutory scheme. The statutes and regulations combined to “permit [liquor] wholesalers to maintain retail [liquor] prices at artificially high levels.”¹⁹⁰ After the plaintiff, a liquor corporation, had its license suspended and received a fine for selling liquor at a price that violated the statute, it sought to invalidate the law on the grounds that it violated the Sherman Act.¹⁹¹ Reversing the New York Court of Appeals, the Supreme Court found the statutory scheme did not qualify for *Parker* immunity because the state failed to adequately supervise its implementation.¹⁹² Justice Powell’s opinion squarely confronted the active supervision requirement. Like in *Midcal*, the dispositive factor in this case concerned the state’s inadequate supervision over its anticompetitive policy.¹⁹³ Because the state’s review mechanisms failed to “exert[] any significant control over” the restraints imposed by private parties via the statutes,¹⁹⁴ the goal of active supervision—to ensure that the challenged conduct reflected state policy—was not met.

One year after *324 Liquor Corp.*, the Court provided its most detailed treatment of the requirements for adequate state supervision in *Patrick v. Burget*.¹⁹⁵ In *Patrick*, the Court considered whether *Parker* immunity shielded a group of Oregon physicians that had served on a peer-review committee. The plaintiff-physician sued the committee after it threatened to terminate his hospital privileges.¹⁹⁶ Because the committee was composed of private actors, active state supervision was necessary for the committee members to avail themselves of the state-action exemption.¹⁹⁷ The Court held Oregon’s

¹⁸⁸ Sasha Volokh, *Will the Supreme Court Hear this Important Antitrust Case?*, WASH. POST: VOLOKH CONSPIRACY (Jan. 27, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/27/will-the-supreme-court-hear-this-important-antitrust-case/?utm_term=.75b56b441347; see also Volokh, *supra* note 18, at 125 (“If Eau Claire had been a private corporation, [the city’s] conduct might have been illegal tying . . .”).

¹⁸⁹ 479 U.S. 335 (1987).

¹⁹⁰ *Id.* at 340.

¹⁹¹ *Id.*

¹⁹² *Id.* at 344 (“New York’s liquor pricing system is not actively supervised by the State.”).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 335 n.7.

¹⁹⁵ 486 U.S. 94 (1988).

¹⁹⁶ *Id.* at 97–98. The plaintiff alleged that the committee’s decision was motivated by a desire “to reduce competition from [plaintiff] rather than to improve patient care.” *Id.*

¹⁹⁷ *Id.* at 96, 100.

supervision inadequate because state law only authorized the supervising entities to review whether the committee followed the proper procedures in excluding the plaintiff-physician under the peer-review system.¹⁹⁸ As the Court explained, active supervision requires the state to review the committee's decisions on the merits.¹⁹⁹

Again in *Patrick*, the Court deemed a supervisory system inadequate because it failed to satisfy the constant requirements identified in *N.C. Dental*; tellingly, no additional factors beyond the four constant requirements were cited.²⁰⁰ *Patrick* thus supports the proposition that, in the context of *Parker* immunity, a supervisory system's adequacy should stand or fall based on whether it satisfies the four constant requirements.²⁰¹ "Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."²⁰² Because the supervising entities did not engage in any substantive review of the committee's decision to terminate the physician-plaintiff, the state's supervision was insufficient to confer *Parker* immunity.²⁰³ Importantly, although the Court made clear that adequate state supervision requires state officials to conduct a substantive review on the merits, it reiterated that federal courts should refrain from conducting their own merits analysis or passing judgment on states' regulatory policies.²⁰⁴

Prior to *N.C. Dental*, the Supreme Court had last addressed the active state supervision requirement in *FTC v. Ticor Title Insurance*.²⁰⁵ In *Ticor Title*, the Court considered whether the Third Circuit correctly held that title insurance companies, which the FTC determined had engaged in horizontal price fixing in Connecticut, Wisconsin, Arizona, and Montana, were entitled to *Parker* immunity.²⁰⁶ In holding that the regulatory schemes in Wisconsin and Montana were not exempt under *Parker*, the Court reinforced its holding in *Patrick* that

¹⁹⁸ *Id.* at 102–06.

¹⁹⁹ *Id.* at 105; see also *324 Liquor Corp.*, 479 U.S. at 344–46 (holding New York's supervision of its liquor-pricing system inadequate for conferring *Parker* immunity because the state failed to "monitor market conditions or engage in any 'pointed reexamination' of the program" (citations omitted)).

²⁰⁰ *Patrick*, 486 U.S. at 102–05.

²⁰¹ *Id.*

²⁰² *Id.* at 101.

²⁰³ *Id.* at 105 ("Such constricted review does not convert the action of a private party . . . into the action of the State for purposes of the state-action doctrine.").

²⁰⁴ *Id.*

²⁰⁵ 504 U.S. 621 (1992).

²⁰⁶ *Id.* at 632.

satisfying *Midcal*'s active supervision prong requires more than the "mere potential for state supervision."²⁰⁷

In *Ticor Title*, the Court considered whether negative option approval mechanisms could suffice for active supervision.²⁰⁸ Although the Court did not rule that such mechanisms were necessarily insufficient, it agreed with the FTC that, notwithstanding the potential for adequate active supervision, it occurred in neither Wisconsin nor Montana.²⁰⁹ The state agencies charged with reviewing the rate filings did not conduct any analysis of the rates to ensure their reasonableness or how they compared with other states.²¹⁰ Instead, the agencies merely verified the filing for mathematical accuracy and, even when Montana would request, but fail to receive, additional information from the rating bureaus concerning the filings, the rates "remained in effect."²¹¹ Finally, "the state agencies' limited role and participation . . . likewise limited" the prospect of judicial review and, therefore, the review could not save an otherwise deficient state supervisory system.²¹² Taken together, these factors compelled the Court's conclusion that "no active supervision" occurred in Wisconsin and Montana.²¹³

The preceding survey reveals that the four constant requirements have always been sufficient to satisfy the active supervision requirement.²¹⁴ The Court has emphasized in all of its state-action cases that, under our federalist system, states are entitled to a significant amount of respect, especially in the realm of professional regulation.²¹⁵ Importantly, this proposed presumption, which would help narrow the broad scope of *N.C. Dental*, is bolstered by not only precedent, but also weighty policy considerations.

²⁰⁷ *Id.* at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana."); *see also Patrick*, 486 U.S. at 101 ("The mere presence of some state involvement or monitoring does not suffice [for satisfying the active supervision requirement].").

²⁰⁸ These mechanisms permitted title insurance companies to file rates with the state and, unless the state disapproved within thirty days, the rate would become effective. *Ticor*, 504 U.S. at 629.

²⁰⁹ *Id.* at 638.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 638–39; *see also Patrick*, 486 U.S. at 103–05.

²¹³ *Ticor*, 504 U.S. at 638.

²¹⁴ Actually, the court in *N.C. Dental* added the requirement that a disinterested government official approve the challenged decision. 135 S. Ct. at 1116–17. Thus, prior to *N.C. Dental* some permutation of the other three requirements sufficed for adequate supervision. *See id.*

²¹⁵ *See supra* Part III.A.

B. Policy Justifications—The Four Constants Should Suffice

This section provides additional arguments and policy considerations that strongly favor a presumption of adequate state supervision when a state supervisory system meets the four constant requirements. First, this presumption would avoid the risk that the FTC or federal courts interpret and apply *N.C. Dental* too broadly; this, in turn, would help alleviate the concern that professionals respond to the decision by refusing to serve on state boards.²¹⁶ Second, the ability to delegate discretionary regulatory authority is critical to the efficacy of state regulatory policies in technical fields and professions.²¹⁷ Finally, although the Court has expanded the reach of the antitrust laws in recent years, federal courts should not permit plaintiffs or the government to use the Sherman Act as a workaround for protecting economic rights under the guise of substantive due process. Given the availability of other avenues for challenging unduly burdensome economic regulations, this argument is particularly persuasive.

1. Limiting the FTC and Federal Courts' Discretion

N.C. Dental is replete with ambiguities.²¹⁸ Because the Court provided minimal guidance on how to interpret the “controlling number of active market participants” phrase and, perhaps more problematically, implied that the active state supervision requirement is amorphous,²¹⁹ the lower courts and the Commission have wide discretion in interpreting the decision. There are at least two reasons why this would be disconcerting to the professional regulators upon whom the states rely to effectuate their occupational regulatory policies.

First, the Commission will likely interpret *N.C. Dental* as broadly as possible.²²⁰ The staff of the FTC’s Competition Bureau is paid to enforce the Sherman Act and, more generally, competition policy.²²¹ Moreover, the

²¹⁶ Here, it is critical that immunity helps these private regulators avoid suit altogether.

²¹⁷ Limiting the active supervision requirement would avoid the risk that states must create new bureaucracies to satisfy *Midcal*’s second prong. See *Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

²¹⁸ For instance: (1) who qualifies as an active market participant; (2) how wide is the scope of the market for active market participants; and (3) what is a controlled board? *N.C. Dental*, 135 S. Ct. at 1122 (Alito, J., dissenting).

²¹⁹ *N.C. Dental*, 135 S. Ct. at 1116.

²²⁰ STAFF GUIDANCE, *supra* note 39, at 9–10.

²²¹ *About the Bureau of Competition*, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/about-bureau-competition> (last visited Sept. 28, 2016).

Commission does not operate under the guise of federalism principles and, for at least the past thirty years, has demonstrated a commitment to reining in the state-action doctrine. As such, who could blame professional regulators for viewing skeptically the FTC's statement that it would apply the *N.C. Dental* decision "reasonably and flexibly?"²²²

In addition to the FTC's role as an aggressive enforcer of the competition laws, another reason why *N.C. Dental* worries professional regulators is that private antitrust litigants may obtain treble damages for successful suits against state boards.²²³ Thus, although Article III judges may be more inclined to respect federalism principles and exercise restraint in interpreting *N.C. Dental* than the competition watchdogs at the FTC, private suits in federal courts pose a greater threat of significant antitrust liability.

To help reduce uncertainty surrounding the decision, the lower courts should establish a presumption that a state supervisory system is sufficient when it meets the four constant requirements discussed above. By limiting the broad scope of *N.C. Dental*, this presumption could encourage private regulators to serve on state boards in the aftermath of *N.C. Dental*.

2. Discretionary Regulatory Authority: Necessary in Certain Professions

The Court recognized in *Southern Motor Carriers* that a compulsion requirement impinges too far on states' regulatory flexibility.²²⁴ An expansive interpretation of the active supervision requirements presents comparable risk. States delegate regulatory authority to nonsovereign, private actors in the medical and legal professions so that individuals with relevant expertise can bring their experience to bear in designing regulatory policies.²²⁵ These persons need a significant amount of discretion to exercise their duties. If they lack discretionary authority, or if a burdensome active supervision requirement forces boards to submit and receive formal state approval for each and every regulation they proposed, the efficiency gains from these types of delegations will no longer be realized. More generally, if states are not able to reassure professionals that active supervision is satisfied and, accordingly, that *Parker*

²²² STAFF GUIDANCE, *supra* note 39, at 10.

²²³ 15 U.S.C. § 15(a) (2016).

²²⁴ *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) ("The Parker doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State.")

²²⁵ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1122 (2015) (Alito, J., dissenting).

immunity will protect them, it seems dubious that these persons will continue to devote their time to serving on state boards.

3. *Checks and Balances*

Finally, and perhaps most importantly, the Framers of the Constitution envisioned a system of checks and balances; central to a government operating under this ideal is that the states retain the authority to which they are entitled.²²⁶ Permitting the FTC or private plaintiffs to unduly interfere with a state's core police powers would denigrate the federalist structure guaranteed by the Constitution and affirmed by the Tenth Amendment.²²⁷ Indeed, a state's right to regulate its internal economic affairs is at the core of its police powers, and permitting federal government interference with the exercise of these powers "would turn federalism on its head."²²⁸ Although the problems caused by excessive occupational licensing requirements offend fundamental notions of economic liberty and free markets, antitrust federalism should not be abandoned wholesale when it occasionally, or even frequently, facilitates bad results.

IV. ADDITIONAL CONSIDERATIONS

This Part provides additional support for why *N.C. Dental* need not, or at least should not, dissuade private actors from serving on state boards. Section A evaluates a recently proposed "modified rule of reason" analysis for antitrust cases involving regulatory boards.²²⁹ This approach should make a trial on the merits more favorable for certain private-regulator antitrust defendants; in particular, the modified rule of reason should work to the benefit of medical professionals whose challenged conduct involves health care regulation. Section B discusses the other options for challenging private-regulatory delegations—the availability of these alternatives provides further support for maintaining the *Parker* doctrine's vitality, at least in areas where states most need to rely on delegations of *discretionary* regulatory authority.

²²⁶ THE FEDERALIST NO. 51 (James Madison).

²²⁷ U.S. CONST. amend. X.

²²⁸ Transcript of Oral Argument at 22, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13–534).

²²⁹ Edlin & Haw, *supra* note 2, at 1100.

A. *Trial on the Merits and a Modified Rule of Reason*

Although state agencies and their members would prefer not facing a suit in the first place, failing to satisfy the *Midcal* requirement does not mean an antitrust violation has occurred. Instead, when a court finds that *Parker* immunity does not apply, the case then proceeds to trial. To meet its initial burden and survive summary judgment, the party challenging a regulatory board's conduct—whether the government or a private plaintiff—must provide sufficient evidence to establish certain basic elements supporting its claim that the defendant has unreasonably restrained trade in violation of the antitrust laws.²³⁰ Such elements include showing that the defendant's conduct had a substantial anticompetitive effect in a relevant market; that any incidental restraints caused by the defendant are not outweighed by procompetitive justifications; or that the defendant engaged in concerted exclusionary conduct.²³¹

Once a case makes it past motions for summary judgment, the standard of review becomes relevant. The presumptive and preferred standard of review in antitrust cases is the rule of reason,²³² especially when challenged conduct involves rules and regulations promulgated by professional associations.²³³ Indeed, the authors of the influential antitrust treatise, Areeda and Hovenkamp, recommend a “rule of reason [approach] for most professional rules that are reasonably intended to promote socially valuable practices.”²³⁴ However, the structural inquiry that Areeda and Hovenkamp suggest for cases involving standard-setting organizations does not adequately accommodate the unique character of antitrust suits against state regulatory boards.²³⁵ Although their

²³⁰ See, e.g., *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986) (“To survive [a] motion for summary judgment, [plaintiffs] must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury.” (citing Fed. R. Civ. P. 56(e))).

²³¹ See *Petri v. Va. Bd. of Med.*, No. 1:13-cv-01486, 2014 WL 6772478, at *3–4 (E.D. Va. Dec. 1, 2014).

²³² See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (explaining that under the rule of reason, “antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful”).

²³³ See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986) (cautioning against condemning rules of professional associations under the per se standard of review).

²³⁴ 1 AREEDA & HOVENKAMP, *supra* note 160, ¶ 227a, at 29. For cases like *N.C. Dental*, where it is clear that the agency has acted in a way that is very difficult to justify on safety or efficiency grounds, “the per se rule” approach would supplement *Id.*

²³⁵ 13 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 2232a, at 444 (Wolters Kluwer eds., 3d ed. 2012) (“[D]irect inquiries into the ‘reasonableness’ of a challenged restraint [in the context of standard-setting] quickly involve the court

approach appropriately recognizes that judges should attempt to refrain from evaluating the substantive reasonableness of challenged state policies, the structural factors in cases involving challenges to regulations promulgated by professional regulatory boards will likely suggest either an anticompetitive purpose or likely effect.²³⁶ Indeed, most state medical boards are staffed with practicing physicians that compete in overlapping geographic markets against competitors whom they are tasked with regulating.²³⁷

Fortunately, another pair of antitrust scholars has proposed a modified rule of reason that addresses the nuances of cases involving state regulatory boards and, in particular, medical boards.²³⁸ Recognizing the inaptness of the conventional rule-of-reason approach in antitrust suits against state licensing boards,²³⁹ Edlin and Haw argue that the rule-of-reason analysis should be modified in this genre of cases.²⁴⁰ They propose a three-pronged approach for their modified rule-of-reason analysis: “[1] identifying a legitimate reason for the licensing restriction, [2] analyzing the fit between the restriction and the problem, and [3] inquiring into less restrictive alternatives.”²⁴¹ Addressing these prongs in turn will reveal why, assuming non-egregious conduct, a professional-regulator defendant should fare well in an antitrust suit.

The first prong—identifying a legitimate reason for the licensing restriction—involves an inquiry into the social-welfare justifications of a restriction imposed by a regulatory board. In other words, the first prong considers whether the regulation improves health or safety.²⁴² Although Edlin and Haw recognize the difficulty of measuring whether a licensing restriction improves quality or safety, they note that “the difficulty of quantifying competitive benefits is nothing new in rule-of-reason cases. [Accordingly,] [p]rofessional boards should be induced to bring their best evidence of

in a morass of technical issues where neither the judge nor the jury has sufficient expertise to produce acceptable results.”).

²³⁶ *Id.* at ¶ 2232d, at 452 (“The structural condition leading to the strongest inference of anticompetitive purpose or likely effect is when all or substantially all of the decision makers are in direct competition with the plaintiff and stand to benefit from the plaintiff’s demise or any significant restraint on its output.”).

²³⁷ *See* Edlin & Haw, *supra* note 2, at 1108.

²³⁸ *See id.* at 1146.

²³⁹ *Id.* (“Under a conventional rule-of-reason analysis, a permissible agreement must directly enhance competition in some way, such as when a group of copyright holders creates a new and valuable product together. Of course, the most plausible benefits of many (and perhaps most) licensing restraints flow directly from their limitations on competition.” (footnote omitted)).

²⁴⁰ *Id.* at 1148.

²⁴¹ *Id.*

²⁴² *Id.* at 1149.

procompetitive effects to the suit.”²⁴³ Indeed, this line of inquiry reflects a fair and balanced approach and is patently reasonable, and arguably necessary, when the antitrust defendant is a state regulatory board. Unless courts permit social-welfare justification to be cited as procompetitive justifications, it is hard to imagine a state medical board *ever* prevailing at trial.²⁴⁴ Indeed, state regulatory boards deliberately restrain competition; yet, they do so to benefit the general public by preventing charlatanism and unscrupulous business tactics.²⁴⁵

Although the first prong seems reasonable enough, Edlin and Haw’s application of it to a situation involving restrictions on nurse practitioners is potentially troublesome. They contend these restrictions, which require nurse practitioners to be supervised, ought to fail the first prong because research does not show that the restrictions improve health care quality.²⁴⁶ Perhaps the research is correct, but that should not be the point. States can have alternative, non-quantifiable reasons for requiring these restrictions, such as providing reassurance to patients by requiring doctors with greater medical training to supervise the nurse practitioners. This example illustrates the precise dangers that an expansive interpretation of *N.C. Dental* poses to states’ rights to regulate their health care industries.

The second prong—analyzing the fit between the restriction and the problem—works in tandem with the first. If courts were to adopt the modified rule-of-reason approach, the focus in litigation would likely center on this prong. Edlin and Haw argue that “claims of quality improvement should be specific and tied to a theory of market failure that justifies government interference.”²⁴⁷ This prong seems appropriate, but with two caveats. First, when courts lack the expertise to evaluate highly technical regulations, such as those passed by state medical boards, they should be more inclined to defer to the board’s judgment. As long as the board provides evidence that the regulation is not a farce, the principles underlying antitrust federalism, as embodied in the *Parker* doctrine, counsel against federal courts second-

²⁴³ *Id.* at 1148.

²⁴⁴ Although some courts have read the Supreme Court’s decision in *Professional Engineers* as foreclosing consideration of public interest factors in Sherman Act cases, Edlin and Haw explain “this rejection is neither universal nor complete.” *Id.* at 1146.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1149.

²⁴⁷ *Id.* at 1148.

guessing whether a policy *actually* serves the best interest of the public.²⁴⁸ Second, in evaluating this second prong, courts should be mindful of a central premise of the *Parker* doctrine: states should have flexibility in enacting regulatory policies, and it is not the federal judiciary's role to countenance antitrust suits simply because a state's regulatory policy does not comport with efficiency-based goals.²⁴⁹

The third prong of this approach—inquiring into less restrictive alternatives—“places the restriction's competitive burden on the anticompetitive side of the scale, asking whether there is an alternative less destructive to competition that achieves the same benefits.”²⁵⁰ A board considering a regulation that would effectively exclude, say, low-cost market entrants would be well advised, at least under Edlin and Haw's modified rule-of-reason approach, to evaluate less restrictive alternatives prior to enacting the regulation. And this should have a beneficial effect for the antitrust defendant even if a court conducts the structural inquiry proposed by Areeda and Hovenkamp, for this factor is relevant to an assessment of the defendants' anticompetitive purpose.²⁵¹

For the most part, the third prong also represents a fair approach under the modified rule of reason. However, as with the first two prongs, the principles underlying the *Parker* doctrine suggest an additional caveat. If a state board reviews objections to a proposed regulation and provides a response explaining why less restrictive alternatives will not adequately achieve the state's regulatory goals, and if the state authorizes the regulation and reviews the board's explanation, this should serve as persuasive evidence that the board acted reasonably, which is an acceptable defense in antitrust cases.²⁵² Of course, that latter condition approximates adequate state supervision, so this example presumes that the board failed the first *Midcal* prong and, thus, must face an antitrust trial on the merits. Whereas Edlin and Haw believe that a court should be equally rigorous regardless of whether the board fails the first or second prong, it seems consistent with the *Parker* doctrine to defer to state

²⁴⁸ See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) (Alito, J., dissenting) (“The question before us is [in cases involving *Parker* immunity] not whether such programs serve the public interest.”).

²⁴⁹ See, e.g., *Parker v. Brown*, 317 U.S. 341, 360 (1943).

²⁵⁰ See Edlin & Haw, *supra* note 2, at 1148.

²⁵¹ See *supra* text accompanying notes 232–34.

²⁵² See 13 AREEDA & HOVENKAMP, *supra* note 235, ¶ 2232a, at 444.

agency conduct when the state has sufficiently authorized it.²⁵³ Likewise, a state attorney general's approval of a board's conduct should provide support for a private regulator's reasonableness defense.

Finally, applying the modified rule of reason to a recent case pending in a federal district court in Texas illustrates its potential to frustrate states' regulatory policies and, more fundamentally, impinge on states' sovereignty. In *Teladoc v. Texas Medical Board*, a telemedicine company sued the Texas Medical Board under the Sherman Act for promulgating a regulation that requires Texas citizens to receive in-person examinations prior to receiving prescription medicine.²⁵⁴ Although the board allegedly failed to adhere to administrative rulemaking requirements, the bigger picture is important here.²⁵⁵ The board should not have to worry about threats from antitrust suits when, in the exercise of its lawfully delegated authority and under state supervision, it fails to perform a rigorous cost-benefit analysis or does not rule out every less restrictive alternative. The benefits of a federalist system will be lost if the federal judiciary permits plaintiffs to use the Sherman Act to strike at the pocketbooks of the professionals upon whom states rely in crafting their regulatory policies.

B. Other Avenues for Challenging Delegations to Private Actors

Yet another reason why federal courts should construe *N.C. Dental* narrowly is that there are other means by which abusive occupational licensing regimes can be curtailed. Indeed, courts have invalidated private delegations under several different theories.²⁵⁶ The Due Process Clause, for instance, provides one source of law that can serve as "a potential limit on the private exercise of regulatory power, especially if the regulators and the regulated parties compete with each other."²⁵⁷ Although there is "no due process doctrine that's specific to private parties," delegations to private actors can be

²⁵³ Admittedly, this situation might be rare. As Edlin and Haw point out, "[a]ny state mandate calling for the regulation of entry and good standing in a profession is likely to meet the Court's low bar for clear articulation, since all licensing restricts competition by reducing the number of competing professionals in the field." Edlin & Haw, *supra* note 2, at 1122.

²⁵⁴ No. 1-15-CV-343 RP, 2015 WL 8773509, at *2-3 (W.D. Tex. Dec. 14, 2015) ("[A]sserting [that the] Defendants have committed a violation of antitrust law, as well as the Commerce Clause of the Constitution in adopting New Rule 190.8 and New Rule 174.").

²⁵⁵ *Id.*

²⁵⁶ Volokh, *supra* note 2, at 932 ("In recent years, state and federal courts have been ruling against private regulatory organizations on a number of theories.").

²⁵⁷ *Id.* at 933.

struck down if the delegate has a pecuniary bias.²⁵⁸ For example, the Board in *N.C. Dental* could have violated due process if it had disciplined North Carolina dentists using in-house disciplinary hearings; if it had, the Board could have been sued for “money damages under 42 U.S.C. § 1983.”²⁵⁹

Another avenue is state non-delegation doctrines. Although non-delegation challenges at the federal level are unlikely to succeed, “[s]ome states have non-delegation doctrines that are stricter than the federal one.”²⁶⁰ Texas has a particularly robust non-delegation doctrine, and plaintiffs have succeeded in challenging private delegations under this doctrine.²⁶¹

In addition, the Texas Supreme Court recently invalidated a State Cosmetology Board’s licensing scheme on substantive due process grounds.²⁶² This development can be connected to the federalism principles advocated herein. If citizens decide to emigrate to Texas because of the favorable climate for economic liberty, other states would have an incentive to change their policies.²⁶³ Importantly, this positive result can be achieved without stretching the federal government’s authority and encroaching on states’ rights. Assuming state boards promulgate policies in accordance with the *Midcal* active supervision requirement, political accountability is protected, and the promise of antitrust federalism remains alive and defensible.

CONCLUSION

In many respects, *N.C. Dental* is a praiseworthy decision: the Court recognized the problem that occupational licensing regimes pose to our free market economy, and it sought to resolve it. Unfortunately, the Court’s holding might permit federal courts and the FTC to address the problem with a hacksaw rather than a scalpel. In failing to acknowledge the particularly egregious conduct of the North Carolina Dental Board, the majority let itself issue an opinion with potentially far-reaching negative consequences. The old adage that “hard facts make bad law” resonates with this decision. Although a

²⁵⁸ *Id.* at 940–41.

²⁵⁹ *Id.* at 952.

²⁶⁰ *Id.* at 955.

²⁶¹ *Id.* at 933.

²⁶² *See generally* Patel v. Tex. Dep’t. of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015) (basing the court’s holding, in part, on due process grounds).

²⁶³ Conversely, if more people become sick or lose eyebrows, other states will take notice and there will be less of an incentive to deregulate these occupations.

definite standard might not have been practicable, state legislatures needed something more precise, or even formalistic, than what the Court provided.

The federalism principles that underlie *Parker* cannot be reconciled with an active supervision requirement so boundless that it permits federal agencies or courts to impose the federal government's normative, efficiency-based standards in their scrutiny of states' regulatory policies. What will be left of economic federalism if the federal government can easily defeat the *Parker* doctrine's protections by alleging that the state has provided inadequate supervision? Without a definite standard, the uncertainty surrounding the holding will remain, with the likely concomitant result that professionals will no longer serve on state boards for fear of incurring antitrust liability or litigation hassle.

The presumption proposed here provides "realistic assurance" that the challenged conduct is the state's own and, further, promotes political transparency.²⁶⁴ This is sufficient to assuage the majority's concerns in *N.C. Dental* and fulfills the goal of the active supervision requirement.²⁶⁵ For this reason, courts should regard a supervisory system meeting the four constants as presumptively adequate. Critically, such an approach is consistent with Supreme Court precedent and alleviates many of the policy concerns and practical difficulties implicated by the decision.

Because the Commission's authority is trumped by the Article III courts, whether the dire predictions elicited by *N.C. Dental* come to fruition will likely hinge on how federal courts interpret and apply the decision. This Comment has provided precedent and policy justifications for why the federal courts should construe *N.C. Dental* narrowly. Limiting the scope of the active supervision inquiry and, more generally, respecting the principles underlying "our federalism" are crucial for the preservation of states' rights as co-equal sovereigns.²⁶⁶ Even though excessive occupational licensing requirements offend our notions of economic liberty, the integrity of the federal judiciary forecloses using the Sherman Act as a quasi-substantive due process doctrine.

²⁶⁴ See *supra* text accompanying notes 200–02.

²⁶⁵ See 2016 SUPPLEMENT PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227a, at 28 (Wolters Kluwer eds., 2016) ("[T]he concern of the majority [was] to use federal antitrust law to provide a layer of transparency and more immediate political control to the process.").

²⁶⁶ See *supra* text accompanying notes 76–80.

Moreover, the non-antitrust alternatives available for challenging private regulatory delegations defeats the argument that the antitrust laws are necessary for eradicating all forms of state-sanctioned anticompetitive behavior—especially if the cost is undue interference with the states' core police powers.

The federalist system prescribed by the Constitution is not anachronistic, and the United States has performed well as a federal republic.²⁶⁷ Hopefully, the federal judiciary will respect its role in a constitution defined by a system of governmental checks and balances and, accordingly, maintain the vitality of the state-action doctrine when appropriate. If it does, medical professionals serving on state boards need not worry about the negative ramifications of *N.C. Dental*. However, if the federal government treats antitrust federalism as an unimportant remnant of colonial times and aggressively applies *N.C. Dental*, we should all prepare for a world in which government bureaucrats, rather than doctors, decide who can legally perform brain surgeries.

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²⁶⁷ Megan Willett, *The 15 Countries With the Highest Quality of Life*, BUS. INSIDER (May 28, 2013, 2:36 PM), <http://www.businessinsider.com/top-countries-on-oecd-better-life-index-2013-5> (identifying the United States as having the sixth highest standard of living in the world based on the Organization for Economic Cooperation and Development's Better Life Index).

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