The Root Canal of Antitrust Immunity: *North Carolina State Board of Dental Examiners v. FTC*[*]

INTRODUCTION

Esse quam videri.[1] North Carolina adopted this Latin phrase, which means "to be rather than to seem," as its motto in 1893.[2] The Supreme Court of the United States has now held the state to that standard in its recent decision, *North Carolina State Board of Dental Examiners v. FTC*.[3] In *Dental Examiners*, a case questioning whether a professional dental board is liable for engaging in anticompetitive action when it sent cease-and-desist letters to non-dentists performing teeth whitening, the Court held that a professional dental board lacking active state supervision is not immune from lawsuits challenging its anticompetitive behavior.[4] In order to receive "state action immunity"[5] from antitrust litigation, known commonly as "*Parker* immunity," a licensing board must *be* a state agency acting for the state rather than merely *seeming to be* a state agency while acting in pursuit of its own, competitive interests. The state must *be* actively supervising the board, rather than allowing the board to *seem to be* acting as the state.[6]

Professional licensing boards are groups charged with the licensing and regulating of a particular practice by state statute.[7] For instance, the state bar regulates the practice of lawyers, while the

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1. Jessica Lee Thompson, *Esse Quam Videri*, N.C. HIST. PROJECT, http://www.northcarolinahistory.org/encyclopedia/402/entry [http://perma.cc/JM6C-PNBJ].

2. *Id.* The motto originates from a sentence in Cicero's "On Friendship." It reads: "Virtute enim ipsa non tam multi praediti esse quam videri volunt," which translates to "not nearly so many people want actually to be possessed of virtue as want to appear to be possessed of it." *Id.*

3. 135 S. Ct. 1101 (2015).

4. *Id.* at 1117.

5. The immunity comes from Parker v. Brown, 317 U.S. 341 (1943). *See infra* Part I.

6. *See generally Dental Examiners*, 135 S. Ct. 1101 (2015).

7. Rebecca Haw Allensworth & Aaron Edlin, *Letting Dentists Feel the Bite of Competition*, WALL ST. J. (Mar. 8, 2015, 6:54 PM), http://www.wsj.com/articles/rebecca-haw-allensworth-and-aaron-edlin-letting-dentists-feel-the-bite-of-competition-1425855260 [http://perma.cc/U4TC-GB2F (dark archive)]; *see, e.g.*, N.C. GEN. STAT. § 55B-2 (2013) (defining "licensing board"); *Dental Examiners*, 135 S. Ct. at 1107 (citing N.C. GEN. STAT. §§ 90-29 to 90-41 (2013)) ("The Board's principal duty is to create, administer, and enforce a licensing system for dentists.").

medical board of a state might regulate doctors, physicians' assistants, and nurse practitioners.[8] Most state boards are statutorily required to be staffed by a majority of "active market participants," individuals that actually practice the profession.[9] This kind of self-regulation has its benefits—those who know the profession can regulate it with understanding and insight. However, self-regulation may lead to self-dealing, where arbitrary restrictions or terms of competition unfairly exclude unlicensed persons.[10] Thus, whether the board is serving the state or serving itself under the guise of a state seal is of utmost concern when the board claims immunity from antitrust litigation.

This Recent Development endeavors to outline the newly crafted Supreme Court test for whether a state-sanctioned professional board is entitled to state-action immunity and suggests that this test will prove to be untenable in practice. This piece ultimately argues that boards and states must take action to protect or alter professional licensing boards and that the Supreme Court's test will frustrate the lower courts in determining whether professional licensing boards deserve *Parker* immunity.[11]

Analysis proceeds in four parts. Part I explains the test for *Parker* immunity, derived from two other Supreme Court cases: *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[12] and *Town of Hallie v. City of Eau Claire*.[13] Part II outlines the background and the parties involved in *North Carolina State Board of Dental Examiners v. FTC*. Part III aims to untangle the Court's new test from *Dental Examiners*. Part IV acknowledges the consequences of the *Dental Examiners* test for professional licensing boards and states and proposes a test for lower courts to follow.

I. *PARKER* IMMUNITY: PRIVATE VS. PUBLIC ACTOR

The Sherman Act promotes and protects robust competition and free market structures by prohibiting "cartels, price fixing, and other combinations or practices that undermine the free market."[14] This law essentially subjects any anticompetitive commercial action not

8. License Application Overview, NORTH CAROLINA MEDICAL BOARD, http://www.ncmedboard.org/licensing [http://perma.cc/EDB6-68ET].

9. On the North Carolina State Board of Dental Examiners, six of eight members must be licensed, practicing dentists. N.C. GEN. STAT. § 90-22(b) (2013).

10. Haw Allensworth & Edlin, *supra* note 7.

11. *See* Aaron Edlin & Rebecca Haw Allensworth, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1093 (2013).

12. 445 U.S. 97 (1980).

13. 471 U.S. 34 (1985).

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

covered by or exempted from other federal laws to antitrust litigation.[15] However, some forms of state regulation are anticompetitive actions. As such, when a state is acting in its sovereign capacity and engages in anticompetitive conduct, including regulatory action, it is immune from federal antitrust liability.[16] If each state regulation had to conform to the Sherman Act, antitrust laws would promote competition at the cost of states' fundamental values, imposing "an impermissible burden on the States' power to regulate."[17] This immunity extends beyond the state itself. In *Parker v. Brown*,[18] the Court held that "state actions" are also immune from federal antitrust liability; thus shielding both state governments and entities with delegated state authority from antitrust laws.[19] *Parker* also recognized the principles of federalism and the obligation of the states to achieve public objectives.[20] As an extension of federalist principles, private parties may claim state action immunity if their actions are taken as expressions of state policy.[21]

Some actions automatically enjoy *Parker* immunity, including anticompetitive actions taken or authorized by state actors like the legislature or state supreme courts.[22] Those actors are government actors and their actions are seen as public actions—actions taken presumably for the public good, yet subject to a political check either by electoral or appointment processes.[23] Private actors, more vulnerable to the temptation of self-dealing, also sometimes act as agents of the state with delegated regulatory duties.[24] While public actors automatically receive *Parker* immunity, private actors do not

15. FRANK CROSS & ROGER MILLER, THE LEGAL ENVIRONMENT OF BUSINESS 598 (2011); *see generally* 15 U.S.C. §§ 41–58.

16. *Id.*; *see* Parker v. Brown, 317 U.S. 341, 350–51 (1943).

17. *Dental Exam'rs*, 135 S. Ct. at 1109.

18. 317 U.S. 341 (1943).

19. *Id.* at 350–51.

20. *Id.*

21. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). However, the Sherman Act "does not always confer immunity where . . . a State delegates control over a market to a nonsovereign actor." *See Dental Examiners*, 135 S. Ct. at 1110.

22. Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 738 (2012).

23. *Parker*, 317 U.S. at 350–51 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."); *see also* Hoover v. Ronwin, 466 U.S. 558, 574 (1984) (explaining the boundaries of the state action test to conduct that can be deemed to be "that of the State acting as a sovereign").

24. *See infra* Part IV.

and must first pass the test the Court outlined in *Midcal*.[25] For a private actor to enjoy *Parker* immunity, it must meet two requirements: (1) the private actor's acts must be in accordance with a "clearly articulated and affirmatively expressed"[26] state policy; and (2) the policy's implementation must be "actively supervised by the State."[27] If a private actor fails either of these prongs, it may be subject to antitrust scrutiny.[28]

The first prong has proven to be an easy hurdle for defendants, with "virtually any colorable claim to state authority" passing as clear articulation.[29] Because statutes delegating state regulatory authority are drafted at high levels of generality, there is often ambiguity as to what extent the state intended the market to be regulated and how the policy should be implemented.[30] The space between policy and implementation can lead to self-dealing anticompetitive conduct.[31] The second *Midcal* prong has more teeth: it attempts to close the gap between authorization and implementation and eliminate the danger that active market participants are furthering private, rather than governmental, interests in regulation. The supervision requirement works by requiring the state to review or approve the policies made by the entity.[32]

Yet some entities may earn *Parker* immunity without *active* state supervision under *Midcal*'s second prong.[33] The Court, in *Hallie,* excused a municipality from the rigors of *Midcal*'s active supervision test.[34] The municipality was not "sovereign"[35] or a truly public actor that automatically gets immunity under *Parker*. Yet, the municipality, the Town of Hallie, was also not considered a private actor because its actions were subject to a political check; the public elected the municipality board members and could vote them out for

25. 445 U.S. 97, 105 (1980).

26. *Id.*

27. *Id.*

28. *Id.* at 105–06; *see also* Edlin & Haw Allensworth, *supra* note 11, at 1100.

29. Edlin & Haw Allensworth, *supra* note 11, at 1120 (explaining that the Court has only rejected a clear articulation claim twice).

30. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1112 (2015).

31. *Id.*

32. *Id.*

33. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46–47 (1985) (holding municipalities immune from antitrust liability).

34. *Dental Examiners*, 135 S. Ct. at 1112–13.

35. *Hallie*, 471 U.S. at 38 ("Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign.").

misbehavior.[36] Thus, the municipality was a quasi-public actor and subject to *Midcal* scrutiny. The Court held that, under the first *Midcal* prong, the entity acted pursuant to a clearly articulated state policy to displace competition.[37] Because of the more direct public supervision, the Court futher held that, under the second prong, the municipality was adequately supervised when acting.[38] According to the Court, municipalities present "little or no danger"[39] of self-dealing or control by active market participants because the entity has regulatory authority over a wide swath of markets rather than a single market. But if there are in fact private interests advanced, the municipalities are electorally accountable and that is sufficient supervision.[40]

Whereas the Town of Hallie's leaders were subject to a public election, professional licensing boards are not.[41] Most often, the professionals elect representatives to the board or legislators appoint a majority of practicing professionals to serve. Boards are not electorally accountable for their actions to the public, but only to the professionals they regulate.[42] Thus, unlike the municipalities sanctioned as carrying out state policy in *Hallie*, boards are privately composed entities with a public function;[43] they are delegated state regulatory powers with minimal state supervision. The question remains: are boards private or public actors? If a board is considered a public actor, then its anticompetitive actions are protected by *Parker* immunity. However, if a board is a private actor with a public function, it is subject to but may not pass the *Midcal* test.

II. *DENTAL EXAMINERS*: THE CONTEXT AND THE CHARACTERS

The dispute underlying *Dental Examiners* arose when the North Carolina State Board of Dental Examiners ("Board") sent cease-and-desist letters to non-dentist teeth whiteners operating without the supervision of licensed dentists.[44] The letters were prompted by practitioner complaints that the new, non-dentist competitors were

36. *See id.* at 45–47.

37. *Recent Case: Antitrust Law – State Action Immunity – Fourth Circuit Holds that State's Dental Board of Examiners Must Show "Active Supervision" by State to Be Entitled to Antitrust Immunity*, 127 HARV. L. REV. 2122, 2122 (2014) (quoting *Hallie*, 471 U.S. at 46–47).

38. *Id.*

39. *Hallie*, 471 U.S. at 47.

40. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1112 (2015).

41. *Id.*

42. *Id.*

43. Weber, supra note 22, at 738.

44. *Dental Examiners*, 135 S. Ct. at 1108.

charging low prices for whitening services and were taking a bite out of the dentists' profits.[45] These rogue whitening service providers, warned that the unlicensed practice of dentistry is a crime, ultimately ceased operations in North Carolina.[46] The Federal Trade Commission ("FTC") alleged in an administrative complaint that the Board's action to exclude non-dentists from the teeth whitening service market "constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act."[47]

Under the Dental Practice Act,[48] the Board is "the agency of the State for the regulation of the practice of dentistry."[49] The Board[50] has eight members and must be staffed by a majority of licensed dentists who themselves are elected by North Carolina licensed dentists.[51] In order to regulate the profession, the Board is charged by the state to "create, administer, and enforce a licensing system for dentists."[52] The Board enjoys great authority over licensed dentists' unauthorized practice of dentistry, but may only file suit against non-dentists to enjoin them from "unlawfully practicing dentistry."[53] The North Carolina Rules Review Committee[54] approves the rules and regulations promulgated by the Board to govern the practice of dentistry post hoc.[55]

Despite the Board's arguments that its members were vested with the power of North Carolina and thus "cloaked with *Parker* immunity," the Fourth Circuit upheld the FTC decision holding the Board liable for Sherman Act abuses.[56] The Fourth Circuit became the only federal appellate court not to grant professional licensing boards immunity from antitrust scrutiny, thus creating a circuit split.[57] The Supreme Court had to bite.

45. *Id.* ("Few complaints warned of possible harm to consumers.").
46. *Id.*
47. *Id.* at 1108–09.
48. N.C. GEN. STAT. § 90-22(a) (2013).
49. *Dental Examiners*, 135 S. Ct. at 1107.
50. *See id.* at 1108 (describing the election and appointment process of the Board).
51. *Id.* The statute requires six of eight seats be filled by licensed, practicing dentists. N.C. GEN. STAT. § 90-22. Interestingly, board members are not subject to removal by the state. *Id.*
52. *Dental Examiners*, 135 S. Ct. at 1107.
53. *Id.* (quoting N.C. GEN. STAT. § 90-40.1 (2013)).
54. Legislators appoint the members of the North Carolina Rules Review Committee. N.C. GEN. STAT. §§ 90-48, 143B-30.1, 150B-21.9(a) (2013).
55. *Dental Examiners*, 135 S. Ct. at 1108.
56. N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359 (4th Cir. 2013).
57. Edlin & Haw Allensworth, *supra* note 11, at 1100; *see, e.g.*, Benson v. Ariz. State Bd. of Dental Exam'rs, 673 F.2d 272 (9th Cir. 1982).

III. A NEW TONGUE TWISTER: THE COURT'S STANDARD FOR NONSOVEREIGN ENTITIES

In *Dental Examiners*, the Supreme Court determined whether the state dental board was entitled to *Parker* immunity by using the *Midcal* test.[58] Specifically, the Court analyzed whether the Board was actively supervised by the state, satisfying *Midcal*'s active supervision test.[59] The first *Midcal* prong, a clearly articulated policy, was not at issue because both parties assumed that the prong was satisfied by the Dental Practice Act.[60] The Act clearly grants the Board the power to regulate dentistry and prohibits the unauthorized practice of dentistry.[61] Yet, the Act is silent with respect to whether teeth whitening is under the Board's purview.[62]

The Board was controlled by active market participants—six of the eight board members were dentists.[63] The Court held that this control made the Board a private actor for purposes of *Parker* immunity.[64] Because the Board is a private actor, "*Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity."[65] In this case, *Midcal*'s active supervision test focused specifically on whether North Carolina actively supervised the Board's interpretation of the Act to include teeth whitening and its enforcement of "that policy by issuing cease-and-desist letters to non-dentist teeth whiteners."[66] Limits on *Parker* immunity are most essential in situations where the state has delegated its regulatory power because the active market participants hold "dual allegiances."[67] The active market participant is bound professionally by the profession's ethical standards and may be influenced by, even if unacknowledged, "private anticompetitive motives."[68] The Court emphasized this as the rationale behind *Midcal*'s active supervision requirement throughout the opinion.[69]

58. The dissent, however, argues that the majority erroneously concludes that the Board is a private actor and thus subject to the *Midcal* test. *Dental Examiners*, 135 S. Ct. at 1117–18 (Alito, J., dissenting).

59. *Id.* at 1114 (Alito, J., dissenting).

60. *Id.* at 1110 (majority opinion).

61. N.C. GEN. STAT. § 90-22(a)–(b) (2013).

62. *Dental Examiners*, 135 S. Ct. at 1110.

63. *Id.*

64. *Id.*

65. *Id.* at 1113.

66. *Id.* at 1110.

67. *Id.* at 1111.

68. *Id.* ("Dual allegiances are not always apparent to an actor.").

69. *Id.* at 1112–14, 1116.

Through precedent, the Court has chiseled out a bulky standard for invoking *Parker* immunity. When a state board is staffed by a "controlling number" of active market participants in the occupation that the board regulates, *Parker* immunity is not automatically a shield for the board's anticompetitive action.[70] The board must affirmatively satisfy both of *Midcal*'s prongs.[71] Because *Midcal*'s first prong, the "clearly articulated" test, is easily satisfied by broad delegations of power, the active supervision test becomes the true test.[72] In order to pass *Midcal*'s active supervision test, the board must show that the supervision is of a certain quality.[73]

Because the Board made no claims that the state exercised *any* supervision over the Board's conduct regarding teeth whitening policies,[74] the Court did not have a supervisory system to review. The Court was left to suggest a standard for adequate active supervision that reads more like a magic eight ball than an x-ray.

Speaking vaguely, the Court held that "[i]mmunity for state agencies . . . requires more than a mere façade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."[75] It further held that the state's active supervision must be "realistic assurance"[76] and "actual state involvement, not deference[,]"[77] to pass *Midcal*. Thus, the anticompetitive conduct, taken by active market participants with delegated state power, must "result from procedures that suffice to make it the State's own"[78] to be covered by *Parker* immunity. The Court helpfully highlighted some of the "constant requirements of active supervision"[79] identified in previous decisions. These include: a supervisor shall not be an active market participant;[80] a supervisor shall review the substance of the regulation, rather than merely reviewing the procedures used to create the regulation;[81] and a supervisor must retain the power to veto or modify the decision to

70. *Id.* at 1104.
71. *See supra* Part I.
72. *See supra* Part I.
73. *See Dental Examiners*, 135 S. Ct. at 1116.
74. *Id.*
75. *Id.* at 1111.
76. *Id.* at 1112, 1116.
77. *Id.* at 1113 (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992)).
78. *Id.* at 1111.
79. *Id.* at 1116.
80. *Id.* at 1117.
81. *Id.* at 1116; *see* Patrick v. Burget, 486 U.S. 94, 102–03 (1988).

comply with state policy.[82] The Court further held that the "mere potential for state supervision is not an adequate substitute for a decision by the State."[83] Yet, the Court muddled even those "constant requirements" with this qualifying language: "[i]n general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case."[84]

The language used throughout the opinion underscores the importance of examining the quality of the state's supervision of the active market participant controlled entity. Lower courts must chew through the veneers of entity structure and regulation and uncover the real nature of the state's supervision to prevent boards controlled by active market participants from serving their own interests at a cost to the public.

Despite the majority's resolve that its active supervision standard is intelligible, the dissent asserted that the Court's adequate active supervision standard distorts *Parker* and "will spawn confusion."[85] The Court's standard requires lower courts to determine "whether a state agency is structured in a way that militates against regulatory capture" and this is "no easy task."[86] Justice Alito instead suggested a simple rule, one that enquires not into the composition of an entity, but rather its nature: if the board is a state agency acting in a sovereign capacity,[87] then, under *Parker*, the Sherman Act does not apply to the board.[88] Justice Alito's dissent highlights the difficulties the lower courts will face in applying the Court's adequate active supervision test.[89]

82. *Dental Examiners*, 135 S. Ct. at 1116.

83. *Id.* (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992)).

84. *Dental Examiners*, 135 S. Ct. at 1117.

85. *Id.* at 1118 (Alito, J., dissenting).

86. *Id.*

87. *See id.* at 1119–20 (Alito, J., dissenting) ("In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power . . . . The Board is not a private or 'nonsovereign' entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny.").

88. *Id.* at 1117–18 (Alito, J., dissenting). Justice Alito supports his simple rule by examining the economic and regulatory landscape at the time of *Parker*, 1943, to inform whether *Parker* immunity was intended to reach state agencies such as a dental board. *Id.* at 1119. The dissent finds the determination of whether the dental board is a state agency as persuasive; because it found that the Board is a state agency, the Board's actions should therefore be protected by *Parker* immunity. *Id.* at 1119–20. The dissent further finds error in the majority's treatment of the Board as a private entity in its application of *Midcal*, a private trade association case. *Id.* at 1121.

89. *Id.* at 1122 (Alito, J., dissenting) ("[The Court's decision] will create practical problems and far-reaching effects on the States' regulation of professions.").

IV. CONSEQUENCES OF *DENTAL EXAMINERS* AND A SUGGESTED TEST FOR LOWER COURTS

State-level occupational licensing is big business; more than a third of American workers are licensed or certified by the government.[90] The boards are "typically dominated by active members of the profession."[91] Thereby, a third of American professionals must conform to a "regime of self-regulation."[92] That self-regulated regime must then wrestle with the "temptation of self-dealing, creating regulations to insulate incumbents rather than to ensure public welfare."[93] At the same time, state regulatory schemes are creating new "professions" of low-skill, low-stakes jobs.[94] Legislatures, under pressure from professional boards, have crafted statutes to define certain tasks as practices of the profession, restricting permissive performance of the task to licensed professionals or to those supervised by licensed professionals.[95]

However, even in professions where licensing serves an obvious public purpose, board regulations can suggest that the active market participants have succumbed to the temptation of creating regulations to preserve the profession at an unnecessary cost to the consumer.[96] The Court itself has observed, "[t]here is no doubt that the members of such associations often have economic incentives to restrain

90. Edlin & Haw Allensworth, *supra* note 11, at 1102.

91. *Id.* at 1103.

92. *Id.*

93. *Id.* at 1104.

94. *Id.* For example, florists in Louisiana are regulated by LA. STAT. ANN. § 3:3808(B)(1) (2013).

95. Edlin & Haw Allensworth, *supra* note 11, at 1105. In Minnesota, the filing of horse teeth is now a practice of veterinary medicine and cannot be performed by an unlicensed "teeth-floater" without supervision from a licensed veterinarian. *Id.* In Louisiana, among other states, only licensed funeral directors are permitted to sell caskets. *Id.* Many other states require a cosmetology license, which requires a hefty $16,000 education, for African-style hair braiders to lawfully practice their craft. *Id.* at 1106. In Illinois, barbers and nail technicians are subject to licensing requirements. *See* 225 ILL. COMP. STAT. 410 (2008). Even interior designers are subject to licensing requirements in more than half of the states, including passing a test and continuing education requirements. Does reading magazines count? *See State Licensing Regulations*, AM. SOC'Y INTERIOR DESIGNERS, https://www.asid.org/content/state-licensing-regulations# [http://perma.cc/9Q7N-KDW4] (providing a single access point to relevant legislation).

96. *See In re* S.C. State Bd. of Dentistry, 138 FTC 229, 230 (2004). Medical licensing boards determine the level of M.D. supervision required over physician assistants and nurse practitioners, and determine whether or not these professionals can prescribe medication either to preserve demand for M.D. services or to protect public health. *See also* Edlin & Haw Allensworth, *supra* note 11, at 1108. The bar, charged with licensing lawyers, may inflate demand for legal services by requiring a lawyer in certain circumstances, like real estate transactions. *Id.* at 1109.

competition and that the product standards set by such associations have a serious potential for anticompetitive harm."[97] Professionals have incentive to limit outsider participation in their particular market, especially if the service is profitable.[98] Nonetheless, some professional boards may regulate levels of professional supervision over nonprofessionals in order to serve the public good, by offering high-quality, expert services.

In the dental field, boards may pass regulations that restrict the ratio of dental hygienists to dentists in a practice for the dual rationales of patient safety and profit maximization. Keeping the hygienist-dentist ratio low may ensure that dentists are adequately supervising hygienists' work in patient procedures that have the potential for harm. Or, alternatively, a board may be motivated by the financial incentives of a high hygienist-dentist ratio; the practice may serve more patients quickly and efficiently, maximizing profits and minimizing dentist-to-patient interaction.[99] In *Dental Examiners*, the Court found that North Carolina dentists fought to remain the exclusive providers of teeth whitening not because of any danger to consumers or genuine belief that whitening requires a specialized skill, but because it is an extremely profitable market.[100]

Because of the competing interests active market participants serve, boards must ensure that their actions comply with or are in furtherance of a "clearly articulated" state policy.[101] Additionally, to comply with the *Dental Examiners* test, there must be adequate active supervision of all professional boards in order to prevent temptation-based regulations.[102] This makes almost every professional board staffed by active market participants vulnerable to antitrust liability.[103] Because the Court did not articulate clearly what *adequate* active state supervision is, professional licensing boards, states, and lower courts are left to grapple with that question.

A. Consequences for Professional Licensing Boards

Professional licensing boards must first accept and adapt to the ultimate consequence of *Dental Examiners*: the Court will not

97. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988)).

98. Edlin & Haw Allensworth, *supra* note 11, at 1107.

99. *See Frequently Asked Questions*, N.C. BOARD OF DENTAL EXAMINERS, http://www.ncdentalboard.org/faqs.htm [http://perma.cc/GGM8-4YLL].

100. *Dental Examiners*, 135 S. Ct. at 1108.

101. *See supra* Part I.

102. *Dental Examiners*, 135 S. Ct. at 1114.

103. *See id.*

presume that professional licensing boards are public actors with guaranteed *Parker* immunity[104] or within the *Hallie* exception. Boards will be presumed more analogous to trade unions than to municipalities and are thus subject to the *Midcal* test for immunity.[105] The Board urged the Court against this conclusion, arguing that there is not a "single other case within 70 years of antitrust state-action jurisprudence that treats a *bona fide* State agency as a 'private' actor subject to the active-supervision requirement."[106] Yet, the Court dismissed the dissent's assertion that the Board "is a state agency; and that is the end of the matter."[107] Now, professional licensing boards will, before acting, have to closely examine the delegation of power to set clearer boundaries for what actions may be permitted as furthering state policy as opposed to advancing private interests. Doing so would likely prevent antitrust litigation altogether because the boards would be "entirely consistent with the State's anticompetitive purpose behind this regulatory scheme" as the antitrust-immune agency was in *Parker.*[108] When acting, boards may have to anticipate antitrust litigation by clearly articulating their rationale for regulations, illustrating the motivations behind new regulations to demonstrate that the active market participant board members are acting in furtherance of state policy rather than out of self-interest.

Outside of litigation, professional licensing boards may also have a staffing problem. The *Dental Examiners* Court did not have to face the question of a board member's personal liability for the board's anticompetitive actions or whether board members have immunity from damage liability.[109] This puts the professionals who serve on boards in an awkward position: they must serve to further the state's policy interests, adhere to their own profession's ethical standards, and, now, ensure that the board's actions are not anticompetitive.[110] Despite the Court's rationale that its *Dental Examiners* opinion is consistent with a professional's simultaneous obligation to comply with duties outside of the "dictates of the State,"[111] professionals are

104. *Id.*

105. *Id.*

106. Reply to Brief in Opposition at 11, *Dental Examiners*, 135 S. Ct. 1101 (No. 13-534) [hereinafter Reply to Brief in Opposition].

107. *Dental Examiners*, 135 S. Ct. at 1118 (Alito, J., dissenting).

108. Reply to Brief in Opposition, *supra* note 106, at 9; *see* Parker v. Brown, 317 U.S. 341, 346 (1943).

109. *Dental Examiners*, 135 S. Ct. at 1115 (majority opinion).

110. *See id.* at 1114.

111. *Id.* at 1115.

likely to be put off by the potential for personal antitrust liability. Professionals may "resign or refuse to accept office lest they face significant personal antitrust exposure."[112]

B. Consequences for the State

To protect the individual members of a professional licensing board threatened with or facing antitrust litigation, a state may "provide for the defense and indemnification of agency members" by passing statutes.[113] If the states want to encourage the participation of professionals in licensing and regulatory activities, then they must consider protecting participants from the consequences of "lawsuits from both private parties and the FTC."[114] However, to prevent litigation from arising altogether, states would also have to change or alter the "ubiquitous practice of relying [solely] on market participants to regulate professional conduct."[115]

States may have to change the composition of their dental, medical, legal, and other professional boards to satisfy, or circumvent the *Dental Examiner* standard. The Court found fault in the North Carolina Board of Dental Examiners because a "controlling number of decisionmakers" were active market participants.[116] The Court conveniently did not explain what a "controlling number" is; on the North Carolina Board of Dental Examiners, six of eight board members were dentists and one was a hygienist.[117] Some scholars have alternatively defined similarly situated boards as "organization(s) in which a *decisive coalition* (usually a majority) is made up of participants in the regulated market."[118] Thus, state legislatures (and reviewing courts) could reasonably come to vastly different calculations of what a "controlling number" equals.[119]

112. Reply to Brief in Opposition, *supra* note 106, at 5–6 (quoting Brief of the Am. Dental Ass'n, Am. Med. Ass'n, et al. as Amici Curiae in Support of Petitioner at 5, *Dental Examiners*, 135 S. Ct. 1101 (No. 13-534)).

113. *Dental Examiners*, 135 S. Ct. at 1115.

114. Reply to Brief in Opposition, *supra* note 106, at 5 (quoting Brief of Amici Curiae State of West Virginia and 9 Other States in Support of Petitioner at 2, *Dental Examiners*, 135 S. Ct. 1101 (No. 13-534) [hereinafter WV Amicus Br.]).

115. Reply to Brief in Opposition, *supra* note 106, at 5 (quoting WV Amicus Br. at 15).

116. *Dental Examiners*, 135 S. Ct. at 1114–1117.

117. *See supra* Part II.

118. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 226 (Wolters Kluwer Law & Bus. 4th ed. 2013) (emphasis added).

119. The dissent suggests that a "controlling number" could equate to "something less than a majority[,]" including a "voting bloc[,]" "obstructionist minority[,]" or an "agency

If states want professional boards to be cloaked in *Parker* immunity, they may also have to change their supervision of boards by requiring some affirmative action approving a board's proposed regulations. The state must *actively* supervise board actions, but this inquiry is "flexible and context-dependent."[120] State review mechanisms must provide "realistic assurance" that a private actor's anticompetitive actions are promoting state, rather than private, interests.[121] To meet this standard, legislatures may have to regularly review regulatory board actions by either passing a resolution affirming, vetoing, or modifying each action.[122] To be adequate state supervision, this course of action must *actually* be taken periodically, not merely exist as a *possibility*. Legislatures could also appoint a state supervisor to the board who may participate in or supervise the board's activities as they are proposed, rather than rubber-stamping board actions with post hoc legislative approval.[123] The appointed state supervisor of the board must be a non-market participant.[124] A state supervisor of a board that is electorally accountable may amplify the adequacy of state supervision.

Although not at issue in *Dental Examiners*, the state may also more "clearly articulate" the policy a board is intended to regulate by updating and expanding statutory delegations of regulatory power. Generally, states could seek to protect boards with *Parker* immunity by more clearly articulating what the state policy is. A state could actively supervise a board's actions by ensuring that a board's anticompetitive actions pass *Midcal*'s first prong. In *Dental Examiners*, whether teeth whitening was a dental practice was not considered or determined by the state, only the Board. The Act that delegated regulatory powers to the Board said nothing of teeth whitening, a practice that was unknown when the Act was passed.[125] Thus the problem. North Carolina could, as an alternative to changing Board composition or increasing continual supervision, amend the Act to include teeth whitening as a practice of dentistry. Then, the Board's action of sending cease-and-desist letters to non-dentists would be clearly regulating the practice of dentistry.

chair empowered to set the agenda or veto regulations[.]" *Dental Examiners*, 135 S. Ct. at 1123 (Alito, J., dissenting).

120. *Id.* at 1116 (majority opinion).

121. *Id.*

122. *See id.*

123. *Id.*

124. *Id.*

125. *Id.*

C. *A Suggested Test for Lower Courts*

Because boards controlled by active market participants must, post-*Dental Examiners*, affirmatively prove that the state provides adequate active supervision, the *Dental Examiners* test will be problematic for the lower courts in future antitrust litigation. Practitioners have staffed boards since their creation for obvious advantages. Now, membership is a disadvantage because it precludes benefiting from *Parker* immunity.[126] While it might have been prudent to conclude that the "individuals best able to regulate technical professions are practitioners with expertise in those very professions,"[127] *Dental Examiners*' requirements expose boards with expert staffs to the perils of antitrust litigation without immunity. The Court's rule suggests that a dental board staffed by bus drivers would escape the higher level of scrutiny of the *Dental Examiners-Midcal* threshold to *Parker* immunity because the decisionmakers do not have personal interest in curbing competition to benefit the dentists at a cost to the public.[128] However, this result seems too extreme.

Courts must now analyze the internal workings of professional boards and the specific structure of state oversight used to monitor the boards' actions in order to determine whether the state has maintained adequate supervision over the board, and, therefore, whether the board is covered by *Parker* immunity. The test of whether a state's supervision of a professional licensing board, or any private entity with regulatory power, is adequate will also require the courts' close examination of the state's oversight. This Recent Development suggests that the lower courts should adopt a balancing standard to determine the adequacy of state supervision.

A balancing test would help lower courts and the FTC answer whether the state's supervision of a licensing board is "realistic assurance"[129] that the board is acting in pursuit of public, not private, interests. The test would first examine the composition of the board and then, based on the composition of the board, determine what level of state supervision is adequate. Then, the test would weigh the risk that the board's actions were motivated by private interests with the level of state supervision needed to both ensure the board is

126. Justice Alito suggests that staffing the Board with accountants would supposedly make it easier to qualify for immunity. *See id.* at 1122 (Alito, J., dissenting). This would, however, frustrate the benefits of having experts regulating their own industries. *Id.*

127. *Id.*

128. *See id.*

129. *See id.* at 1112, 1116 (majority opinion) (relying on Patrick v. Burget, 486 U.S. 94, 101, 108); *see also supra* Part III.

meeting the state's policy objectives and to protect the public consumer's interest in maintaining a reasonably competitive market. To maintain balance under the test, a board with an overwhelming majority of active market participants would have to be subject to more active state supervision than a board with a non-controlling number of active market participants as decisionmakers. If the North Carolina State Board of Dental Examiners had only four of eight members who were active market participants, then the level of state supervision may only require post-action review by a state supervisor. If the Board's composition remained the same, with six of eight members who are dentists, courts may require that the heavy influence of market participants be balanced by more active state supervision, including regular legislative affirmation of Board actions or the appointment of a state supervisor who is not a dentist.

CONCLUSION

The Court's *Dental Examiners* standard will be difficult to apply in the lower courts and by the FTC. Since boards are not presumptively state actors, a board controlled by active market participants now has a heavy burden of affirmatively proving that its anticompetive actions were in line with the state's clearly articulated policy *and* that the state is actively supervising board actions. There now exists a cavity of entities, controlled by active market participants and delegated authority by the state, that are unsure of whether their actions will be immune under *Parker*. The FTC has made clear its intention to be "vigilant through enforcement" in "preventing occupational licensing requirements, which now govern a significant and growing segment of the economy, from unduly suppressing pro-consumer competition."[130] Professional licensing boards must be on high alert when engaging in anticompetitive activities. States, if concerned with protecting licensing boards, must augment or supplement their supervision of boards by providing protection for board members or more clearly articulating the policy to be followed by boards. When presented with antitrust claims against boards, lower courts must craft a test that weighs a board's composition against the state supervision imposed upon it to determine the need for a political check when boards face the temptation of self-interested regulation.

130. *Statement by FTC Chairwoman Edith Ramirez on U.S. Supreme Court Ruling Regarding North Carolina Dental Board Matter*, FTC (Feb. 25, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/statement-ftc-chairwoman-edith-ramirez-us-supreme-court-ruling [http://perma.cc/2PLR-C69B (dark archive)].

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